

Commissioners of the State Ins. Fund v Wyckoff
2023 NY Slip Op 34182(U)
November 27, 2023
Supreme Court, New York County
Docket Number: Index No. 453044/2021
Judge: Leslie A. Stroth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH

PART

12

Justice

-----X

COMMISSIONERS OF THE STATE INSURANCE FUND

Plaintiff,

- v -

LACEANNE WYCKOFF,

Defendant.
-----XINDEX NO. 453044/2021MOTION DATE 11/09/2023MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

In this action for recovery of overpaid worker's compensation benefits, plaintiff, Commissioners of The State Insurance Fund (NYSIF), move pursuant to CPLR 2221 for leave to renew plaintiff's motion for a default judgment, previously denied by court order dated May 25, 2022 (the prior order).

NYSIF had moved pursuant to CPLR 3215 (a) for a default judgment against defendant, Laceanne Wyckoff (defendant) (motion sequence 001), but the Court denied its motion because NYSIF failed to effectuate proper service (*see* NYSCEF Doc No. 16). Two addresses were listed for defendant but service was only effectuated on one address – 153 Richardson Street, Lower Apt., Richburg, New York 14715.

Plaintiff now moves pursuant to CPLR 2221 (e) for leave to renew its prior motion for a default judgment on the grounds that proper service of process has been completed upon the defendant. The service address used in plaintiff's pleadings is 153 Richardson Street, Lower Apt., Bolivar, New York 14715, while the service address listed on the affidavit of service of the Allegany County Sheriff's office was 153 Richardson Street, Lower Apt., Richburg, New York 14715.

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]) and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]; see *Dinten-Quiros v Brown*, 49 AD3d 588, 589 [2d Dept 2008]). The requirement that a motion for leave to renew be based on new facts “is a flexible one,” and the Court has discretion, in the interests of justice, to consider such evidence (*JRP Holding, Inc. v Pratt*, 113 AD3d 823, 824 [2d Dept 2014] [internal quotation marks and citation omitted]; *Matter of Defendini*, 142 AD3d 500, 502 [2d Dept 2016]).

Here, plaintiff submits the amended affidavit of service by Deputy Sheriff for the County of Allegany, State of New York, Guy Middaugh (amended affidavit of service, NYSCEF doc no. 22), to explain that:

The reason that the Sheriff's affidavit of service used “Richburg” as the City or Town in its address and the pleadings used Bolivar, as the City, Town or Village is that Richburg is a Village within the Town of Bolivar and are used interchangeably when identifying addresses.

...
The Village of Richburg is located within the confines of the Town of Bolivar, and both the aforementioned addresses in fact reference the same residence. Thus, the initial Affidavit of Service which stated that service was completed on the defendant at her address in Richburg was proper as the mailing address in the Village of Richburg and the mailing address in the Town of Bolivar refer to the same address. (Aff in support of motion for leave to renew, NYSCEF Doc No. 19 ¶¶ 6, 9).

The Court is satisfied by the justification proffered by movant in support of this motion. Moreover, as there is no opposition to renewal or to the ultimate relief requested, leave to renew is granted.

Turning to the merits, CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing” (*Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 [2d Dept 2011]).

Here, on March 5, 2021, the Workers' Compensation Board issued a decision, finding that Wyckoff received \$8,522.26 in workers compensation benefit overpayment (Workers' Compensation Board decision, NYSCEF doc no. 12). NYSIF sent a letter to Wyckoff, requesting reimbursement for the overpayment, but Wyckoff failed to respond or remit payment (*see* claim letter, NYSCEF doc no. 13). The affidavit of Daniel Becker, New York State Insurance Fund employee, states that NYSIF was forced to retain counsel and will incur legal fees in excess of \$3,000 (*see* Becker aff, NYSCEF doc no. 8 ¶ 8).

As noted above, plaintiff has provided proof of service of the summons and complaint upon Wyckoff by personally serving her at her residence, pursuant to CPLR 308 (1). Despite such service, Wyckoff has not answered the complaint, and her time to do so has not been extended by the Court. Based upon the foregoing, plaintiff has established that the defendant has defaulted in appearing in this action.

The Court next considers the application for attorneys' fees. State Finance Law § 18(5) provides that a debtor who owes money to a state agency, like NYSIF, and fails to pay that debt within 90 days of receipt of notice of that debt "is liable for 'an additional collection fee charge to cover the cost of processing, handling and collecting such debt, not to exceed twenty-two percent of the outstanding debt'" (*Commissioners of State Ins. Fund v Gomez*, 2017 NY Slip Op 30404[U] at ** 3 [Sup Ct, NY County 2017], quoting State Finance Law § 18[5]). The collection fee "may not exceed the agency's estimated cost of processing, handling and collecting such debt" (State Finance Law § 18[5]).

However, pursuant to State Finance Law § 18(5), the sum owed must first be "liquidated", and until a judgment is entered hereon, defendant's debt is unliquidated" (*Commissioners of State Ins. Fund v Johnny Infante*, 2013 WL 6630938, at *1 [Sup Ct, NY County 2013] [listing cases];

Commissioners of State Ins. Fund v Brooklyn Barber Beauty Equip. Co., 191 Misc 2d 1, 12 [Civ Ct, NY County 2001], *clarified on denial of reconsideration*, No. 195TSN2001, 2002 WL 32098265 [Civ Ct, NY County 2002]). Moreover, no calculation of actual expenditures and costs of collection have been submitted (*Commissioners of State Ins. Fund v Elias Kassas*, 5 Misc. 3d 1012[A], *5 [Civ Ct, NY County 2004] ["Section 18(5) does not automatically entitle SIF to collection costs of 22% of the debt, without SIF establishing its reasonable costs"]). Accordingly, plaintiff has failed to establish its prima facie case for a collection fee.

Accordingly, it is

ORDERED that plaintiff's motion is granted only to the extent that plaintiff Commissioners of the State Insurance Fund is entitled to a default judgment against defendant Lacey Wyckoff, in the amount of \$8,522.26; and it is further

ORDERED that the Clerk is directed to enter a money judgment in favor of plaintiff Commissioners of the New York State Insurance Fund and against defendant Lacey Wyckoff for \$8,522.26 as computed by the Clerk at the statutory rate from March 5, 2021, and costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs.

11/27/2023

DATE

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

