

American States Ins. Co. v McFarlane
2024 NY Slip Op 35531(U)
March 26, 2024
Supreme Court, Nassau County
Docket Number: Index No. 612165/22
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAUPresent: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 2

AMERICAN STATES INSURANCE COMPANY,

X

Plaintiff,

-against-

Index No.: 612165/22
Motion Sequence...01
Motion Date...11/20/23SHAINA MCFARLANE,
EDOUARD MARKENDY,
PIERRE SAMUEL,

(Individual Defendants)

and

AMERICAN MEDICAL INITIATIVES, P.C., BAY
RIDGE ORTHOPEDIC ASSOCIATES, COME
CHIROPRACTIC, P.C., DR. SIMEON ISAACS,
DPM, GRACE MEDICAL HEALTH PROVIDER
P.C., HAAR ORTHOPAEDICS & SPORTS
MEDICINE, P.C., HEADLAM MEDICAL
PROFESSIONAL CORPORATION, HLK MEDICAL,
P.C., INTEGRATIVE FAMILY HEALTH NP, PLLC,
INTERVENTIONAL PHYSICAL MEDICINE AND
REHAB OF NEW YORK PLLC, LORRAINE
RIOTTO, M.D., LR MEDICAL PLLC, MARK H.
VINE, M.D., NEWLINE RX, INC., PSG
PSYCHOLOGY PLLC, RAJIVAN MANIAM, M.D.,
REHAB TIME PT, P.C., SEDATION VACATION
PERIOPERATIVE MEDICINE PLLC, SINAI
DIAGNOSTICS LLC, WIZARD COMPUTER
SERVICES, INC. and XPERT SUPPLY CORP.,

(Healthcare Provider Defendants)

Defendants.

X

Papers Submitted:

Notice of Motion.....X

Upon the foregoing papers, the unopposed motion by the Plaintiff, AMERICAN STATES INSURANCE COMPANY (“AMERICAN”), seeking an Order pursuant to CPLR § 3215, granting a default judgment in its favor as against only the following Defendants, SHAINA MCFARLANE, EDOUARD MARKENDY, PIERRE SAMUEL (“Individual Defendants”), AMERICAN MEDICAL INITIATIVES, P.C., BAY RIDGE ORTHOPEDIC ASSOCIATES, COME CHIROPRACTIC, P.C., DR. SIMEON ISAACS, DPM, HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C., HLK MEDICAL, P.C., INTEGRATIVE FAMILY HEALTH NP, PLLC, INTERVENTIONAL PHYSICAL MEDICINE AND REHAB OF NEW YORK PLLC, MARK H. VINE, M.D., NEWLINE RX, INC., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, SINAI DIAGNOSTICS LLC, WIZARD COMPUTER SERVICES, INC. and XPERT SUPPLY CORP., is determined as hereinafter provided.¹

The Complaint seeks a declaration pursuant to CPLR § 3001 that AMERICAN has no duty to provide coverage for any claims made by or on behalf of the Individual Defendants, SHAINA MCFARLANE, EDOUARD MARKENDY and PIERRE SAMUEL, based on their failure and/or refusal to appear for an Examination Under Oath

¹ The Court notes that the within Motion was originally filed as against additional Defendants, however, since its filing, a Stipulation of Discontinuance was filed as to the Defendants, LORRAINE RIOTTO, M.D., HEADLAM MEDICAL PROFESSIONAL CORPORATION and GRACE MEDICAL HEALTH PROVIDER, P.C., on November 21, 2023, December 4, 2023, respectively (*See* Stipulations of Discontinuance, NYSCEF Doc. Nos. “110” and “112-113”). Additionally, the Plaintiff withdrew its Motion for Default as against the Defendants, GRACE MEDICAL HEALTH PROVIDER, P.C., HEADLAM MEDICAL PROFESSIONAL CORPORATION, LR MEDICAL PLLC and PSG PSYCHOLOGY PLLC, only, on November 17, 2023 (*See* Stipulation to Withdraw Default Motion, NYSCEF Doc. No. “109”). As such, the default motion as to the aforementioned Defendants, only, are withdrawn. Lastly, the Court notes that the Defendants, DR. SIMEON ISAACS, DPM and INTEGRATIVE FAMILY HEALTH NP, PLLC, filed an Answer on January 23, 2024, which the Plaintiff rejected as untimely (*See* Answer and Notice of Rejection, NYSCEF Doc. Nos. “118” and “119”, respectively).

(“EUO”), which is a condition precedent to coverage. Furthermore, the Plaintiff provided the EUO Requests sent to the Individual Defendants regarding the claims referenced in the Complaint at which the Defendants failed to appear (*See* EUO Requests, annexed to Motion as Exhibit “KK”, “LL-NN”, “PP”, “RR”, “TT-UU” and “WW”).

The Plaintiff commenced this action by the electronic filing of a Summons and Complaint on or about September 13, 2022 (*See* Summons and Complaint, annexed to Motion as Exhibit “A”).

The Plaintiff submits proof that the Defendant, SHAINA MCFARLANE, was personally served a copy of the Summons and Complaint on September 19, 2022 (*See* Affidavit of Service, annexed to Motion as Exhibit “G”). The Plaintiff submits proof that service was effectuated upon the Defendant, EDOUARD MARKENDY, on October 11, 2022, by affixing a copy of the Summons and Complaint to 1066 Nostrand Avenue, Brooklyn, NY 11225, and by mailing a copy of same to said address on October 13, 2022 (*See* Affidavit of Service, annexed to Motion as Exhibit “H”). Nail and mail service was utilized after Plaintiff was unable to effectuate service upon the Defendant, MARKENDY, on September 24, 2022, at 1:42 p.m., October 6, 2022, at 7:36 p.m., and October 11, 2022, at 12:35 p.m.

The Plaintiff purportedly effectuated service upon the Defendant, PIERRE SAMUEL, on October 10, 2022, by delivering a copy of the Summons and Complaint to David A, a co-habitant who refused to provide his full name, a person of suitable age and discretion, at 170 Hawthorne St., #4B, Brooklyn, NY 11225, and thereafter mailing a copy of same to said Defendant on October 13, 2022 (*See* Affidavit of Service, annexed to Motion as Exhibit “I”). However, the Court notes that said Defendant’s address in the

Summons and Request for Judicial Intervention is listed as 171 Winthrop Street, Brooklyn, NY 11225. The Plaintiff does not proffer any explanation, reasonable or otherwise, as to the inconsistencies noted for the address of the Defendant, PIERRE SAMUEL.

The Plaintiff submits proof that the Defendant, BAY RIDGE ORTHOPEDIC ASSOCIATES, was personally served by delivering a copy of the Summons and Complaint on the front desk clerk, Stephaine Nedman, an agent authorized to accept service on September 19, 2022 (*See* Affidavit of Service, annexed to Motion as Exhibit “K”). The Plaintiff submits proof that service was effectuated upon the Defendant, DR. SIMEON ISAACS, DPM, on September 27, 2022, by affixing a copy of the Summons and Complaint to 1314 Ocean Parkway, Apt #5G, Brooklyn, NY 11230, and by mailing a copy of same to said address on September 29, 2022 (*See* Affidavit of Service, annexed to Motion as Exhibit “M”). Nail and mail service was utilized after Plaintiff was unable to effectuate service upon said Defendant on September 19, 2022, at 6:19 p.m., September 24, 2022, at 12:37 p.m., and September 27, 2022, at 12:16 p.m.

The Plaintiff submits proof that service was effectuated upon the Defendant, MARK VINE, M.D., on September 23, 2022, by delivering a copy of the Summons and Complaint to Roberta “Doe”, a clerk who refused to provide their full name, a person of suitable age and discretion, and thereafter mailing a copy of same to MARK VINE, M.D., on September 30, 2022 (*See* Affidavit of Service, annexed to Motion as Exhibit “V”).

The Plaintiff submits proof that service was effectuated upon the remaining Company Defendants, AMERICAN MEDICAL INITIATIVES, P.C., COME CHIROPRACTIC, P.C., HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C., HLK MEDICAL, P.C., INTEGRATIVE FAMILY HEALTH NP, PLLC, INTERVENTIONAL

PHYSICAL MEDICINE AND REHAB OF NEW YORK PLLC, NEWLINE RX, INC., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, SINAI DIAGNOSTICS LLC, WIZARD COMPUTER SERVICES, INC. and XPERT SUPPLY CORP., *via* the Secretary of State pursuant to Business Corporation Law (“BCL”) § 306. The Plaintiff also submits proof that an additional copy of the Summons was mailed to the aforementioned Company Defendants pursuant to CPLR § 3215(g)(4)(i) (*See* Notice of Service, annexed to Motion as Exhibit “CC”).

Pursuant to CPLR § 3215, a plaintiff may move for a default judgment against a defendant who fails to answer or otherwise appear in the action within one year of the default. Pursuant to CPLR § 3215(f), the movant must provide: (i) proof of service of the summons and complaint; (ii) an affidavit by the party setting forth the facts constituting the claim; (iii) proof of the default and/or amount due.

Where a defendant is a domestic or authorized foreign corporation that was served pursuant to Business Corporation Law (“BCL”) § 306(b), CPLR § 3215(g)(4)(i) and (ii) requires that an affidavit be submitted demonstrating that the defaulting defendant was provided with additional notice of the summons and complaint and informed that service was originally effectuated pursuant to BCL § 306. Such additional mailing must be made by first class mail upon the defaulting defendant-corporation at least twenty (20) days before the entry of judgment.

Here, the Plaintiff’s motion has been timely filed within one year of the default. The Plaintiff submitted proof that the Defendants, SHAINA MCFARLANE, EDOUARD MARKENDY, AMERICAN MEDICAL INITIATIVES, P.C., BAY RIDGE ORTHOPEDIC ASSOCIATES, COME CHIROPRACTIC, P.C., DR. SIMEON ISAACS,

DPM, HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C., HLK MEDICAL, P.C., INTEGRATIVE FAMILY HEALTH NP, PLLC, INTERVENTIONAL PHYSICAL MEDICINE AND REHAB OF NEW YORK PLLC MARK H. VINE, M.D., NEWLINE RX, INC., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, SINAI DIAGNOSTICS LLC, WIZARD COMPUTER SERVICES, INC. and XPERT SUPPLY CORP., were served with the Summons and Complaint pursuant to the CPLR and BCL. The Plaintiff also showed proof of compliance with the additional mailing requirements of CPLR § 3215(g)(4)(i), as well as CPLR § 3215(g)(4)(ii). The Plaintiff also proffered sworn affidavits by the Plaintiff's Senior Claims Resolution Specialist, Michelle Parisi, and Senior Special Investigator, Lisa Saccone, which appropriately serves as sufficient proof of the facts constituting the claim pursuant to CPLR § 3215(f) (*See* Affidavits, NYSCEF Doc. Nos. "42" and "43").

However, the Plaintiff failed to properly serve the Defendant PIERRE SAMUEL, pursuant to the CPLR. As such, the motion as to said Defendant, *only*, shall be denied.

Lastly, while an answer was filed on behalf of the Defendants, DR. SIMEON ISAACS, DPM and INTEGRATIVE FAMILY HEALTH NP, PLLC, on January 23, 2024 (*See* Answer, NYSCEF Doc. No. "118"), these Defendants did not cross-move for extension of time to answer, nor was any request made to submit opposition herein. As such, the Plaintiff's application shall also be granted as to these Defendants, as unopposed.

Accordingly, it is hereby

ORDERED, that the unopposed motion by the Plaintiff seeking an Order, pursuant to CPLR § 3215, granting a default judgment in its favor as against the

Defendants, SHAINA MCFARLANE, EDOUARD MARKENDY, AMERICAN MEDICAL INITIATIVES, P.C., BAY RIDGE ORTHOPEDIC ASSOCIATES, COME CHIROPRACTIC, P.C., DR. SIMEON ISAACS, DPM, HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C., HLK MEDICAL, P.C., INTEGRATIVE FAMILY HEALTH NP, PLLC, INTERVENTIONAL PHYSICAL MEDICINE AND REHAB OF NEW YORK PLLC, MARK H. VINE, M.D., NEWLINE RX, INC., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, SINAI DIAGNOSTICS LLC, WIZARD COMPUTER SERVICES, INC. and XPERT SUPPLY CORP., is **GRANTED**; and it is further

ORDERED, that the unopposed motion by the Plaintiff seeking an Order, pursuant to CPLR § 3215, granting a default judgment in its favor as against the Defendants, PIERRE SAMUEL, is **DENIED**; and it is further

ORDERED, that the Plaintiff, AMERICAN STATES INSURANCE COMPANY, is under no obligation to pay, honor, or reimburse the within defaulting Defendants, SHAINA MCFARLANE, EDOUARD MARKENDY, AMERICAN MEDICAL INITIATIVES, P.C., BAY RIDGE ORTHOPEDIC ASSOCIATES, COME CHIROPRACTIC, P.C., DR. SIMEON ISAACS, DPM, HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C., HLK MEDICAL, P.C., INTEGRATIVE FAMILY HEALTH NP, PLLC, INTERVENTIONAL PHYSICAL MEDICINE AND REHAB OF NEW YORK PLLC, MARK H. VINE, M.D., NEWLINE RX, INC., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, SINAI DIAGNOSTICS LLC, WIZARD COMPUTER SERVICES, INC. and XPERT SUPPLY CORP., for any claims that were

submitted by, or on behalf of the Individual Defendants, SHAINA MCFARLANE, EDOUARD MARKENDY and PIERRE SAMUEL; and it is further

ORDERED, that counsel for the Plaintiff shall serve a copy of this Order upon the within Defaulting Defendants at their last known respective address(es) by certified mail, return receipt requested, AND by regular mail, within twenty (20) days of the date of entry of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COURT**; and it is further

ORDERED, that the remaining appearing parties are reminded to appear for the previously scheduled **Compliance and ADR Conference on April 8, 2024, at 10:30 a.m., which shall be held IN PERSON.**

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
March 26, 2024



HON. RANDY SUE MARBER, J.S.C.

ENTERED

Mar 27 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE