CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS PART 40

LONGEVITY MEDICAL SUPPLY, INC,

A/A/O TRICE, KATRINA

Plaintiff(s),

-against-

UNITED AUTOMOBILE INSURANCE COMPANY,

Defendant(s).

Index No. CV-704158-23/KI

Pt 40 Cal. ## 32, 33, Motion Seq. ## 1, 2.
Calendar Date: 2/10/25

DECISION AND ORDER

Recitation, as required by CPLR §2219(a) of the papers considered in review of this Motion:

Papers

P's motion for default judgment 1
D's opposition and cross-motion 2
P's reply, and opposition to cross-motion 3
D's reply in further support of cross motion.... 4

Upon the foregoing cited papers, and after oral argument, Plaintiff's motion for default judgment (motion sequence #1) is DENIED, and Defendant's cross-motion to dismiss the complaint herein for lack of personal jurisdiction (motion sequence #2) is DENIED.

This is an action seeking the recovery of assigned first-party no-fault benefits by a provider for treatment rendered to assignee Katrina Trice after a January 24, 2022 motor vehicle accident. Plaintiff filed the Summons & Complaint on February 13, 2023, and service was effectuated on April 7, 2023, via the Department of State. On June 12, 2023, Plaintiff filed a motion for default judgment with an application for judgment. On October 11, 2023, Defendant filed a cross-motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.

DEFENDANT'S CROSS-MOTION TO DISMISS THE COMPLAINT

Section 5107 of Article 51 of the Insurance Law, entitled "Coverage for non-resident motorists," provides, in pertinent part, that "(a) Every insurer authorized to transact or transacting business in this state, or controlling or controlled by or under common control by or with such an insurer, which sells a policy providing motor vehicle

liability insurance coverage or any similar coverage in any state or Canadian province, shall include in each such policy coverage to satisfy the financial security requirements of article six or eight of the vehicle and traffic law and *to provide for the payment of first party benefits pursuant to subsection (a) of section five thousand one hundred three of this article when a motor vehicle covered by such policy is used or operated in this state*" (emphasis added). *See*, Prop. & Cas. Ins. Co. of Hartford v. Clarke, 7 Misc. 3d 358 (Sup. Ct. 2005). Additionally, "[a]lthough the insurer may not be authorized to transact business in this state, it is still possible for the non-resident owner-insured to give proof of financial responsibility under VTL § 344 by 'filing with the commissioner a written certificate ... of an insurance carrier authorized to transact business in the state in which the motor vehicle is registered otherwise conforming to the provisions of this article.'" Id.

In this case, Defendant has failed to produce evidentiary proof in admissible form in support of its motion to dismiss. Defendant's affidavit from Kerry Heitz is not in admissible form as it does not contain a Certificate of Conformity, although the court notes that "the absence of a certificate of conformity for an out-of-state affidavit is not a fatal defect." *See*, Fredette v. Town of Southampton, 95 A.D.3d 940, (2nd Dept., 2012). The important issue here, however, is that Defendant has also tendered the declaration page of the out-of-state insurance policy which is also deemed inadmissible due to lack of certification. Furthermore, Kerry Heitz's affidavit does not support the admissibility of the declaration page as a business record. In fact, it makes no mention of it.

As such, contrary to Defendant's assertions, triable issues of material fact exist as to whether Defendant transacts business in the State of New York which precludes granting its motion to dismiss the plaintiff's complaint.

PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

In its moving papers and opposition to Defendant's cross-motion, Plaintiff argues that a default judgment is warranted as Defendant has failed to timely appear in this action. Plaintiff avers that Defendant was served on April 7, 2023, via the Secretary of State, and Defendant's time to serve an Answer "expired." Furthermore, Plaintiff argued that even more time has passed because as of the date of filing its motion, Defendant still

failed to submit an Answer to the complaint. Plaintiff concludes that a default judgment under CPLR § 3215 in the amount $3,331.56 should be granted, as service was proper under VTL § 253.

A plaintiff seeking leave to enter a default judgment must submit proof of service of the summons and complaint, the facts constituting the cause of action, and the defendant's default in answering or appearing. CPLR 3215(f); *Curra v. Brunswick Hosp. Ctr., Inc.*, 161 A.D.3d 1042, 1043, 78 N.Y.S.3d 204, 205 (2018). Plaintiff purports to have completed service pursuant to the N.Y. CLS VTL § 253 statute, which provides in pertinent part:

> "A summons in an action described in this section may issue in any court in the state having jurisdiction of the subject matter and be served as hereinafter provided."
>
> "Service of summons shall be made by, [1] mailing a copy to the secretary of state at this office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of ten dollars and; [2] such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested and; *[3] plaintiff shall file with the clerk of the court in which the action is pending...an affidavit of compliance, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail*." [emphasis added].

The Court does not address whether service can be properly effectuated on the Defendant pursuant to VTL § 253. However, *assuming arguendo*, that service could be obtained pursuant to VTL § 253, the Court finds that Plaintiff has failed to strictly comply with the requirements thereunder. In examining whether service of the summons and complaint was properly effectuated under the provisions of VTL § 253, there is no indication as per the Court's file, or the motion herein, that the third prong was satisfied rendering service defective. *To wit*, Plaintiff has failed to file with the Clerk of the Court, "an affidavit of compliance, a copy of the summons and complaint, and either a

return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail."

Based on the above, Plaintiff has not provided sufficient proof that Defendant was properly served with process. And as a result, a default judgment cannot be granted. Thus, Plaintiff's motion for default judgment is denied.

Plaintiff's motion for default judgment is denied and Defendant's cross-motion is denied.

This constitutes the decision and order of the Court.

Date: February 27, 2025

Hon. Lola O. Waterman
Civil Court Kings