

Walker v Pennyfeather
2025 NY Slip Op 35485(U)
August 18, 2025
Supreme Court, Bronx County
Docket Number: Index No. 804509/2023E
Judge: John A. Howard-Algarin
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NEW YORK SUPREME COURT - COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, PART 14
-----x
COURTNEY REVEE WALKER,

-against-

KYLE PENNYFEATHER and LAREIK DA TAYLOR,
-----x
Defendants.

Index No. 804509/2023E
Motion Sequence No. 2
Motion Date: May 22, 2025

DECISION/ ORDER
Present:
Hon. John A. Howard-Algarin
Justice Supreme Court

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion to vacate judgment and to compel:

<u>Papers</u>	<u>NYSCEF Doc. No(s).</u>
Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits Thereto	26-36
Affirmation(s) in Opposition	41-42
Reply Affirmation	44

In this motor vehicle negligence action, plaintiff is seeking an order, pursuant to CPLR § 5015[a], restoring this matter to the active case calendar, and, pursuant to Insurance Law §§ 5218 and 5208, compelling Motor Vehicle Accident Indemnification Corporation (“MVAIC”), to appear for and defend the defaulting parties. MVAIC opposes asserting that it is not a proper party to sue. For the reasons stated below, plaintiff’s motion is granted, in part, and denied, in part.

Plaintiff’s cause of action stems from personal injuries she allegedly sustained on October 12, 2021, when a vehicle owned and operated by defendants, came in contact with her as she was crossing Webster Avenue, at or near its intersection with East Fordham Road in Bronx County, New York (NYSCEF Doc No. 28). This action was disposed of in April 2025 on procedural grounds.

A. Vacatur of Default Judgment.

On June 7, 2024, plaintiff was granted a default judgment against both defendants upon their failure to timely answer or otherwise respond to the complaint (NYSCEF Doc Nos. 22, 29). The court in its decision ordered plaintiff to appear for an inquest to assess damages (*id.*). Significantly, on at least three occasions prior to the April 25, 2025, plaintiff sought last minute adjournments of the scheduled proceeding. On April 25, 2025, notwithstanding that her counsel had contacted the court the day before and was directed to be ready to proceed with the assessment of damages, plaintiff appeared through a *per diem* who insisted on another adjournment. Consequently, the court dismissed this action

from its active case calendar and marked the matter disposed (NYSCEF Doc Nos. 25, 30). Plaintiff now moves to vacate the court's dismissal asserting that she had not been directed to file her note of issue and, therefore, it would have been procedurally inappropriate to proceed.

It is without question that a note of issue must be filed to place an action on the trial calendar for the purposes of either a trial or an inquest (22 NYCRR § 202.21). The court should have directed plaintiff to file her note of issue and a notice of inquest in order to place this matter on the inquest calendar (*see, e.g., Perez v Jordan*, 37 AD3d 200 [1st Dept 2007]; *Evangelista v Slatt*, 20 AD3d 349, [1st Dept 2005][failure to timely file note of issue prior to inquest leading to dismissal of action]). Hence, this court vacates its April 25, 2025 order dismissing this action and restores this action to its active case calendar.

B. Request to Compel MVAIC to Appear and Defend.

Plaintiff argues that MVAIC should be compelled to provide a defense for the defaulting defendants, pursuant to Insurance Law §§ 5218 and 5208, because neither defendant had insurance at the time of the accident. MVAIC opposes asserting that it is not a proper party because plaintiff has not exhausted all of her remedies as to the identified driver and owner of the offending vehicle.

Identified Owner/Operator

In support of her motion, plaintiff submits the certified police report ("Report") regarding the underlying accident (NYSCEF Doc No. 36). The Report lists the name and address of defendant Kyle Pennyfeather, who was operating the vehicle that came in contact with plaintiff. The Report also contains the make, model and license plate number of the vehicle defendant was driving at the time of the accident. With this information, plaintiff was able to identify the owner of the vehicle, defendant Lareik Da Taylor.

According to the relevant portion of the Insurance Law:

[a]ny qualified person having a cause of action for death or personal injury arising out of the ownership, maintenance or use of a motor vehicle in this state, when the identity of the motor vehicle and of the operator and owner cannot be ascertained or it is established that the motor vehicle was at the time of the accident, in the possession of a person without the owner's consent and that the identity of such person cannot be ascertained may, upon notice to the corporation, apply to a court for an order permitting an action therefor against the corporation in that court (NY Ins Law § 5218).

Stated otherwise, the insurance law permits suit directly against MVAIC if the (1) the identity of the motor vehicle and the owner and the operator thereof is unknown and

unascertainable or (2) where it is established that the vehicle was used without the consent and permission of the owner by an unknown person (*Cudahy v MVAIC*, 36 AD2d 717 [1st Dept 1971]). An action cannot lie against MVAIC directly unless one of the two conditions are met. (*id.*). The fact that the offending vehicle is uninsured is immaterial (*id.*). Since there is an identified owner and operator of the offending vehicle here, plaintiff is not entitled to have MVAIC indemnify the defaulting defendants pursuant to Insurance Law § 5218 (*Nakamura v MVAIC*, 209 AD3d 535, 536 [1st Dept 2022]).

To be sure, MVAIC is a remedy of last resort, plaintiff must first exhaust her remedies against the known owner and operator of the vehicle, before seeking relief from MVAIC (*id.*; see also *Brandon by Morton v MVAIC*, 233 AD2d 604 [3d Dept 1996])[reasoning that “a final judgment against a financially irresponsible motorist must first be obtained before recovery may be sought against [MVAIC]”).

Uninsured Owner/Operator

In Reply to MVAIC’s opposing assertion that plaintiff has not exhausted all of her remedies as it relates to § 5218, plaintiff argues that she is entitled to MVAIC protection pursuant to § 5208 [a] [1] [B], which states:

[a] The protection provided by the corporation on account of motor vehicle accidents caused by financially irresponsible motorists shall be available to: [1] [a]ny qualified person having a cause of action because of death or bodily injury, arising out of a motor vehicle accident occurring within this state, who files with the corporation within one hundred eighty days of the accrual of the cause of action, as a condition precedent to the right to apply for payment from the corporation, an affidavit stating that: . . . [B] the cause of action is against the owner or operator of a designated uninsured motor vehicle (NY Ins Law § 5208 [a] [1] [B]).

Plaintiff’s cause of action accrued on October 12, 2021. As such, plaintiff had until April 11, 2022, to file a notice of claim with MVAIC in the form of an “affidavit” as required by § 5218 [a] [1] [B]. It appears from plaintiff’s reply that she is arguing that the affidavit she submitted in support of her instant motion satisfies this requirement. However, her affidavit is dated April 23, 2025, and her motion was filed May 22, 2025. As such, MVAIC would not have received the affidavit within the statutorily prescribed 180 days.

Significantly, plaintiff has also failed to timely move for leave of court to file a late affidavit upon MVAIC, which motion would have had to have been filed within one year from the period for filing the affidavit specified in paragraph one, two or three of subsection [a] of the statute (see NY Ins Law §§ 5208 [a], [c]). Given plaintiff’s failure to timely file an affidavit with MVAIC, she has not satisfied the condition precedent for MVAIC coverage under § 5218 [a] [1] [B] (compare *Ocean Diagnostic Imaging v MVAIC*, 8

Misc3d 137 [A] [1st Dept 2005][finding that “[i]nasmuch as the record establishes that plaintiff’s assignor failed to file a timely notice of claim or seek leave to file a late notice of claim ... a condition precedent to the right to apply for payment from [MVAIC] was not satisfied”)].

Accordingly, it is:

ORDERED that plaintiff’s motion for an Order, pursuant to CPLR § 5015 [a], restoring this matter to the active case calendar, is **GRANTED**; it is further

ORDERED that the clerk of the court shall restore this matter to the active case calendar; it is further

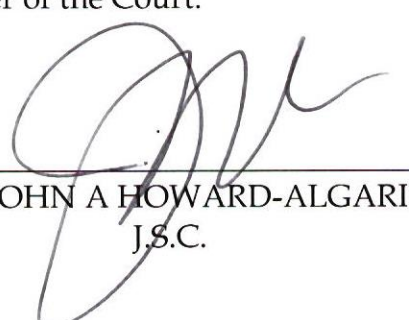
ORDERED that plaintiff’s motion for an Order, pursuant to Insurance Law §§ 5218 and 5208, compelling MVAIC to appear and answer for the defaulting insureds, is **DENIED**; it is further

ORDERED that plaintiff’s counsel is hereby directed to file and serve a note of issue and notice of inquest forthwith, and this matter shall be scheduled for an inquest for the assessment of damages **at 2:30 p.m., on September 18, 2025, in Part 14, courtroom 607 of the Bronx Supreme Court**; and it is further

ORDERED that MVAIC shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 18, 2025


HON. JOHN A HOWARD-ALGARIN
J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION.....	☐ GRANTED	☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER ☒ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT