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A.B. Med. Servs. PLLC v Specialty Natl. Ins. Co.
2006 NYSlipOp 50810(U)
Decided on April 28, 2006
Appellate Term, Second Department
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Decided on April 28, 2006

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS

PRESENT: : WESTON PATTERSON, J.P., GOLIA and
BELEN, JJ 2004-1440 K C.

A.B. Medical Services PLLC D.A.V. CHIROPRACTIC P.C. DANIEL KIM'S ACUPUNCTURE P.C. ROYALTON CHIROPRACTIC P.C. a/a/o Elsie Pena and Belkis Pena, Respondents,

against

Specialty National Insurance Company, Appellant.

Consolidated appeal from orders of the Civil Court of the City of New York, Kings County (Loren Baily-Schiffman, J.), entered on July 19, 2004 and December 23, 2004. The order entered July 19, 2004 denied defendant's motion for renewal of plaintiffs' motion to enter a default judgment and defendant's cross motion for summary judgment seeking, in effect, to open the default and to compel plaintiffs to accept defendant's answer. The order entered December 23, 2004, insofar as appealed

from, upon [*2] granting defendant's motion for reargument, adhered to its prior determination in the order entered July 19, 2004.

Appeal from order entered July 19, 2004 dismissed as superseded.

Order entered December 23, 2004 modified by providing that, upon reargument, so much of defendant's prior motion as sought renewal and, upon renewal, vacatur of the portion of the order entered February 6, 2004 which had granted plaintiffs' underlying motion to enter a default judgment and denied defendants' cross motion is granted, plaintiffs' underlying motion to enter a default judgment denied, and defendant's cross motion granted to the extent of permitting defendant to file and serve its answer within 30 days of the date of the order entered hereon; as so modified, affirmed without costs.

In this action to recover assigned first-party no-fault benefits in the sum of $23,022.23, plaintiffs initially moved for an order directing entry of a default judgment upon defendant's failure to appear and answer. In order to establish entitlement to a default judgment, plaintiffs were required to proffer proof that they submitted the claims to defendant, setting forth the fact and the amounts of the losses sustained, and that payment of no-fault benefits was overdue (*see* Insurance Law § 5106 [a]; *Mary Immaculate Hosp. v Allstate Ins. Co.* 5 AD3d 742 [2004]; *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc 3d 128[A], 2003 NY Slip Op 51701[U] [App Term, 2d & 11th Jud Dists]). Plaintiffs failed to establish the submission of the claim forms to defendant. In his affidavit, plaintiffs' "practice and billing manager" alleged that he "issued all of the billings," that he "personally billed out the claim," and that "[a]ll billing of plaintiff was sent to defendant." The foregoing allegations in the affidavit are insufficient to demonstrate personal knowledge of the mailing of the claim forms, and do not contain an adequately detailed description of standard office mailing procedure so as to create a presumption of mailing (*see Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2001]; *A.B. Med. Servs. v State Farm Mut. Auto. Ins. Co.*, 3 Misc 3d 130 [A], 2004 NY Slip Op 50387[U] [App Term, 2d & 11th Jud Dists]). Accordingly, having failed to establish the facts constituting the claim

(CPLR 3215 [f]), namely, the submission of the claims to defendant, upon reargument, the motion by defendant for renewal should have been granted and plaintiffs' underlying motion for leave to enter a default judgment denied.

Moreover, the court erred in adhering to that portion of its earlier order which denied renewal of the underlying cross motion. While generally delay by an insurer will not be acceptable as a reasonable excuse for a default (*see A.B. Med. Servs. PLLC v Travelers Prop. Cas. Co.*, 6 Misc 3d 53 [App Term, 2d & 11th Jud Dists 2004]), that rule is not absolute. "[W]hether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits . . . [There is] no basis to categorically exclude consideration of a delay by an insurance company in making such a determination" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2005]). In the instant case, there was a sufficient showing to establish a reasonable excuse for the defendant's default in answering, particularly in light of the initial delay by the office of the Superintendent of Insurance, upon which service was made, in forwarding process to defendant. Moreover, defendant's submissions in support of its cross motion adequately demonstrated that it had a [*3]meritorious defense.

Weston Patterson, J.P., Golia and Belen, JJ., concur.

Decision Date: April 28, 2006