

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

GEORGE C. DINSTBER III and DONNA R. NOVICK,

Plaintiff(s),

-against-

JOSEPH FLUDD and TIWANN FLUDD,

Defendant(s).

ORIGINAL RETURN DATE: 11/06/02

SUBMISSION DATE: 11/27/02

INDEX No.: 009833/02

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2,3
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SurReply.....	5,6

This action arises out of a motor vehicle accident on January 10, 2002 involving a vehicle owned and operated by plaintiff George C. Dinstber, III and a vehicle operated by defendant Joseph Fludd and owned by either defendant Joseph Fludd or defendant Tiwann Fludd. Plaintiff Donna R. Novick was a passenger in the Dinstber vehicle.

At the time this action was commenced on June 12, 2002, both plaintiffs George C. Dinstber, III and Donna R. Novick were represented by counsel. On August 12, 2002, plaintiff George C. Dinstber, III discharged his counsel in writing. Said counsel however continues to represent plaintiff Donna R. Novick.

By this motion, pro se plaintiff George C. Dinstber, III seeks an order awarding him a default judgment against defendants for damages sustained as a consequence of the accident. Although plaintiff Dinstber in his moving papers characterizes his damage claims as including both personal injury and property damage to his vehicle, the complaint itself contains no claim for property damage.

A default award may not exceed an amount or differ in the kind of relief from that sought in the complaint (P&K Marble Inc. v. Pearce, 168 AD2d 439; see, R.D. Smithtown LLC v. Lucille Roberts Figure Salons, Inc., 227 AD2d 439).

Accordingly, any recovery to which plaintiff Dinstber might otherwise be entitled by reason of defendants' default is limited to personal injuries.

"In order to successfully oppose a motion for leave to enter a default judgment based upon the failure to serve an answer, the defendant must demonstrate a reasonable excuse for its delay and the existence of a meritorious defense (citations omitted)" (Gurreri v. Village of Briarcliff Manor, 249 AD2d 508).

Despite the well settled nature of the foregoing principle of law, defendants offer neither an excuse for their default nor anything to suggest a meritorious defense. Counsel for defendants' claim that it attempted to telephone plaintiff Dinstber "on repeated occasions" without success "in order to work this matter out" cannot constitute an excuse for its default. To the contrary, it implies that defendants were already in default before defendants even attempted to communicate with him. There is no claim that defendants were unaware of plaintiff Dinstber's pro se status and their service of an answer on both plaintiff Dinstber and counsel for plaintiff Novick on September 9, 2002 was clearly untimely.

Accordingly, plaintiff Dinstber is awarded a default judgment against defendants.

As liability has been determined by default, the threshold issue of serious injury has necessarily been determined in plaintiff Dinstber's favor (Porter v. SPD Trucking, 284 AD2d 181). Moreover, defendants "are not entitled to disclosure from [plaintiff Dinstber] on the issue of damages in preparation for the inquest (citations omitted)" (Id.).

In view of same, severance of plaintiff Novick's claim from those of plaintiff Dinstber appears warranted as sought by defendants and joined by plaintiff Novick. However, as plaintiff Dinstber has obtained a written waiver of any lien claims for disbursements advanced by his former counsel, and since disclosure is at its inception with regard to plaintiff Novick, plaintiff Dinstber's claim shall go forward under index #9833/02. Plaintiff Novick is directed to purchase a new index number and file a new Request for Judicial Intervention (RJI) within 30 days after receipt of a copy of this order from any source.

Consistent with the foregoing, the title of this action is amended to read as follows:

"GEORGE C. DINSTBER III,

Plaintiff,

-against-

JOSEPH FLUDD and TIWANN FLUDD,

Defendants."

A trial is required on the issue of plaintiff Dinstber's damages.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of the Calendar Control Part (CCP) for the 19th day of March, 2003 at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of plaintiff Dinstber's claims.

The directive with respect to the trial is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

The Court notes that Chambers staff has been directed to mail a copy of this order to all parties to insure its expeditious receipt.

This decision constitutes the order of the Court.

Dated: 1-7-03

HON THOMAS P. PHELAN

Thomas P. Phelan
J.S.C.

ENTERED

JAN 09 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE