

**NYU-The Hosp. For Joint Diseases v Progressive  
Cas. Ins. Co.**

2008 NY Slip Op 31643(U)

June 4, 2008

Supreme Court, Nassau County

Docket Number: 7692-07/

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

NYU-THE HOSPITAL FOR JOINT DISEASES,  
a/a/o HARRISON J. SNYDER; MOUNT SINAI  
HOSPITAL, a/a/o JUAN RODRIGUEZ; ST.  
VINCENT'S HOSPITAL OF RICHMOND, a/a/o  
ANGEL REYES, JANE WIJAYARATNA,

TRIAL / IAS PART 32  
NASSAU COUNTY

Index No. 17692/07

Motion Sequence No. 001

Plaintiffs,

- against -

PROGRESSIVE CASUALTY INSURANCE  
COMPANY,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	_____
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant moves for an order pursuant to CPLR 317 and 5015 (a) (1) vacating the default judgment entered here against the defendant, and allowing the defendant's answer and discovery demands to be deemed timely served. The plaintiff opposes the motion.

The defense attorney states, in a supporting affirmation dated February 6, 2008, as shown in the affidavit dated February 6, 2008 of Angel Boyer, the defendant's no-fault litigation representative, the circumstances surrounding the earliest notice received by the

defendant of the existence of the lawsuit was on November 30, 2007, when the defendant received a copy of a service of process transmittal letter from its agent, CT Corporation, dated November 28, 2007, enclosing a copy of the Insurance Department transmittal letter of October 23, 2007. The defense attorney points out, as shown in the Boyer affidavit, no copy of the summons and complaint was sent by CT Corporation at that time nor received from anyone by the defendant until it requested it from the plaintiff's lawyer on November 30, 2007. The defense attorney asserts Boyer was informed, immediately telephoned the office of the plaintiff's lawyer, and asked for a copy of the summons and complaint while learning a default judgment had been entered against the defendant. The defense attorney avers the defendant subsequently sent a copy of the summons and complaint to the defense counsel's office which received the papers on December 4, 2007, and served a verified answer and discovery demands on December 5, 2007, which was rejected and returned by letter dated December 20, 2007.

The defense attorney contends the default was unintentional and excusable, and the instant motion is timely. The defense attorney points out the defendant's agent was served with a copy of the judgment with notice on December 12, 2007. The defense attorney remarks the defendant first received actual notice of the entry of the judgment on November 30, 2007, after the time to answer had expired. The defense attorney asserts the defendant failed to receive notice of the action in time to defend it, and the defendant was not served by personal delivery to the corporation, to wit hand delivery nor to a CPLR 318 agent. The

defense attorney opines the defendant is entitled to *vacatur* of the default without the need to established a reasonable excuse for the delay in answering or appearing. The defense attorney states, even if a reasonable excuse for the default were required, the defendant has established it.

The defense attorney contends the defendant has shown meritorious defenses of exhaustion of benefits in Action #1, timely requests for verification which are still unsatisfied in Action #2, and timely payments in Actions #3 and #4. The defense attorney avers, when coupled with the meritorious defenses, the brief delay involved, and the complete lack of prejudice to the plaintiff, *vacatur* is warranted. The defense attorney points to the affidavit of Angel Boyer which details those defenses.

The defense counsel opines the Nassau County Clerk entered judgment here pursuant to CPLR 3215, however to constitute a sum certain, that statute contemplates a situation, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. The defense counsel states there was reliance on extrinsic proof for this default judgment, so the judgment is a nullity.

The plaintiff's attorney states, in an opposing affirmation dated March 18, 2008, the Superintendent of Insurance acknowledged service of the summons and complaint as effective as of October 22, 2007, and a copy of those papers was mailed to the defendant on October 23, 2007. The plaintiff's attorney contends the defendant's mere denial of receipt of process is insufficient to rebut the presumption of receipt created by the Superintendent's

acknowledgment. The plaintiff's attorney asserts the defendant's application for *vacatur* is defective since neither the defendant's representative nor the defense attorney has personal knowledge of the facts. The plaintiff's attorney points out the plaintiff entered a judgment against the defendant on December 4, 2007, and a copy of the judgment was served upon the defendant by regular and certified mail on December 12, 2007. The plaintiff's attorney notes the defendant did not respond to the default judgment, and on January 21, 2008, an information subpoena, which required a response within seven days, was served by regular and certified mail upon the defendant, who did not respond to the information subpoena. The plaintiff's attorney avers the defendant's counsel exhibited a pattern of neglect even after the default, and the default was inexcusable. The plaintiff's attorney contends the defendant has failed to provide a reasonable excuse for the default.

The plaintiff's attorney also contends the existence of a meritorious defense is irrelevant, and points to the first cause of action. The plaintiff's attorney points out the defendant's representative claims exhaustion of policy limits, however Angel Boyer's affidavit is based upon a review of the file, and that person's affidavit is hearsay. The plaintiff's attorney opines the Boyer affidavit cannot create a foundation for the alleged breakdown of payments; the breakdown is not sworn to and is not in admissible form. The plaintiff's attorney notes the breakdown of payments has handwritten notations, to wit alterations which further nullify the form. The plaintiff's attorney submits the form does not comply with 11 NYCRR § 65-3.15 which requires listing the dates in the order in

which each service was rendered.

The plaintiff's attorney states, on the second cause of action, the plaintiff does not have a record of receiving the alleged verification requests. The plaintiff's attorney states the affidavit of Angel Boyer is hearsay, and insufficient to prove the requests were mailed to the plaintiff. The plaintiff's attorney states the defendant issued a denial of claim form alleging the policy was exhausted which has not been proven, and the defendant did not mention it had not received any verification requests.

The plaintiff's attorney states, with respect to the third and fourth causes of action, these were subsequently paid. The plaintiff's attorney asserts the plaintiff has issued a partial satisfaction of judgment.

“A motion to vacate a default is addressed to the sound discretion of the Supreme Court” (*Paulucci v. Casa De Cuzzi, Inc.*, 272 AD2d 594). Under CPLR 5015 (1) (a), “the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, . . . on motion of any interested person with such notice as the court may direct, upon the ground of excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.”

In order to restore a case to the trial calendar after default, the defendant must establish: (1) a meritorious defense of the case, (2) a reasonable excuse for the delay, (3)

the absence of an intent to abandon the matter, and (4) the lack of prejudice to the nonmoving party if the case is restored to the calendar (*see, Rudy v Chasky*, 260 AD2d 625; *Iazzetta v Vicenzi*, 243 AD2d 540). The defendant here has not made that showing, in the supporting sworn statements, and the other supporting papers to this motion.

Accordingly, the motion is denied.

So ordered.

Dated: June 4, 2008

ENTER:



J. S. C.  
HON ANTONIO L. BRANDVEER

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

**ENTERED**

JUN 11 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE