SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN *Justice* PART 22

THE NEW YORK AND PRESBYTERIAN HOSPITAL
a/a/o MATTHEW DOWLING

- v -

SAFECO INSURANCE COMPANY OF AMERICA

INDEX NO. 103045/06

MOTION DATE 6-13-07

MOTION SEQ. NO. 004

MOTION CAL. NO. 63

The following papers, numbered 1 to 3, were read on this motion to vacate a default judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Memo of Law	2
Replying Affirmation	3

Cross-Motion: ☐ Yes ■ No

This subrogation action arises from a December 2004 motor vehicle accident which, according to the underlying complaint, resulted in serious injuries to Matthew Dowling, who was insured under an automobile liability policy containing a New York State No-Fault endorsement, issued by defendant Safeco Insurance Company of America. Between September 27 - October 1, 2005, Dowling was hospitalized and underwent hip replacement surgery at The New York and Presbyterian Hospital, plaintiff herein, and assigned his no-fault benefits to the hospital. According to the instant complaint, the plaintiff presented its subrogation claims to the defendant in the amount of $25,910.17. The defendant received the claims on October 27, 2005, but did not pay them.

On or about December 23, 2005, the plaintiff commenced this action seeking to collect $25,910.17 from the defendant. The defendant asserted, inter alia, a defense of lack of coverage, arguing that Dowling's surgery was not a consequence of injuries sustained in this accident, and sought discovery on that issue. On November 30, 2006, the plaintiff provided the defendant with the complete medical record with respect to Dowling's hospitalization. The defendant sought depositions of the plaintiff, Dowling and Dowling's treating physician.

By an order dated December 29, 2006, the court (Tingling, J.) granted a motion by the plaintiff for a protective order and vacated the defendant's notice of deposition of the plaintiff on the ground that the "defendant failed to request additional verification pursuant to 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b) and failure to do so constitutes waiver of said discovery."

By an order dated March 12, 2007, the court (Tingling, J.) granted, upon the plaintiff's default, a motion by the defendant to reargue and, upon reargument, vacated the order dated December 29, 2006, denied the plaintiff's motion for a protective order and directed the parties to proceed with outstanding discovery. A so-ordered stipulation dated March 23, 2007, directed that "the depositions of all parties and non-parties shall be held on or before May 31, 2007."

The plaintiff now moves to vacate the March 12, 2007, order entered upon its default, and seeks an order denying the defendant's motion to reargue the December 29, 2006, order. In essence, the plaintiff asks this court to excuse its default on the defendant's reargument motion and deny the motion, leaving in effect the December 29, 2006, order, granting it's motion for a protective order. The plaintiff argues that it is entitled to this relief because it has a reasonable excuse for the default and a meritorious defense to the defendant's reargument motion.

A party seeking to vacate an order entered upon his or her default is required to demonstrate both a reasonable excuse for the default and the existence of meritorious cause of action or defense. See CPLR 5105(a)(1); Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d 138 (1986); Goldman v Cotter, 10 AD3d 289 (1st Dept. 2004).

The court finds that the plaintiff has established a reasonable excuse for its default by establishing that its opposition papers were misdirected by the plaintiff and/or court personnel to Justice Kaplan rather than Justice Tingling, who had, in the interim, been reassigned to another IAS Part. See Zrake v New York City Dept. of Educ., 17 AD3d 603 (2nd Dept. 2005); Coughlin v Merchants Mutual Insurance Co., 58 AD2d 913 (3rd Dept. 1977). To the extent that the cause was law office failure, it is well settled that such may constitute a "reasonable excuse." See e.g. Mutual Marine Office, Inc. v Joy Construction Corp., 39 AD3d 417 (1st Dept. 2007); Goldman v Cotter, supra; Hunter v Enquirer/Star, Inc., 210 AD2d 32 (1st Dept. 1994). Although, as the defendant points out, the plaintiff failed to appear on the return date, it has not clear that Justice Tingling required the parties to appear on that motion. The court further notes that the plaintiff took immediate steps to cure its default, thereby demonstrating its intent to defend the motion. See Cantarelli s.p.a.

v L. Della Cella Co., Inc., 40 AD2d 445 (1st Dept. 2007); Goldman v Cotter, supra.

However, the plaintiff has failed to show that it had a meritorious defense to the defendant's motion to re-argue. In granting the plaintiff's motion for protective order in the first instance, the court found that "defendant failed to request additional verification pursuant to 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b) and failure to do so constitutes waiver of said discovery." The court's statutory references are to the provisions of the No-Fault law which require an insurer to respond within 30 days of receiving a claim from an insured or assignee, to request any verification within 10 days of receipt of a claim for benefits, to request any further verification within 15 days of receipt of a completed verification form (see Insurance Law § 5106[a];11 NYCRR 65-3.5) and to follow-up within 10 days if the insured or assignee fail to respond within 30 days (see 11 NYCRR 65-3.6).

The defendant does not dispute that it insured Dowling at the time of the accident or that the surgery took place and cost $25,910.17, subjecting it to a subrogation claim by the plaintiff in the first instance. Rather, it is the defendant's position, as noted above, that there is a lack of coverage, ie. it argues that Dowling's surgery was not necessitated by the subject accident and thus, was not an insured incident under the policy. As the defendant correctly argues on this motion, there was no showing by the plaintiff that the defendant failed to comply with the above-cited provisions of the NYCRR and thereby waived any discovery. See Hospital for Joint Dseases v Travelers Property Casualty Insurance Co., 34 AD3d 532 (2nd Dept. 2006); Fair Price Medical Supply, Inc. v St. Paul Travelers Insurance Co., 16 Misc 3d 8 (App Term 1st Dept. 2007; Vitality Chirpractic, P.C. v Kemper Insurance Co., 14 Misc 3d 94 (App Term 2nd and 11th Jud Dist. 2006). Indeed, there is no such proof in the papers now before the court.

In any event, it is settled law that an insurer may assert a lack of coverage defense even where it fails to timely request additional verification under the No-Fault statutes. See Central General Hospital v Chubb Group of Insurance Companies, 90 NY2d 195 (1997). That is, where it is claimed that the policy does not contemplate coverage in the first instance, an insurer's failure to comply with those requirements of the No-Fault rules does not bar a lack of coverage defense. As stated by the Court in Central General Hospital, supra at 199, "an insurer, despite its failure to reject a claim within the 30-day period prescribed by Insurance Law § 5106(a) and 11 NYCRR 65-15(g)(3), may assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident." To hold otherwise, would improperly expand the scope of the insurance contract by waiver. See Central General Hospital v Chubb Group of Insurance Companies, supra at 201; see also Zappone v Home Insurance Co., 55 NY2d 131 (1982).

Thus, regardless of whether the defendant complied with the No-Fault rules regarding verification, it is entitled to assert a coverage defense and to demand discovery on that issue. While the No-Fault statutes are in derogation of common law and must be construed narrowly (see Pekelnaya v Allyn, 25 AD3d 111 [1st Dept. 2005]; Presbyterian Hospital v Allstate Casualty Co., 201 AD2d 210 [2nd Dept. 1994]), this principle is not applied to discovery in regard to coverage issues. See Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185 (2000); Fair Price Medical Supply Corp. v Travelers Indemnity, – AD3d – 2007 N.Y. Slip Op 05220 (2nd Dept. June 12, 2007). Rather, general discovery rules apply. Specifically, CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." Subsection (a)(4) of CPLR 3101 permits such disclosure from a non-party. Furthermore, the phrase "material and necessary" is to be liberally construed, applying a test of "usefulness and reason." See Allen v Crowell-Collier Publishing, 21 NY2d 403 (1968). Under these principles, the defendant is entitled to the demanded discovery in regard to its lack of coverage defense.

Accordingly, the plaintiff's motion to vacate its default must be denied.

For these reasons, upon the foregoing papers, and after oral argument, it is,

ORDERED that the plaintiff's motion to vacate the order dated March 12, 2007, entered upon its default, is denied, and it is further,

ORDERED that parties are directed to proceed with discovery in accordance with this decision and as previously directed, and it is further,

ORDERED that the parties shall appear on October 12, 2007, at DCM, 80 Centre Street, Room 103, for a compliance conference.

Dated: August 25, 2007

FILED
SEP 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

Deborah Kaplan

Deborah A. Kaplan ***J.S.C.***

DEBORAH A. KAPLAN
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**