SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

AMER-A-MED HEALTH PRODUCTS, INC., a/a/o Heather Goldberg, Annette Guerro and Sarah Johnson, on behalf of itself and all others similarly situated,

Plaintiff(s),

-against-

GEICO INSURANCE COMPANY,

Defendant(s).

ORIGINAL RETURN DATE:07/16/10
SUBMISSION DATE: 10/04/10
INDEX No.: 009808/04

MOTION SEQUENCE #8,9,10

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2,3
Answering Papers.....	4,5,6
Defendant's Memorandum of Law.....	7,8

Plaintiff ("Amer-A-Med") moves pursuant to CPLR 5015(a) for an order vacating this Court's dismissal of the within action on June 23, 2010, based upon failure to prosecute and for an order granting an extension of time in which to file a Note of Issue *sine die*, from the date of the Order granting the relief as herein requested. Plaintiff additionally moves, pursuant to CPLR 1012 (a)(2) and 1013, for an order permitting Dr. Edward J. O'Brien, D.C. to intervene in the within action and allowing plaintiff-intervenor to serve an amended complaint. In addition to moving for intervenor status as to Dr. O'Brien, counsel reiterates those prayers for relief for vacautur of this Court's dismissal of the within action on June 23, 2010, and for an order granting an extension of time to file a Note of Issue *sine die*, from the date of the Order granting the relief as herein requested.

GEICO Insurance Company ("GEICO") cross-moves for an order dismissing the within action on the basis that the named plaintiff does not have standing or in the alternative due to plaintiff's failure to comply with provisions embodied in CPLR 902.

By way of background, the within putative class action was initially filed on July 19, 2004, by Globe Surgical Supply ("Globe"), a supplier of durable medical equipment ("DME"). Globe commenced the action on behalf of itself and all other members who had received from GEICO certain reimbursement payments for claims submitted in connection to DME. Globe alleged that while the claims submitted were subject to a particular payment schedule embodied in former Part E of the Twenty-Third Amendment to Regulation No. 83 (11 NYCRR 68), GEICO illegally reduced the amount reimbursed in direct contravention of the insurance regulations. Former Part E regulated and prescribed the amount of reimbursement to providers of DME and stated the following: "For medical equipment and supplies (e.g. TENS units, soft cervical collars) provided by a physician or medical equipment supplier, the maximum permissible charge is 150 percent of the documented costs of the equipment to the provider."

Following a degree of discovery, Globe sought class certification, which application was denied. Thereafter, Globe moved for reargument, and while this Court granted leave to reargue, it adhered to it's prior determination which denied class certification. Plaintiff subsequently appealed; and on December 30, 2008, the Appellate Division, Second Department, issued a reversal and held that plaintiff's motion for class certification was "denied without prejudice to renewal" (*Globe Surgical Supply v GEICO Insurance Company,* 59 AD3d 129, 147 [2d Dept 2008]. In so holding, the Appellate Division determined that all of the prerequisites for class certification were present with the exception of the adequacy of the proposed class representative, to wit: Globe Surgical Supply (*Id.,* at 145).*

By Order dated March 12, 2009, this Court dismissed the within action for failure to prosecute in accordance with CPLR 3216 (*see* Levy Aff. in Opp., Exs. C, D). As a result, Globe moved by Order to Show Cause, pursuant to CPLR 5015(a), for an order vacating this Court's dismissal, as well as for an extension of time in which to file the Note of Issue (*Id.*). In so moving, Globe argued that the failure to timely file the Note of Issue was due to law office failure resulting from the similarity existing between the within action and another putative class action entitled Globe v Allstate, which was stayed pending the resolution of an appeal (*Id.,* Ex. C, ¶13). Counsel for Globe asserted that due to this similarity, "counsel for the plaintiff and their staffs mistakenly indicated in their law office records that Globe v Geico was similarly stayed or dormant pending the resolution of the appeal" (*Id.*). By Order dated June 10, 2009, this Court vacated the March 12, 2009, order which dismissed the within action and granted Globe an additional 120 days in which to file the Note of Issue (*Id.,* at Ex. D).

---

* Globe's principal, Mr. Jean M. Francois, was arrested on or about June 1, 2005, and charged with Insurance Fraud in the third degree and Conspiracy in the fifth degree. Mr. Francois thereafter entered into a plea agreement, pleading guilty to disorderly conduct.

On July 31, 2009, Amer-A-Med moved to intervene in the within action so that the motion for class certification could be renewed (*Id.*, Ex. E). On September 17, 2009, the application was granted, and Amer-A-Med was substituted as plaintiff in the within action (*Id.*). In or about October 2009 Amer-A-Med filed an Amended Class Action Complaint in response to which GEICO filed an Answer and an Amended Answer on November 10 and November 30, 2009, respectively (*Id.*, Exs. F, G, and I). GEICO's Amended Answer contained various affirmative defenses and counterclaims (*Id.*, G, I). By Notice of Motion dated January 8, 2010, Amer-A-Med moved pursuant to CPLR 3211(a)(6),(a)(7) and (a)(8), as well as CPLR 3211(b), for an order dismissing the first and second counterclaims and the first, third, fourth, tenth, eleventh, twelfth and twenty-first affirmative defenses asserted by defendant, GEICO (*Id.*, Ex. J). By Order dated April 15, 2010, this Court granted Amer-A-Med's application to the extent of dismissing GEICO's third, fourth, tenth, eleventh, twelfth and twenty-first Affirmative defenses, as well as GEICO'S first and second counterclaims (*Id.*, Ex. K).

Subsequently, on June 23, 2010, this Court, for a second time, dismissed the within action pursuant to CPLR 3216, based upon plaintiff's failure to prosecute same and for failing to timely file the Note of Issue (*see* Bell Aff. dated June 29, 2009, ¶2; *see also* Bell Aff. dated September 17, 2009, ¶¶2,13). The respective applications interposed by the parties herein, including Amer-A-Med's motion seeking a vacatur of this Court's second dismissal, thereafter ensured and are determined as set forth hereinafter.

In support of the application, counsel for Amer-A-Med argues that plaintiff has a reasonable excuse for the default and a meritorious cause of action and as a result a vacatur should be granted (*see* Bell Aff. dated June 29, 2010, ¶¶14,21-31). In so arguing, counsel proffers an argument strikingly similar to that previously posited on its prior application to vacate the first dismissal of the within action (*Id.*, ¶14). Specifically, counsel argues that due to "the pendency of a similar action by Amer-A-Med against * * * Allstate Insurance Company" and as a result of "the complexity and similarity of the underlying actions and their statuses, counsel for Plaintiff and their staffs mistakenly indicated in their law office records that the Globe v GEICO action did not have a date by which a Note of Issue was due" (*Id.*). Counsel further asserts that this "law office failure and/or inadvertent mistake in no way affected the diligence in which Plaintiff prosecuted this case * * * and demonstrates that the plaintiff had no intent or willingness to abandon or neglect to prosecute the instant action" (*Id.*).

Plaintiff's application is opposed by GEICO, which cross-moves for an order dismissing the within action. Counsel for GEICO initially contends that the putative class representative, Amer-A-Med, does not have standing to proceed with the underlying action and thus plaintiff does not have a meritorious claim (*see* Levy Memo. of Law dated August 19, 2010 at 6-7; Levy Aff. in Opp. dated August 19, 2010, Exs. L, M; *see also* Levy Memo. of Law dated October 1, 2010, pp. 3-4). Particularly, counsel asserts that Amer-A-Med is a foreign corporation, having been incorporated in Florida, which never obtained authority to do business in New York and that, in accordance with Business Corporation Law 1312, may not properly maintain the instant action warranting both denial of plaintiff's motion, as well as the granting of GEICO's dismissal

application (*Id.*). Counsel for GEICO provides a copy of the Articles of Incorporation indicating that Amer-A-Med was incorporated in Florida, as well as a certification from the New York Department of State, dated August 16, 2010, whereon it is indicated that with respect to "AMER-A-MED HEALTH PRODUCTS INC. * * * no such Application for Authority to do business [is] on file with this Department" (*see* Levy Aff. dated August 19, 2010, Exs. L, M).

Counsel for GEICO further argues that notwithstanding the Appellate Division's decision, issued in December 2008, which permitted plaintiff to renew its application for class certification, plaintiff's counsel has thus far failed to make any application in relation thereto and rather elected to litigate the within action on the merits by moving for dismissal of GEICO's affirmative defenses and counterclaims (*see* Levy Memo. of Law dated August 19, 2010, pp. 8-14; *see also* Levy Memo. of Law dated October 1, 2010, pp. 6-8). Counsel asserts that such delay in moving for class certification contravenes the provisions of CPLR 902, which required plaintiff to move for class certification within sixty days after GEICO served it's Answer to plaintiff's Amended Complaint (*Id.*).

CPLR 5015(a)(1) provides, in relevant part: "the court which rendered a judgment or order may relieve a party of it upon such terms as may be just, on motion of any interested person with 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 with written notice of its entry upon the moving party . . . ." When moving to vacate the dismissal of an action for failure to prosecute, it is incumbent upon the party so moving to establish "a justifiable excuse for the delay and a good and meritorious cause of action" (*Baczkowski v D. A. Collins Construction Co., Inc.*, 89 NY2d 499, 503 [1997; *Myers v Polytechnic Preparatory Country Day School,* 50 AD3d 868 [2d Dept 2008]; *Serby v Long Island Jewish Med. Ctr.*, 34 AD3d 441 [2d Dept 2006]; CPLR 3216[e]).

As noted above, counsel for plaintiff has proffered law office failure as the reason it failed to timely file a Note of Issue. While a court, in its discretion, is empowered to accept law-office failure as a reasonable excuse for the default (*Wynne v Wagner*, 262 AD2d 556 [2d Dept 1999]; *Putney v Pearlman*, 203 AD2d 333 [2d Dept 1994]; CPLR 2005), a pattern of neglect should not be excused (*Fort Madison Associates Caldararo*, 280 AD2d 581 [2d Dept 2001]; *Roussodimou v Zafiriadis*, 238 AD2d 568 [2d Dept 1997]).

In the instant matter, while plaintiff's explanation of law office failure was reasonable in relation to the first dismissal predicated upon CPLR 3216, within the context of the second dismissal based upon said statute, the Court finds said explanation to be lacking and demonstrative of a pattern of neglect (*Id.*). Here, upon a review of the record it is clear that the legal basis for the first dismissal was identical to that which predicated the second dismissal, to wit: failure to prosecute and timely file a Note of Issue, which should have placed counsel on notice as to the importance of following filing requirements (*Id.*). Additionally, the excuse proffered to vacate the first dismissal was identical to that proffered to vacate the second dismissal. Given that the first dismissal resulted from the conceded similarity between this action and that which was instituted against Allstate, counsel should have been quite cognizant of both the possibility for additional confusion with respect to the two actions and the grave necessity of guarding against same (*Id.*).

Further, in addition to finding that plaintiff has failed to proffer a reasonable excuse for its default, the Court finds that plaintiff has also failed to demonstrate the existence of a meritorious cause of action due to Amer-A-Med's lack of standing (*Myers v Polytechnic Preparatory Country Day School,* 50 AD3d 868 [2d Dept 2008]: *Serby v Long Island Jewish Medical Ctr.,* 34 AD3d 441 2d Dept 2006]). BCL§1312 (a) provides the following:

> "A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation."

"In order for a court to find that a foreign corporation is 'doing business' in New York within the meaning of Business Corporation Law §1312(a), "the corporation must be engaged in a regular and continuous course of conduct in the State" (*Highfill, Inc. v Bruce and Iris, Inc.*, 50 AD3d 742 [2d Dept 2008] quoting *Commodity Ocean Transp. Corp. of N.Y. v Royce*, 221 AD2d 406, 407 [2d Dept 1995]). Here, a review of the record, including the above-referenced Articles of Incorporation, demonstrates that Amer-A-Med was a foreign corporation, having been incorporated in the State of Florida. Moreover, as indicated by the document issued by the Department of State, Amer-A-Med does not possess authority to engage in business within the state. However, notwithstanding its status as a foreign corporation and the absence of authority to do business in New York, Amer-A-Med has expressly alleged in the Amended Class Action Complaint, dated October 7, 2009, that it was nonetheless engaged in conducting business. Specifically, Amer-A-Med alleged therein that "[a]s a durable medical equipment supplier, it sold medical devices and suppliers [sic] to insured consumers, took assignments from the insureds, and then sent claims into, and obtains [sic] reimbursement from, No-Fault Insurers like defendant Geico." Amer-A-Med expressly defined No-Fault Insurers as "an insurance company that provides insurance subject to the terms of New York's No-Fault Insurance Law."

Thus, as the record herein clearly supports a finding that Amer-A-Med is a foreign corporation, which was doing business in New York absent the requisite authority, it therefore does not have standing to maintain the within action and plaintiff has failed to demonstrate the existence of a meritorious claim (*Highfill, Inc. v Bruce and Iris, Inc.*, 50 AD3d 742 [2d Dept 2008]; *Baczkowski v D. A. Collins Construction Co., Inc.*, 89 NY2d 499 [1997]). The Court is constrained to note, that in response to GEICO's arguments and accompanying documents, which identify Amer-A-Med as an foreign corporation unauthorized to do business within the state, counsel for plaintiff remains silent and does not, in any respect, directly or substantively address the threshold issue of Amer-A-Med's standing. Rather, a full year after Amer-A-Med being added as the class

representative**, and apparently in the face of GEICO's motion to dismiss based upon lack of standing, counsel for plaintiff suddenly cross-moves for an order granting permission for yet another individual to intervene and assume the status as the class representative.

As a final but important matter, even were this Court to grant a vacatur of the dismissal, given plaintiff's failure to comport with the time requirements embodied in CPLR 902, dismissal of the within action would have been warranted. CPLR 902 provides, in relevant part: "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, plaintiff shall move for an order to determine whether it is to be so maintained."

In interpreting the statute, the Court of Appeals stated that "[t]he explicit design of Article 9 * * *, is that a determination as to the appropriateness of class action relief shall be promptly made at the outset of the litigation." (*O'Hara v Del Bello*, 47 NY2d 363, 368 [1979]; Alexander, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C902:1). With particular respect to the time strictures embodied in the statute, the Court stated that same were contemplating "address to the issue whether the litigation shall proceed as a class action well before any determination on the merits of the action" (*O'Hara v Del Bello*, 47 NY2d 363, 368 [1979]).

Here, plaintiff contends that the time constraints articulated in the statute are applicable only to the initial motion for certification, which, in this case, was interposed in 2006. However, such a position would frustrate the purpose of the statute as articulated by the Court of Appeals. In the instant matter, subsequent to Amer-A-Med being substituted as the class representative, rather than renewing the application for class certification, plaintiff elected to litigate the within action by moving to dismiss various affirmative defenses and counterclaims as asserted by GEICO in its Amended Answer served in response to Amer-A-Med's Amended Complaint. Clearly, the effect of plaintiff's election to litigate the legal sufficiency of GEICO's affirmative defenses and counterclaims, prior to moving for class certification, stands in stark contradiction to CPLR 902, the purpose of which is to entertain matters relating to the appropriateness of class certification "well before any determination on the merits of the action" (*Id.*).

Based upon the foregoing, plaintiff's application for an order vacating this Court's dismissal of the within action and for an order granting an extension of time to file a Note of Issue is denied;

** Amer-A-Med was substituted as the plaintiff in accordance with this Court's Short Form Order dated, September 17, 2009. However, plaintiff's application which now seeks permission for Dr. Edward J. O'Brien, D. C., to intervene and be substituted as the new putative class representative was not made until September 17, 2010.

plaintiff's application for an order permitting Dr. Edward J. O'Brien, D.C., to intervene in the within action is denied as moot; and GEICO's application for an order dismissing the within action is also denied as moot.

This decision constitutes the order of the court.

Dated: 11-10-10

HON THOMAS P. PHELAN

J.S.C.

Attorneys of Record

Abrams, Fensterman, Fensterman, et al.
Attn: John M. Belesi, Esq.
Attorneys for Plaintiffs and the requested class
1111 Marcus Avenue, Suite 107
Lake Success, NY 11042

Locks Law Firm, PLLC
Attn: Andrew P. Bell, Esq.
Attorneys for Plaintiff and the Putative Class
747 Third Avenue, 37th Floor
New York, NY 10017

Rivkin Radler LLP
Attn: Barry I. Levy, Esq.
Attorneys for Defendant
926 RXR Plaza
Uniondale, NY 11556

Thomas W. Alfano, Esq.
9 Rockaway Avenue
Garden City, NY 11530

Klafter, Olsen & Lesser, LLP
Attn: Seth R. Lesser, Esq.
Two International Drive, Suite 350
Rye Brook, NY 10573