

**Empire Healthchoice Assur., Inc. v Walter Lester,
D.C.**

2013 NY Slip Op 31595(U)

July 17, 2013

Sup Ct, NY County

Docket Number: 650074/2010

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
d/b/a EMPIRE BLUE CROSS BLUE SHIELD,

Plaintiff,

- against -

WALTER LESTER, D.C., COURTNEY LESTER,
and EXECUTIVE CARE SERVICE, LLC,

Defendants.

Index No.: 650074/2010

Motion Date: 2/6/2013

Motion Seq. No.: 005

The following papers, numbered 1 to 3, were read on this motion to Strike.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1

Answering Affidavits - Exhibits No(s) 2

Replying Affidavits No(s) 3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM
DECISION.

Dated: July 16, 2013


Hon. Eileen Bransten

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion is: GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X
EMPIRE HEALTHCHOICE ASSURANCE, INC.,
d/b/a EMPIRE BLUE CROSS BLUE SHIELD,

Plaintiff,

-against-

Index No.: 650074/2010
Motion Date: 2/6/2013
Motion Seq. No.: 005

WALTER LESTER, D.C., COURTNEY LESTER,
and EXECUTIVE CARE SERVICE, LLC,

Defendants.

-----X
BRANSTEN, J.

This matter comes before the Court on Plaintiff Empire Healthchoice Assurance, Inc.'s ("Empire") motion to strike the Answer and Counterclaims of Defendants Walter Lester, D.C. ("Dr. Lester"), Courtney Lester ("Mrs. Lester") and Executive Care Service LLC ("Executive", collectively, "Defendants") for violation of the Court's Conditional Order dated March 12, 2013 and for entry of default judgment. Defendants oppose. For the reasons set forth below, Plaintiff's motion is granted, Defendants' answer is stricken and default judgment is entered in favor of Plaintiff.

Background¹

A. Underlying Claim

According to the Complaint, Dr. Lester is the principal of Executive, a chiropractic medical practice located in Manhattan. (Cmpl. ¶¶ 1, 3, 4). Empire alleges that in March 2005, Executive entered into a group health insurance contract with Empire and that Dr. Lester was Executive's Group Benefits Administrator. (Cmpl. ¶¶ 3, 4). Dr. Lester's wife, Mrs. Lester, is a part-time administrator at Executive who applied to Empire for coverage as an Executive employee. The Complaint states that the Lesters and their three children were covered by Empire from 2005 until 2008 and that Empire paid \$448,873.12 for treatment that Dr. Lester performed on his immediate family during that time. (Cmpl. ¶¶ 1, 8, 12). The Lesters dispute the existence of any contract.

Empire alleges that every health insurance contract it has entered into since 2003 must, under New York Insurance Law Section 3201, contain two provisions relevant to this case. (Affirmation of Joel Rosner, dated Oct 25 2012 ("Rosner Affirm.") ¶ 55). The first provision states that Empire would not pay for any services rendered to the insured that were performed by an immediate family member. (Cmpl. ¶ 10). The second provision requires that any money mistakenly paid by Empire must be returned within 60 days. (Cmpl. ¶ 11).

¹ All facts in this section are undisputed, unless otherwise noted.

Dr. Lester submitted 5,169 claims for chiropractic treatments of his three children during the three-year coverage period. (Cmpl. ¶ 20). While the youngest child was between two months and fourteen months old, Dr. Lester submitted claims for an average of two treatments of the child per day. (Cmpl. ¶ 23).

Plaintiff alleges that when it requested Defendants return the payments made to Mrs. Lester for treatment by an immediate family member in violation of the contract, Defendants refused. Plaintiff commenced this action on January 28, 2010, asserting that (i) Defendants' acts constitute breach of contract, (ii) in the alternative, that the Lesters' acts constitute unjust enrichment and (iii) Dr. Lester's acts constitute fraud. (Cmpl. ¶¶ 37-56.)

B. *Discovery Violations*

This Court issued a Preliminary Conference Order on September 30, 2010, requiring Defendants to respond to Plaintiff's first document request and first set of interrogatories within thirty days. On October 18, 2010, this Court further directed Defendants to produce documents and answer interrogatories. On January 13, 2011, this Court again issued an order directing Defendants' discovery compliance with Plaintiff's first document request and first set of interrogatories. On January 24, 2011, this Court

granted Defendants thirty days to comply with all of the aforementioned discovery demands.

This Court issued a Compliance Conference Order on March 29, 2011, further directing Defendants to respond to discovery requests. This Court also issued a Status Conference Order on July 22, 2011, again directing discovery responses from the Defendants and authorizing Plaintiff to move to compel the requested discovery. On December 14, 2011, this Court granted Plaintiff's motion to compel, requiring Defendants to produce and transcribe, in an affidavit, all identified medical records. At a hearing on February 24, 2012, this Court further ordered Defendants to comply with discovery and stated that a conditional order would be forthcoming.

On March 12, 2012, this Court issued a Conditional Order (the "Conditional Order") requiring that Defendants "fully comply" by March 16, 2012, with Plaintiff's first document request, first set of interrogatories, and produce two affidavits, one concerning the transcription of illegible medical records and another regarding search and discovery efforts of documents that cannot be produced, pursuant to *Jackson v. City of New York*, 185 A.D.2d 768 (1st Dep't 1992). The Conditional Order also required that Defendants "fully comply" by March 30, 2012 with Plaintiff's second and third document requests and interrogatories. The Conditional Ordered stated that "Defendants's failure to fully comply [with this order]

will result automatically in the STRIKING OF THEIR ANSWER AND COUNTERCLAIMS” (emphasis in original).

Dr. Lester and Executive failed to produce 248 medical records relating to claims filed by Dr. Lester for his treatment of Mrs. Lester and their children. (Affidavit of Joel Rosner dated October 25, 2012 (“Rosner Aff.”) ¶ 6). Dr. Lester and Executive also failed to produce transcriptions for 740 of the identified medical records by March 16, 2012. (Rosner Aff. ¶ 5). In addition to Dr. Lester’s failure to provide an affidavit certifying the accuracy of the transcriptions, the transcriptions that were produced contained extensive gibberish. *See e.g.*, Rosner Aff. Ex. J at 79 (for example, “exercise male attraction to units normal sure education when you pirate team 38 and give 550”). Defendants also failed to produce appeal-from-claim-denial records, patient assignment-of-benefits records, and contracts with other health insurers as ordered. (Rosner Aff. Exs. A at 1, D at 24-25, O, Y). Although Mrs. Lester asserted her Fifth Amendment privilege against self-incrimination in response to Plaintiff’s first set of interrogatories, she failed to respond in any manner to Plaintiff’s second and third interrogatories or document requests by the deadline set in the Conditional Order. (Rosner Aff. ¶ 26, n.2).

Defendants do not allege that they fully complied with the Conditional Order, but rather state that “Plaintiff has received a sufficient number of medical records to prosecute its claim.” (Dr. Lester’s and Executive’s Joint Memorandum in Opposition 9). Defendants

also state that their failure to comply with the Conditional Order “is more appropriately dealt with through the examination of witnesses at trial and a missing evidence instruction if appropriate.” (Defendants’ Joint Memorandum in Opposition 10).

I. Plaintiff’s Motion to Strike Defendants’ Pleadings

Plaintiff moves to strike Defendants’ pleadings pursuant to the Conditional Order and CPLR 3126, on the grounds that Defendants have failed to fully comply with the Conditional Order, to present a reasonable excuse for such failure, or to offer a meritorious defense.

A. *Motion to Strike Standard*

The CPLR empowers courts to penalize a party who refuses to comply with discovery orders. Pertinent to this case, CPLR 3126 applies to parties who “refuse[] to obey an order for disclosure or wilfully fail[] to disclose information which the court finds ought to have been disclosed.” The nonexclusive list of sanctions in CPLR 3126 permits courts to fashion orders “as are just.” As the Court of Appeals stated in *Gibbs v. St. Barnabas Hospital*, 16 N.Y.3d 74, 79 (2010), “CPLR 3126 therefore broadly empowers a trial court to craft a

conditional order—an order that grants the motion and imposes the sanction unless within a specified time the resisting party submits to the disclosure” (internal quotations omitted).²

The *Gibbs* decision laid out, in detail, the reasons for requiring compliance with conditional orders such as the one issued here:

There is a compelling need for courts to require compliance with enforcement orders if the authority of the courts is to be respected by the bar, litigants and the public. . . . The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. . . . For these reasons, it is important to adhere to the position we declared a decade ago that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Gibbs*, 16 N.Y.3d at 81 (citing *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999)).

In *Gibbs*, the trial court issued a conditional order requiring the plaintiff to serve a bill of particulars by a specified date or have his pleadings stricken. *Gibbs*, 16 N.Y.3d at 78. The plaintiff failed to fully comply and served the bill of particulars seventy-five days after the conditional order’s deadline. *Gibbs*, 16 N.Y.3d at 83. The Court of Appeals held that the trial court was required, as a matter of law, to enforce the conditional order, in order to prevent judicial orders from becoming empty threats. *Gibbs*, 16 N.Y.3d at 83. As in *Gibbs*,

² Despite Plaintiff citing *Gibbs* at length in its moving papers, Defendants’ three opposition briefs do not refer to *Gibbs* even once.

this Court must enforce the Conditional Order, lest court orders be deemed *brutum fulmen* by the bar and the public.

Defendants argue that their pleadings should not be stricken because they have “substantially complied” with the Conditional Order. However, Defendants fail to cite any case in which a conditional order was satisfied through substantial compliance. While both lower courts in *Gibbs* had permitted the defaulting party to escape from the mandate of the conditional order, the Court of Appeals reversed and did not allow for any “substantial compliance” exception. *Gibbs*, 16 N.Y.3d at 79. Indeed, the *Gibbs* court stated that “we have made clear that to obtain relief from the dictates of a conditional order . . . the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.” *Gibbs*, 16 N.Y.3d at 80. The sole path of extrication available to Defendants is not to argue “substantial compliance,” but rather to show both a reasonable excuse and a meritorious defense.

Although Defendants assert what they refer to as a “panoply of defenses,” Defendants simply do not allege any excuse whatsoever for failure to comply with the Conditional Order. The holding in *Gibbs* requires not only an excuse, but a “reasonable excuse.” *Gibbs*, 16 N.Y.3d at 80. Defendants failure to submit an affidavit alleging a reasonable excuse for failure to fully comply with the Conditional Order requires striking Defendants’ pleadings.

Defendants also argue that CPLR 3126 requires finding that a party who “fails to disclose what the court finds ought to be disclosed” acted in a wilful and contumacious manner. However, as the Court of Appeals noted in *Gibbs*, failure to comply with a discovery demand is an entirely different transgression from failure to follow a court order. *Gibbs*, 16 N.Y.3d at 82. With conditional orders, “the court relieves itself of the unrewarding inquiry into whether a party’s resistance was wilful.” *Gibbs*, 16 N.Y.3d at 82 (*quoting* David D. Siegel, N.Y. Prac. §367 at 608 (4th ed.)). When Defendants defaulted on the Conditional Order, the Conditional Order became absolute and obligated Defendants to satisfy the well-established two-part test. Defendants having failed to do so, Plaintiff is entitled to have Defendants pleadings stricken.³

II. Plaintiff’s Motion for Entry of Default Judgment

Entry of an order striking an answer is the equivalent of a default in answering, and a plaintiff’s right to recover upon a defendant’s default in answering is governed by CPLR 3215. *See Reynolds Sec., Inc. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 572 (1978). After a party’s default, CPLR 3215(b) authorizes the Court to refer the assessment of

³ Defendants also contend that they are not required to “translate” any documents produced in discovery, such as the medical records. Regardless of this position’s lack of merit (as the court did not order a translation but a transcription), the proper time to raise this argument was in response to any number of prior orders requiring the transcription or when the Conditional Order was issued.

damages to a referee. CPLR 3215(b) further authorizes the court to direct “that judgment be entered by the clerk in accordance with the report without any further application [to the court].”

Here, Defendants’ pleadings have been stricken and Defendants have been determined to be in default. Therefore, pursuant to CPLR 3215(b), the Court hereby refers the damages inquest to a special referee and further directs that judgment be entered according to the report without any further intervention of the court.

Plaintiff’s other arguments are rendered moot. The Court has considered Defendants’ other arguments and finds them unpersuasive.

(Order of the Court follows on next page.)

Conclusion

For the reasons set forth above, and in accordance with CPLR 4317(b), it is hereby ORDERED that Plaintiff Empire's motion to strike the pleadings and enter default judgment is granted; and it is further

ORDERED that the Answer and Counterclaims of Defendants Walter Lester, Courtney Lester, and Executive are stricken; and it is further

ORDERED that Defendants are held in default; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of damages suffered by Plaintiff due to Defendants breach of contract and fraud; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at

www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendants shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that if the defendants fail to serve objections to the plaintiff's pre-hearing memorandum within 20 days from service of plaintiff's papers, then plaintiff and the Special Referee shall proceed regardless; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter,

the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 17, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.