

<b>DTG Operations, Inc. v Carnes</b>
2014 NY Slip Op 31098(U)
April 29, 2014
Supreme Court, New York County
Docket Number: 101806/12
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

DTG OPERATIONS, INC. d/b/a DOLLAR RENT  
A CAR

Plaintiff,

-against-

INDEX NO. 101806/12

MOTION SEQ. NO. 001

MICHAEL CARNES, D.C., FOUNTAIN DIAGNOSTIC  
MEDICAL, P.C., GENERAL MEDICAL SERVICES,  
P.C., BRONX CHIROPRACTICE SERVICES, P.C.,  
FIVE BORO PSYCHOLOGICAL AND LICENSED  
MASTER SOCIAL WORK SERVICES, P.L.L.C.,  
ACTIVE CARE MEDICAL SUPPLY CORP., EMPIRE  
ACUPUNCTURE, P.C., INFINITE CHIROPRACTIC,  
P.L.L.C., PREFERRED MEDICAL NUMCLEAR  
IMAGING, P.C., UNITED MEDICAL OFFICES OF  
LONG ISLAND, P.C., MULTIPLE MEDICAL HEALTH  
SERVICES, P.C., INTEGRITY MEDICAL SERVICES,  
P.C., ALL MEDICAL CARE OF BRONX, P.C.,  
CENTRAL BROADWAY MEDICAL, P.C., NEW YORK  
MEDICAL OFFICE BASED SURGERY P.C.,  
GENERAL ANESTHESIA SERVICES, L.L.P., MINAL  
SHAH, M.D., JANINA WHEATON, JIM ORLANDO,  
MALCOLM BEARD, JERRY BEARD and TIMOTHY  
MCBRIDE,

Defendants.

**FILED**

APR 30 2014

COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, numbered 1- 9 were considered on the motion for a default judgment, cross-motion to dismiss, cross-motion for a default judgment, and cross-motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>7, 8, 9</u>
Replying Affidavits _____	<u>3, 4, 5, 6</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided as indicated below.

### BACKGROUND

This is an action for declaratory judgment arising out of an alleged motor vehicle collision. On July 2, 2011, defendants Janina Wheaton (Wheaton), Jim Orlando (Orlando), Malcolm Beard (Malcolm), Jerry Beard (Jerry), and Timothy McBride (McBride) (collectively "Individual Defendants") were allegedly involved in a collision while riding together in an automobile insured by plaintiff DTG Operations, Inc. d/b/a/ Dollar Rent A Car's (DTG). The police report indicates no complaints of injuries at the scene of the collision. The Individual Defendants later claimed bodily injuries resulting from the collision. Subsequently, defendants Michael Carnes, D.C. (Michael Carnes), Fountain Diagnostic Medical, P.C., General Medical Services, P.C., Bronx Chiropractic Services, P.C. (Bronx Chiropractic), Five Boro Psychological and Licensed Master Social Work Services, P.L.L.C., Active Care Medical Supply Corporation (Active Care Medical), Empire Acupuncture, P.C. (Empire Acupuncture), Infinite Chiropractic, P.L.L.C. (Infinite Chiropractic), Preferred Medical Nuclear Imaging, P.C., United Medical Offices of Long Island, P.C., Multiple Medical Health Services, P.C. (Multiple Medical), Integrity Medical Services, P.C., All Medical Care of Bronx, P.C., Central Broadway Medical, P.C., New York Medical Office Based Surgery P.C. (New York Medical), General Anesthesia Services, L.L.P. (General Anesthesia Services), and Minal Shah, M.D. (Minal Shah) (collectively "Medical Provider Defendants") began submitting claims to plaintiff DTG, seeking to recover No-Fault benefits, as the alleged assignees of the Individual Defendants.

In this action, plaintiff DTG seeks a declaration that it owes no duty to pay No-Fault

benefits to any of the named defendants on the ground that defendants Wheaton, Malcolm, Jerry, and McBride failed to appear for duly scheduled examinations under oath (EUO), as required under the insurance policy and the No-Fault regulations. Plaintiff DTG also argues that it owes no duty to pay No-Fault benefits, as defendant Orlando failed to return an executed copy of his EUO transcript, in violation of the No-Fault regulations and in violation of a condition precedent to coverage for all No-Fault claims submitted by the Medical Provider Defendants. Further, plaintiff DTG claims that all of the defendants who are medical providers, proceeding as assignees of defendant Orlando, have failed to appear for EUOs, in violation of the No-Fault regulations and in violation of conditions precedent to coverage for the No-Fault claims. Plaintiff DTG has denied such claims. Plaintiff DTG has also denied all claims submitted by the Medical Provider Defendants, positing that the alleged injuries of the Individual Defendants, and any subsequent medical treatment, were not causally related to the collision on July 2, 2011.

Plaintiff now moves for a default judgment against all defendants except for Michael Carnes, Bronx Chiropractic, Active Care Medical, Empire Acupuncture, Infinite Chiropractic, Multiple Medical, New York Medical, General Anesthesia Services, and Minal Shah, as such defendants have answered.

Defendants Multiple Medical and Infinite Chiropractic (collectively hereinafter "Multiple Medical") cross-move to dismiss the complaint against them, and for a default judgment against the Individual Defendants except for defendant Wheaton.<sup>1</sup> Defendant Empire Acupuncture

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<sup>1</sup> The Court notes that defendants Multiple Medical and Infinite Chiropractic cross-moved against non-moving parties, as the Individual Defendants, except for defendant Wheaton, have failed to appear in this action, and have not filed any motions. Nonetheless, "[a]lthough a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party, a technical defect of this nature may be disregarded where, as here, there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought."

cross-moves for summary judgment of dismissal.

### DISCUSSION

#### Plaintiff's Motion for Default Judgment

CPLR 3215 provides that “[w]hen a defendant has failed to appear, . . . the plaintiff may seek a default judgment against him. . . . The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.” Here, plaintiff’s motion for a default judgment is granted in part as to defendants Fountain Diagnostic Medical, P.C., General Medical Services, P.C., Five Boro Psychological and Licensed Master Social Work Services, P.L.L.C., Preferred Medical Nuclear Imaging, P.C., United Medical Offices of Long Island, P.C., Integrity Medical Services, P.C., All Medical Care of Bronx, P.C., Central Broadway Medical, P.C., Janina Wheaton, Jim Orlando, Malcolm Beard, and Timothy McBride, as such defendants, to date, have failed to answer plaintiff DTG’s complaint or appear in this action. Additionally, such defendants have not submitted any opposition to plaintiff DTG’s motion.

Plaintiff’s motion for a default judgment is denied in part, however, as to defendant Jerry Beard, based on insufficient proof of service requesting an examination under oath (EUO). While plaintiff provides copies of the two letters it sent to defendant Jerry Beard with accompanying affidavits of service, the address used for Jerry Beard is different from the address that such defendant provided on the police report.<sup>2</sup> Further, plaintiff has used this incorrect

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*Daramboukas v Samlidis*, 84 AD3d 719, 721 (2d Dept 2011) (internal quotations and citations omitted).

<sup>2</sup>The apartment number provided by claimant Jerry Beard on the police report is “10 F,” however, plaintiff mailed the letters requesting an EUO to apartment “F.”

address for service on such defendant of all papers in the instant case, including plaintiff's notice of motion and accompanying motion papers. Thus, that portion of plaintiff's motion which seeks a default judgment against defendant Jerry Beard, based on his failure to answer and failure to appear for his scheduled EUO on two occasions, is denied. Such case against defendant Jerry Beard is dismissed unless within 30 days of this decision, plaintiff files a motion with proof of service that the summons and complaint were served on such defendant's correct address.

Defendants Multiple Medical/Infinite Chiropractic's Cross-Motion to Dismiss and for Default Judgment on Cross-Claims

Defendants Multiple Medical cross-move to dismiss the complaint against them, and for a default judgment against the Individual Defendants except for defendant Wheaton on their cross-claims. Applying the above principles for a default judgment, here, the portion of Multiple Medical defendants' cross-motion seeking a default judgment is granted as to defendants Orlando, Malcolm, Jerry, and McBride, given that such defendants have failed to appear in this action, and have also failed to oppose the instant cross-motion.

As to the portion of such cross-motion seeking to dismiss the complaint, it is well settled that on a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

Defendants Multiple Medical argue that this action violates New York Insurance Law 5106(b) and the No-Fault regulations. According to such defendants, the medical providers, not plaintiff, have the right to choose the forum to hear this controversy. Insurance Law 5106(b) states, in pertinent part, that:

Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

However, plaintiff correctly argues that defendants Multiple Medical waived their rights to arbitrate this matter by their active participation in this action. The Court of Appeals has held that "where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer . . . , his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory." *DeSapio v Kohlmeyer*, 35 NY2d 402, 405 (1974); *see also Gabor v Spicyn*, 99 AD2d 1000 (1st Dept 1984); *Nishio v Hutton & Co.*, 168 AD2d 224 (1st Dept 1990). The Court of Appeals in *DeSapio* further held that the "utilization of judicial discovery procedures is . . . an affirmative acceptance of the judicial forum." 35 NY2d at 406.

Here, it is undisputed that defendants Multiple Medical filed an answer in this action asserting counterclaims against plaintiff and cross-claims against defendants Jim Orlando, Malcolm Beard, Jerry Beard, and Timothy McBride, which failed to assert their right to arbitration as an affirmative defense in such answer. Moreover, such defendants have sought discovery in this action and have moved for a default judgment, thus, they affirmatively accepted the judicial forum. As such, they have waived their right to arbitration, and their cross-motion to dismiss is denied.

#### Defendant Empire Acupuncture's Cross-Motion for Summary Judgment

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853

[\* 7]  
(1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853.

Here, defendant Empire Acupuncture (“Empire”) has failed to establish entitlement to summary judgment as a matter of law and, thus, its motion for summary judgment is denied. Defendant Empire argues that plaintiff’s motion fails to prove that: (1) the treatment provided was not medically necessary; (2) it was reasonable to require defendants to appear for an EUO; (3) the EUO scheduling letters were actually mailed; (4) defendants failed to appear at the EUOs; and (5) the denials of claim were timely mailed. However, as plaintiff, at this stage, is moving solely for a default judgment against certain defendants, plaintiff need not prove its causes of action against defendant Empire. Rather, defendant Empire, as the party moving for summary judgment, bears the burden to establish that it is entitled to judgment as a matter of law, and that no issues of fact exist. Defendant Empire has failed to do so.

In support of its motion, defendant Empire submits the affirmation of its attorney, Melissa Betancourt. It is well settled that “a bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing.” *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1st Dept 1981), *aff’d* 54 NY2d 715 (1981). Moreover, defendant Empire has failed to proffer any evidence in support of its motion, such as claims it submitted to plaintiff, or plaintiff’s allegedly untimely denial of such claims. In fact, the only evidence proffered by defendant Empire is the complaint and its verified answer. Such documents do not establish that defendant Empire is entitled to summary judgment against plaintiff. The court notes that there has been no discovery to date, and a Preliminary Conference Order has yet to be issued. As defendant

Empire Acupuncture has failed to sustain its burden, its cross-motion for summary judgment is denied.

DECISION

Accordingly, it is

ORDERED that the motion of plaintiff seeking a default judgment against defendants Fountain Diagnostic Medical, P.C., General Medical Services, P.C., Five Boro Psychological and Licensed Master Social Work Services, P.L.L.C., Preferred Medical Nuclear Imaging, P.C., United Medical Offices of Long Island, P.C., Integrity Medical Services, P.C., All Medical Care of Bronx, P.C., Central Broadway Medical, P.C., Janina Wheaton, Jim Orlando, Malcolm Beard, and Timothy McBride is granted and plaintiff shall settle order/judgment with respect to such default judgment, with notice, in accordance with 22 NYCRR § 202.48, returnable to Room 119A; and it is further

ORDERED that the motion of plaintiff seeking a default judgment against defendant Jerry Beard is denied and such case against defendant Jerry Beard is dismissed unless within 30 days of this decision, plaintiff files a motion with proof of service that the summons and complaint were served on defendant's correct address; and it is further

ORDERED that the portion of defendants Multiple Medical and Infinite Chiropractic's cross-motion seeking a default judgment against defendants Jim Orlando, Malcolm Beard, Jerry Beard, and Timothy McBride on their cross-claims is granted and an inquest shall be held, at or shortly after trial (with scheduling to be determined by the trial judge), assessing damages against such defaulting defendants and entering judgment accordingly, with costs and disbursements; and it is further

ORDERED that the portion of defendants Multiple Medical and Infinite Chiropractic's cross-motion seeking to dismiss the complaint is denied; and it is further

ORDERED that defendant Empire Acupuncture's cross-motion for summary judgment is

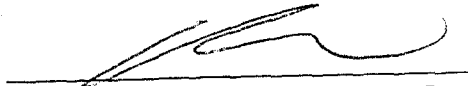
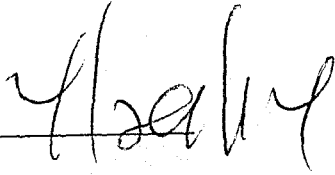
denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve upon all parties to this action a copy of this decision and order, together with notice of entry; and it is further

ORDERED that discovery shall be completed expeditiously. (By separate order, a preliminary conference order is being issued.)

This constitutes the decision and order of the court.

Dated: \_\_\_\_\_



DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

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