

<b>Hertz Vehs., LLC v Mollo</b>
2016 NY Slip Op 30047(U)
January 11, 2016
Supreme Court, New York County
Docket Number: 160423/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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HERTZ VEHICLES, LLC,

Plaintiff,

Index No. 160423/2014

-against-

**DECISION/ORDER**

DARREN T. MOLLO, D.C.,  
CHARLES DENG ACUPUNCTURE, P.C.,  
MIDDLE VILLAGE DIAGNOSTIC IMAGING, P.C.,  
PROMPT MEDICAL SERVICES, P.C.,  
KSENIA PAVLOVA, D.O.,  
PENN CHIROPRACTIC, P.C.,  
JULES FRANCOIS PARISIEN, M.D.,  
QUALITY CUSTOM MEDICAL SUPPLY, INC.,  
MADISON PRODUCTS OF USA, INC.,  
ISLAND LIFE CHIROPRACTIC PAIN CARE, P.L.L.C.,  
KENSINGTON RADIOLOGY GROUP, P.C.,  
CLIFFORD EDMOND,  
RIDELGO JACQUOTIN,  
EDRICE JOCELYN and  
GARY BEAUCICAUT,

Defendants.

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**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	4

Plaintiff commenced the instant action against defendants seeking a declaratory judgment that there is no coverage as to the defendant-claimants Clifford Edmond, Redelgo Jacquotin,

Edrice Jocelyn and Gary Beaucicaut or their assignee-provider defendants who seek no-fault coverage from plaintiff. Plaintiff now moves for an order pursuant to CPLR § 3215 granting it default judgment against defendants Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Ksenia Pavlova, D.O., Penn Chiropractic, P.C., Jules Francois Parisien, M.D., Madison Products of USA, Inc. and Island Life Chiropractic Pain Care, P.L.L.C. (the “defaulting defendants”). The defaulting defendants cross-move for an order pursuant to CPLR §§ 3012(d) and 2005 extending their time to appear and plead or compelling plaintiff to accept their untimely served answer. For the reasons set forth below, plaintiff’s motion is denied and the defaulting defendants’ cross-motion is granted.

The relevant facts are as follows. Defendants Clifford Edmond, Ridelgo Jacquotin, Edrice Jocelyn and Gary Beaucicaut (collectively the “claimants”) were allegedly involved in a motor vehicle accident while occupants of a vehicle owned and self-insured by plaintiff Hertz Vehicles LLC (“Hertz”) on May 1, 2014. According to the police report, the claimants did not claim to have sustained any injuries at the scene of the collision. Nonetheless, thereafter, claimants sought medical attention for personal injuries they allegedly sustained from the accident and assigned their rights to collect no-fault benefits to the medical provider defendants. The medical provider defendants subsequently submitted their claims to plaintiff for reimbursement. Plaintiff, pursuant to its rights under the no-fault regulations, sought verification of these claims by requesting that each claimant attend an Examination Under Oath (“EUO”). Claimants, despite due demand, failed to appear for their scheduled EUOs on two occasions. Based on these EUO no-shows, plaintiff denied coverage for all no-fault claims submitted by claimants and their medical provider defendants. Further, plaintiff also denied all claims on the ground that it maintains a founded belief that the subject accident was staged

and/or intentionally caused. Thus, plaintiff brings the instant action seeking a declaratory judgment that it has no duty to provide no-fault benefits to defendants relating to claimants' alleged accident.

The defaulting defendants brought a pre-answer motion to dismiss plaintiff's complaint, which was denied in the court's decision and order dated May 7, 2015. Thereafter, pursuant to a stipulation dated May 12, 2015 the parties agreed to extend the time for the defaulting defendants to serve an answer to plaintiff's complaint to June 16, 2015. The defaulting defendants did not serve an answer by or on June 16, 2015. In her affirmation, Irina Saks ("Ms. Saks"), counsel for the defaulting defendants, claims that she did not timely serve an answer because she was nine months pregnant at the time the stipulation was executed and, due to giving birth shortly thereafter, lost track of the deadline. When she discovered the error, she prepared an answer and in early August asked opposing counsel to stipulate to extend the time to serve the answer.

The court now considers the defaulting defendants' cross-motion for an order pursuant to CPLR §§ 3012(d) and 2005 extending their time to appear and plead or compelling plaintiff to accept their untimely served answer. Pursuant to CPLR § 3012(d), the court may extend the time of a party to appear or plead in the action or compel the acceptance of a pleading untimely served upon showing of a reasonable excuse for the delay or default. The court may exercise its discretion to excuse delay or default resulting from law office failure pursuant to CPLR § 2005. *See Cirillo v. Macy's, Inc.*, 61 A.D.3d 538, 540 (1<sup>st</sup> Dept 2009) ("Supreme Court has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve timely an answer"). In exercising its discretion, the court may consider such factors as the length of the delay, counsel's attempt to correct the error once discovered, prejudice to the non-moving party and the "public policy favoring the resolution of disputes on their merits." *See*

*Jones v. 414 Equities LLC*, 57 A.D.3d 65, 81 (1<sup>st</sup> Dept 2008).

In the present case, the court exercises its discretion to excuse the defaulting defendants' failure to timely serve an answer as the court finds that the claim of law office failure due to Ms. Saks' childbirth is a reasonable excuse. Ms. Saks attempted to correct the error in early August by asking opposing counsel to accept the untimely served answer. Further, plaintiff has failed to show that it would be prejudiced in any way by the delay. In the interest of resolving disputes on their merits, the court exercises its discretion to grant the defaulting defendants' cross-motion for an order compelling plaintiff to accept the answer untimely served.

Plaintiff's argument that the defaulting defendants' claim of law office failure cannot excuse their default because it is conclusory and unsubstantiated is without merit. "Claims of law office failure which are 'conclusory and unsubstantiated' cannot excuse default." *Galaxy General Contracting Corp. v. 2201 7<sup>th</sup> Ave. Realty LLC*, 95 A.D.3d 789, 790 (1<sup>st</sup> Dept 2012) (holding that the defendant's attempt to claim law office failure without specifying why the failure occurred was conclusory and unsubstantiated). In the present case, the claim of law office failure was non-conclusory and substantiated as the affirmation of Ms. Saks specified the reason for the delay in sufficient detail.

Accordingly, plaintiff's motion is denied and defendants' cross-motion is granted. Thus, plaintiff is hereby directed to accept the defaulting defendants' answer. This constitutes the decision and order of the court.

Dated: 11/11/16

Enter: \_\_\_\_\_

*CK*  
J.S.C.

**CYNTHIA S. KERN**  
J.S.C.