

**State Farm Mut. Auto. Ins. Co. v Austin Diagnostic
Med., P.C.**

2016 NY Slip Op 30917(U)

April 18, 2016

Supreme Court, Queens County

Docket Number: 704504/15

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order/Declaration

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

FILED
APR 29 2016
COUNTY CLERK
QUEENS COUNTY

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**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, STATE FARM
INDEMNITY COMPANY and STATE FARM
FIRE AND CASUALTY COMPANY,**

Plaintiffs,

Index No.:704504/15

Mot. Date: 1/25/16

-against-

Mot. Cal. No. 189

Mot. Seq. 2 and 3

AUSTIN DIAGNOSTIC MEDICAL, P.C.,

Defendant.

-----X

The following papers numbered EF 15 to 21, EF 23, EF 29 to 47 to 50, and EF 52 to 61 read on this application by plaintiffs **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM INDEMNITY COMPANY and STATE FARM FIRE AND CASUALTY COMPANY** (State Farm) for a temporary restraining order as against the defendant (Motion Sequence No. 2) and the motion by plaintiff State Farm seeking a default judgment as against the defendant (Motion Sequence No. 3); and the cross-motion by defendant seeking dismissal and related relief.

	<u>PAPERS NUMBERED</u>
Order To Show Cause (signed).....	EF 23
Affidavits - Exhibits.....	EF 15-21
Notice of Motion-Affidavits-Exhibits	EF 29 - 46
Notice of Cross-Motion-Affidavits.....	EF 47-50
Memorandum of Law.....	----
Exhibits (to Cross-Motion).....	EF 52-58
Opposition to Cross-Motion-Exhibits.....	EF 59-61

Initially, the motion, designated Motion Sequence No. 2, and the motion and cross-motion, designated as Motion Sequence No. 3) are consolidated for purposes of disposition and for determination herein, in the interest of judicial economy.

Upon the foregoing papers, it is ordered that the motions, under Motion Sequence Nos. 2 and 3 are both granted; and the cross-motion is denied.

This Court previously denied the defendant's motion to extend its time to answer, or to compel the plaintiffs to accept its untimely answer. For the reasons set forth therein and in this decision, the plaintiffs are entitled to a default judgment as against the defendant.

This is an action for declaratory judgment declaring that (1) the defendant failed to appear for duly-scheduled examinations under oath, thereby breaching a condition precedent to no-fault coverage and violating the no-fault regulations; (2) the claims identified in exhibit "1" of the summons and complaint were timely and properly denied due to the defendant's failure to appear for the examinations under oath; and (3) that the defendant has no right to receive payment for the bills submitted to the plaintiff State Farm and listed on exhibit "1" of the summons and complaint, because defendant breached a condition of coverage and violated its obligations under the no-fault laws.

The defendant was served with the summons and complaint, through the New York State Secretary of State on May 12, 2015. On or about September 21, 2015, about three-months late, without consent from the plaintiffs, the defendant served its answer, which was rejected by the plaintiffs as untimely on September 22, 2015.

In order to avoid a default, the defendant must show a reasonable excuse for the default and a potentially meritorious defense to the action (see HSBC Mortgage Corp. v Celina Morocho, 106 AD3d 875 [2d Dept. 2013]; U.S. Bank National Ass'n. v Allen, 102 AD3d 955 [2d Dept. 2013]; Onewest Bank, FSB v Martinez, 101 AD3d 969 [2d Dept. 2012]; Wells Fargo Bank, N.A. v Russell, 101 AD3d 860, 861 [2d Dept. 2012]).

Moreover, the defendant has nowhere denied that it failed to comply with a condition precedent of policy coverage by failing to appear at examinations under oath when requested to do so by the carrier. This being the case, there would be no coverage for the subject claims, in any event; hence no meritorious defense on the part of the

defendant to the carrier's position (see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co., 35 AD3d 720 [2d Dept. 2006]; Delta Diagnostic Radiology, P.C. v American Tr. Ins. Co., 49 Misc. 3d 149(A) [App. Term 2d Dept. 2015]; Compas Med., P.C. v Praetorian Ins. Co., 49 Misc. 3d 147(A) [App. Term 2d Dept. 2015]). Thus, the plaintiffs are granted a default judgment as against the defendant.

The plaintiffs request for a preliminary injunction is determined, as set forth below.

To obtain a preliminary injunction, the moving party must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor (see Zoller v HSBC Mtge. Corp. (USA), 135 AD3d 932, 933 [2d Dept. 2016]; CPLR 6301). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (Matter of Armanida Realty Corp. v Town of Oyster Bay, 126 AD3d at 894-895 [2d Dep5t. 2015]; see Doe v Axelrod, 73 NY2d 748, 750 [1988]). "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (SHS Baisley, LLC v Res Land, Inc., 18 AD3d 727, 728 [2d Dept. 2005])

Here, the plaintiffs have demonstrated the criteria for injunctive relief, and entitlement to a default judgment as against the defendant. However, this relief is rendered moot by the Court's finding herein that the plaintiffs are entitled to a default judgment as against the defendant, along with a declaration that the defendant is not entitled to payment for the claims set forth in the schedule annexed to the plaintiff's motion papers.


The cross-motion by defendant is denied as untimely and wholly without basis. The cross-motion was required to be made prior to the expiration of the time for service of the responsive pleading, in other words, on or around June 12, 2015 (see CPLR 3211[e]). The cross-motion was made on or about December 11, 2015, six months late, without good cause, at a time when the defendant was in default (see Yi Zhao v Liu, 136 AD3d 1025 [2d Dept. 2016]). Moreover, even if it were timely, it fails to satisfy the

criteria for a motion to dismiss pursuant to CPLR 3211(a)(1), (a)(4) or (a)(7). The defendant's request for sanctions and attorneys' fees is unwarranted.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, ADJUDGED AND DECLARED that the plaintiffs' motion for a default judgment is granted, and that the plaintiffs properly and timely denied the subject claims listed in Exhibit "1" to plaintiff's summons and complaint, and the defendant is not entitled to payment for the subject claims.

Dated: April 18, 2016



TIMOTHY J. DUFFICY, J.S.C.

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