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| <b>Country-Wide Ins. Co. v Garvey</b>                                                                                                                                                                                                                            |
| 2016 NY Slip Op 32388(U)                                                                                                                                                                                                                                         |
| December 5, 2016                                                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 160907/14                                                                                                                                                                                                                                         |
| Judge: Kathryn E. Freed                                                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X  
COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

AMANDA GARVEY

("Eligible Injured Party Defendant"),

And

DOSHI DIAGNOSTIC IMAGING SERVICES P.C.,  
INTEGRATED NEUROLOGICAL ASSOCIATES  
PLLC, DHD MEDICAL P.C., LS MEDICAL P.C.,  
DUNAMIS REHAB PT P.C., DR. BRUCE JACOBSON  
DC P.C., MASTER CHENG ACUPUNCTURE P.C. AND  
DAMADIAN MRI IN CANARSIE, P.C.

("Medical Provider Defendants"),

Defendant(s).

-----X  
**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION:

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVIT ANNEXED

1-2 (Exs. A-L)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Country-Wide Insurance Company moves, pursuant to CPLR 3215, for a default judgment against defendants Doshi Diagnostic Imaging Services P.C., Integrated Neurological Associates PLLC, LS Medical, P.C., Dunamis Rehab PT P.C.,

Dr. Bruce Jacobson DC P.C., Master Cheng Acupuncture P.C. and Damadian MRI in Canarsie, P.C. After a review of plaintiff's papers and the relevant statutes and case law, plaintiff's motion, which is unopposed, is **denied**.

### **FACTUAL AND PROCEDURAL BACKGROUND:**

This action arises from an alleged automobile accident on April 10, 2014 in which defendant Amanda Garvey was allegedly injured. Ex. A. On or about November 3, 2014, plaintiff commenced the captioned action against defendant Garvey and the aforementioned defendants, which allegedly treated Garvey for injuries arising from the incident. Ex. A. In its complaint, plaintiff alleged that it was entitled to a declaration that defendants were not entitled to no-fault benefits pursuant to the policy of insurance it issued which covered a vehicle involved in the accident since Garvey breached the policy by failing to appear for an examination under oath ("EUO"). Ex. A.<sup>1</sup>

Defendant Doshi Diagnostic Imaging Service, P.C. was personally served with the summons and complaint on November 14, 2014. Ex. B. Defendant Dr. Bruce Jacobson DC, P.C. was served via the secretary of state on November 24, 2014. Ex. B. Defendants Integrated Neurological Associates, PLLC, LS Medical, P.C., Damadian MRI in Canarsie, P.C., Dunamis Rehab PT, P.C., and Master Cheng Acupuncture, P.C. were served via the secretary of state on December 17, 2014. Ex. B. Garvey was purportedly served by affix and mail service on April 2, 2015. Ex. B.<sup>2</sup> All

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<sup>1</sup>The claims against defendant DHD Medical, P.C. were discontinued by stipulation dated January 21, 2015. Ex. C.

<sup>2</sup>By order dated December 1, 2016 (motion sequence 001), this Court deemed the affix and mail service on Garvey improper and granted plaintiff a 60-day extension of time to serve Garvey pursuant to CPLR 306-b.

defendants failed to join issue.

On July 12, 2016, plaintiff filed the instant motion, pursuant to CPLR 3215, for a default judgment against defendants Doshi Diagnostic Imaging Service, P.C., Dr. Bruce Jacobson DC, P.C., Integrated Neurological Associates, PLLC, LS Medical, P.C., Damadian MRI in Canarsie, P.C., Dunamis Rehab PT, P.C., and Master Cheng Acupuncture, P.C. In support of the motion, plaintiff submits, inter alia, an attorney affirmation; the summons and complaint; affidavits of service; an affirmation of additional mailing of the summons and complaint; notices for Garvey to appear at two scheduled EUOs; a denial of coverage issued due to Garvey's failure to appear for an EUO; and affidavits of individuals with personal knowledge regarding the mailing procedures for the notice of the EUO and a denial of coverage issued to Garvey arising from the failure to appear for the EUO.

#### **POSITION OF THE PLAINTIFF:**

Plaintiff argues that it is entitled to a declaratory judgment upon default against the aforementioned defendants pursuant to CPLR 3215 due to their failure to answer the complaint, which was properly served. Although plaintiff concedes that its motion is untimely, it maintains that "[p]laintiff's counsel that was handling the declaratory judgment cases was on medical leave for eleven (11) months and the cases were not reassigned in his absence." Pltf's. Aff. In Supp., at par. 5.

#### **LEGAL CONCLUSIONS:**

Plaintiff's motion for a default judgment is denied since it failed to move for such relief within one year of defendants' default in answering the complaint. CPLR 3215 (c) provides that:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall* dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. (*emphasis added*).

[T]he policy behind this statute is “to prevent plaintiffs from unreasonably delaying the termination of an action.” (*Reyes v Dunbar*, 124 Misc2d 958, 959 [1984], quoting Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3215 [last available in 1992]; *see also* Thirteenth Annual Report of NY Judicial Council, 1947, at 215.)

*Portfolio Recovery Assocs., LLC v Ploski*, 36 Misc3d 186, 189 (Sup Ct Westchester County 2012).

A court properly exercises its discretion in dismissing a complaint where a plaintiff fails to seek a default judgment within one year after defendant’s default in answering the complaint and plaintiff makes no showing of sufficient cause why the complaint should not be dismissed. *See Ewart v Maimonides Med. Ctr.*, 239 AD2d 543, 544 (2d Dept 1997); *Herzbrun v Levine*, 23 AD2d 744 (1<sup>st</sup> Dept 1965).

As noted above, the defendants against which plaintiff seeks a default were served in November and December of 2014. Ex. B. Since defendants’ time to answer expired, at the latest, in January of 2015, plaintiff had one year, until January of 2016, to move for a default judgment. *See* CPLR 3215(c). However, plaintiff did not file the instant motion until July 12, 2016, approximately six months after the expiration of its time in which to do so. Since plaintiff did not “take proceedings” within one year of defendants’ default, it has the burden of demonstrating why its complaint should not be dismissed.

In its discretion, this Court finds that plaintiff’s conclusory excuse that “[p]laintiff’s counsel that was handling the declaratory judgment cases was on medical leave for eleven (11) months and

the cases were not reassigned in his absence” (Pltf’s. Aff. In Supp., at par. 5) does not constitute sufficient cause for the submission of an untimely motion for default. Plaintiff provides absolutely no explanation regarding how and why the absence of the ill attorney caused the untimely filing of the instant motion. Aside from the fact that the attorney is not even named, plaintiff does not explain why another attorney in the office could not have handled the file in his absence, especially for the relatively simple task of moving for a default prior to a statutory deadline. Thus, given plaintiff’s delay in making the instant motion, as well as the mandatory language of the statute, the complaint must be dismissed pursuant to CPLR 3215 (c).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Country-Wide Insurance Company seeking a default judgment against defendants Doshi Diagnostic Imaging Service, P.C., Dr. Bruce Jacobson DC, P.C., Integrated Neurological Associates, PLLC, LS Medical, P.C., Damadian MRI in Canarsie, P.C., Dunamis Rehab PT, P.C., and Master Cheng Acupuncture, P.C. pursuant to CPLR 3215 is denied; and it is further,

ORDERED that the Clerk of the Court shall mark this matter dismissed as against defendants Doshi Diagnostic Imaging Service, P.C., Dr. Bruce Jacobson DC, P.C., Integrated Neurological Associates, PLLC, LS Medical, P.C., Damadian MRI in Canarsie, P.C., Dunamis Rehab PT, P.C., and Master Cheng Acupuncture, P.C. pursuant to CPLR 3215(c); and it is further,

ORDERED that the claims by plaintiff Country-Wide Insurance Company against defendant DHD Medical PC are permitted to be withdrawn as per stipulation dated January 21, 2015; and it is further,

ORDERED that the caption of this action is hereby amended to read as follows:

-----X  
COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 160907/14

AMANDA GARVEY

("Eligible Injured Party Defendant"),

Defendant.

-----X

and it is further,

ORDERED that counsel for plaintiff Country-Wide Insurance Company shall serve a copy of this order with notice of entry on the County Clerk (Room 141B), by filing with NYSCEF a completed "Notice to the County Clerk" (NYSCEF Form EF-22, available on the NYSCEF site), within 20 days after this order is uploaded to NYSCEF, and the Clerk is directed to mark the court's records to reflect the change to the caption; and it is further,

ORDERED that counsel for plaintiff Country-Wide Insurance Company shall serve a copy

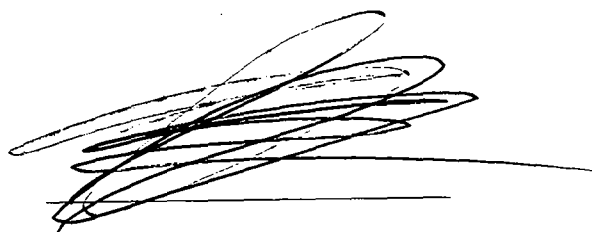
of this order with notice of entry on the General Clerk's Office (Room 119) pursuant to e-filing protocol at [genclerk-ords-non-mot@nycourts.gov](mailto:genclerk-ords-non-mot@nycourts.gov), within 20 days after this order is uploaded to NYSCEF, and the clerk is directed to mark the court's records to reflect the change to the caption; and it is further,

ORDERED that counsel for plaintiff Country-Wide Insurance Company is directed to serve a copy of this order with notice of its entry on all parties within 20 days after it is uploaded to NYSCEF; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: December 5, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', with a horizontal line drawn underneath it.

KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**