SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 10

X

PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE ADVANCED INSURANCE COMPANY, PROGRESSIVE GARDEN STATE INSURANCE COMPANY, PROGRESSIVE MAX INSURANCE COMPANY, PROGRESSIVE PREFERRED INSURANCE COMPANY, PROGRESSIVE PREMIER INSURANCE COMPANY OF ILLINOIS, PROGRESSIVE SPECIALTY INSURANCE COMPANY, and UNITED FINANCIAL CASUALTY COMPANY,

Index No.: 002660/15
Motion Sequence...02
Plaintiffs, Motion Date...03/23/17
-against- **XXX**

EXCEL PRODUCTS, INC,

Defendant.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, EXCEL PRODUCTS, INC (hereinafter "EXCEL") seeking an Order vacating and setting aside the Judgment entered against it upon default on July 10, 2015, pursuant to CPLR §§ 317, 5015 (a)(1) and 3215, and granting the Defendant an extension of time to appear and answer in this action, is decided as provided herein.

The Plaintiffs commenced this action on or about March 24, 2015, by the filing of a Summons and Verified Complaint (*See* the Summons and Verified Complaint attached to the Notice of Motion as Exhibit "A"). The Verified Complaint seeks a declaration that the Defendant is not entitled to reimbursement for medical services and durable medical equipment purportedly rendered and billed to the Plaintiffs pursuant to the no-fault laws of New York's Insurance Law, based upon the Defendant's failure to satisfy the conditions precedent of its insurance policy or to verify its claims in a manner required by law.

With respect to the Plaintiffs' prior motion for a default judgment, they submitted proper proof of service of the Summons and Verified Complaint upon the Defendant. In addition, the Plaintiffs submitted proper proof of service of a Notice of Service Pursuant to Business Corporations Law ("BCL") § 306 (b). The Defendant was also served with notice of the motion for a default judgment. As such, this Court previously granted the Plaintiffs' underlying motion for default judgment against the Defendant (*See* this Court's Short Form Order, dated July 10, 2015, attached to the Plaintiffs' Affirmation in Opposition as Exhibit "D").

The Defendant now moves to vacate the default judgment, arguing that it did not receive timely notice of the instant action. In support of its motion, the Defendant proffers the Affidavit of Valeria Hamamy, sole owner of EXCEL (*See* Hamamy's Affidavit attached to the Notice of Motion). Ms. Hamamy attests that she personally reviews any legal documents mailed to EXCEL. Moreover, Ms. Hamamy attests that, because of her personal

experience and daily job responsibilities, she has first-hand personal knowledge of the practices employed and instituted by EXCEL for receipt of mail. Ms. Hamamy further attests that incoming mail from the United States Postal Service was delivered to EXCEL's office located at 2917 Avenue J, Suite 4, Brooklyn, New York 11210. Ms. Hamamy attests that, at no point did she receive the Summons and Verified Complaint that was allegedly served on EXCEL through the Secretary of State. Lastly, Ms. Hamamy attests that she first became aware of the instant action through her legal counsel in January of 2017 (*Id.*)

In support of the Defendant's attempt to establish a meritorious defense, Ms. Hamamy merely states that the Plaintiffs' allegations are mistaken and have no basis in fact.[1] Counsel for the Defendant argues that the Plaintiffs have not demonstrated that they timely and properly requested Examinations Under Oath ("EUOs"), issued denials, or demonstrated good cause and an objective basis for requesting EUOs.

In opposition, counsel for the Plaintiffs argues that they properly served the Defendant with the Summons and Verified Complaint pursuant to BCL § 306 (b). Counsel for the Plaintiffs notes that the address on file with the Secretary of State is the same address attested to by Ms. Hamamy as the office location of EXCEL. Moreover, counsel for the Plaintiffs highlights that, prior to moving for default judgment against the Defendant, the Plaintiffs served EXCEL with a Request for Judicial Intervention (hereinafter "RJI") on May 20, 2015. Further, a copy of the Order granting the default against the Defendant, signed by

[1] Importantly, Ms. Hamamy is silent in her Affidavit as to whether EXCEL received any correspondence from the Plaintiffs, including requests for EUOs.

this Court and entered by the Nassau County Clerk's Office July 10, 2015, was served on the Defendant with Notice of Entry on August 18, 2015. Lastly, a copy of the Judgment signed by this Court and entered by the Nassau County Clerk's office on September 3, 2015 was served on the Defendant with Notice of Entry on September 10, 2015 (*See* the Affidavits of Service attached to the Plaintiffs' Affirmation in Opposition as Exhibits "C-E"). Counsel for the Plaintiffs argues that, despite all of the above notices, the Defendant failed to do anything for nearly a year and a half after Judgment was entered against it.

To vacate a default judgment, the defaulting party must demonstrate that they had a reasonable excuse for the delay in responding to the action, that they have a meritorious defense, that the default was not willful and that the plaintiff will not be prejudiced (*See Lichtman v. Sears, Roebuck & Co.*, 236 A.D.2d 373 [2d Dept. 1997]). A default by a Defendant should be vacated where there is "minimal prejudice caused by the defendant's short delay in answering, as well as the public policy in favor of resolving a case on the merits" (*See Classie v. Stratton Oakmont, Inc.*, 236 A.D.2d 505 [2d Dept. 1997]). Furthermore, "it is within the sound discretion of the Court to determine whether the proffered excuse and the statement of the merits are sufficient" (*See Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 257 [1stDept. 2001] citing *Mediavilla v. Gurman*, 272 A.D.2d 146 [1st Dept. 2001]). The court also has discretion to consider whether the Defendant acted promptly in curing the default without delay or prejudice to the Plaintiff (*See Statewide Ins. Co. v. Bradham,* 301 A.D.2d 606 [2d Dept. 2003]).

The Defendant herein has failed to establish a credible excuse for failing to

have appeared in this action. The Defendant's conclusory assertion that it was not served with a Summons and Complaint by the Secretary of State lacks a cogent basis. Unlike the case law cited by the Defendant, there is no evidence that the Secretary of State had an erroneous address for EXCEL when it served process. Rather, the address on file with the Secretary of State, as well as the address indicated in the various Affidavits of Service proffered by the Plaintiff, is identical to that referenced by Ms. Hamamy as the office location of EXCEL in her Affidavit. Moreover, this Court takes note that Ms. Hamamy does not deny receiving EUO notices, a copy of the RJI, a copy of the Order granting default against it, with notice of entry, or a copy of the Judgment with notice of entry. Therefore, the excuse that EXCEL did not have actual notice of the instant action until January of 2017 lacks merit. Lastly, although the Court need not determine the issue of a meritorious defense in that a reasonable excuse for failing to answer the complaint was not provided, the Court does not find the defenses asserted by the Defendant to have been supported by any evidence or persuasive arguments.

Accordingly, it is hereby

ORDERED, that the Defendant's motion to vacate the default judgment is **DENIED.**

This decision constitutes the decision and order of the Court.

DATED: Mineola, New York
May 26, 2017

Hon. Randy Sue Marber, J.S.C.
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