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| <b>Magno v Molina</b>                                                                                                                                                                                                          |
| 2018 NY Slip Op 31863(U)                                                                                                                                                                                                       |
| July 31, 2018                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 805661/15                                                                                                                                                                                                       |
| Judge: Joan A. Madden                                                                                                                                                                                                          |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
NATIVIDAD MAGNO, as Administrator of the ESTATE  
OF MARIETTA MAGNO, deceased,

Plaintiff,

INDEX NO. 805661/15

-against-

MARITZA MOLINA, M.D., ARASHDEEP SINGH,  
POONIA, M.D., ANDREA LIN, M.D., PUTNAM  
NURSING AND REHABILITATION CENTER and  
PUTNAM HOSPITAL CENTER.

Defendants.

-----X  
JOAN A. MADDEN, J.:

In this action for medical malpractice, defendant Putnam Nursing and Rehabilitation Center ("Putnam Nursing") moves to vacate its default in failing to appear for a conference on March 2, 2017, to reinstate its answer, and to reinstate Lewis Brisbois Bisgaard & Smith LLP ("Lewis Brisbois") as its counsel. Plaintiff opposes the motion in part.

Putnam Nursing seeks to vacate two prior orders of this Court: an amended order dated February 8, 2017, permitting Lewis Brisbois to withdraw as its counsel and scheduling the March 2, 2017 conference; and an order dated March 8, 2017, pursuant to section 202.27(b) of the Uniform Rules of Trial Courts, striking Putnam Nursing's answer based on its failure to appear at the March 2, 2017 conference.

An order striking an answer pursuant to section 202.27(b) of the Uniform Rules of Trial Courts, on account of defendant's failure to appear at a conference should be vacated where defendant can show a reasonable excuse for its default and a meritorious defense. See CPLR

5015(a)(1); DaimlerChrysler Insurance Co v. Seck, 82 AD3d 581 (1<sup>st</sup> Dept 2011); Uddaraju v. City of New York, 1 AD3d 140 (1<sup>st</sup> Dept 2003); Levy v. New York City Housing Authority, 287 AD2d 281 (1<sup>st</sup> Dept 2001); Mediavilla v. Gurman, 272 AD2d 146 (1<sup>st</sup> Dept 2000). A defaulting defendant has one year from service of notice of entry of the order striking the answer, to make the motion to vacate. CPLR 5015(a)(1); Carillo v. New York City Transit Authority, 39 AD3d 296 (1<sup>st</sup> Dept 2007).

Defendant Putnam Nursing's motion to vacate its default pursuant to CPLR 5015(a) (1) is timely, given that Putnam Nursing was served with notice of entry of the order striking its answer on July 5, 2017, and its order to show cause to vacate was filed on July 3, 2018.

Putnam Nursing has made a sufficient showing as to both a reasonable excuse for its default and a meritorious defense. Putnam Nursing submits an affidavit from an employee, Elizabeth Conti, explaining that its failure to appear at the March 2, 2017 conference was due to the fact that its attorneys were mistakenly relieved as counsel and therefore no attorney appeared on its behalf at the conference. Ms. Conti further explains that Putnam Nursing was sold in 2014, and as a result a mistake was made about the law firm representing Putnam Nursing in this action; Putnam Nursing subsequently determined that Lewis Brisbois was the correct law firm assigned to defend this action, and that firm has been representing Putnam Nursing and all parties have been on notice of such representation. Putnam Nursing asserts that the parties have been litigating the action for the past year and conducting discovery, with the "understanding" that Lewis Brisbois represents Putnam Nursing, and none of the parties can "plausibly claim prejudice" as a result of its answer being stricken. Contrary to plaintiff's assertion, the foregoing explanation is sufficient to demonstrate a reasonable excuse for Putnam Nursing's default in

failing to appear at the March 2, 2017 conference.

Putnam Nursing submits the expert affirmation of Dr. Capobianco, which adequately demonstrates a potentially meritorious defense. While plaintiff asserts that the expert affirmation “ignores critical facts,” defendant need only show a potentially meritorious defense. See Gottlieb v. Northriver Trading Co LLC, 106 AD3d 580 (1<sup>st</sup> Dept 2013); Daimlerchrysler Insurance Co v. Seck, supra. The showing of merit to vacate a default under CPLR 5015(a)(1) is less than the more extensive showing necessary to defeat summary judgment. Willams v. City of New York, 71 AD3d 605 (1<sup>st</sup> Dept 2010).

Based on the circumstances presented, and in view of the strong public policy in New York that matters be decided on the merits, defendant Putnam’s Valley’s default is vacated and its answer is restored. See Auerbach v. Tregerman, 106 AD3d 633 (1<sup>st</sup> Dept 2013); DaimlerChrysler Insurance Co v. Seck, supra.

The branch of Putnam Nursing’s motion to vacate this Court’s order dated February 9, 2017, permitting Lewis Brisbois to withdraw as its counsel, is granted in the absence of opposition, and said order is hereby vacated and Lewis Brisbois is reinstated as counsel for Putnam Nursing.

Finally, with respect to plaintiff’s objections that Putnam Nursing has failed to comply with discovery orders to provide its own records, and has engaged in “willful non-compliance” with discovery orders, as reflected in the Court’s discovery order dated July 26, 2018, upon the failure of defendants Putnam Nursing and Putnam Hospital Center, to produce witnesses for depositions or otherwise comply with discovery orders, sanctions pursuant to CPLR 3126 will be imposed, including the determination of issues upon which the witness’ testimony is relevant and

material in favor of the demanding party and against the non-complying party.

Accordingly, it is

ORDERED that the motion by defendant Putnam Nursing and Rehabilitation Center is granted; and it is further

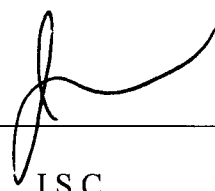
ORDERED that this Court's Order dated March 8, 2017, striking the answer of defendant Putnam Nursing and Rehabilitation Center, is vacated, and said defendant's answer is hereby reinstated; and it is further

ORDERED that this Court's Amended Order dated February 8, 2017 permitting Lewis Brisbois, to withdraw as counsel for defendant Putnam Nursing, is hereby vacated and Lewis Brisbois is reinstated as counsel for Putnam Nursing; and it is further

ORDERED that upon the failure of defendants Putnam Nursing and Rehabilitation, and Putnam Hospital Center, to produce witnesses for depositions or otherwise comply with discovery orders, sanctions pursuant to CPLR 3126 will be imposed, including the determination of issues upon which the witness' testimony is relevant and material, in favor of the demanding party and against the non-complying party.

DATED: July 31, 2018

ENTER:

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
**J.S.C.**