

**Hereford Ins. Co. v Physical Medicine &
Rehabilitation of N.Y., P.C.**

2018 NY Slip Op 32611(U)

October 11, 2018

Supreme Court, New York County

Docket Number: 153072/2017

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 153072/2017

HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

MOT. SEQ. NOS. 001, 002

PHYSICAL MEDICINE & REHABILITATION OF NEW YORK, P.C.
A/K/A PHYSICAL MEDICINE & REHABILITATION OF NY, P.C.
A/K/A PMR OF NY BUSHWICK A/K/A PMR OF NY REGO PARK,
NICKY BHATIA, MD, P.C., ADVANCED RECOVERY EQUIPMENT
AND SUPPLIES, LLC, LENOX HILL RADIOLOGY AND MEDICAL
IMAGING ASSOCIATES, P.C. A/K/A LENOX HILL RADIOLOGY
MEDICAL IMAGING, NEW YORK SPINE SPECIALISTS, LLP
A/K/A NEW YORK SPINE SPECIALIST, ADVANCED SURGERY
CENTER, L.L.C., KATZMAN ORTHOPEDICS, P.C., JASON W.
BROWN, M.D., P.C. A/K/A JASON BROWN, M.D., P.C., NU AGE
MED SOLUTIONS, INC., ICONIC WELLNESS SURGICAL
SERVICES, L.L.C., JON-PAUL DADAIAN, P.C., ADVANCED
ORTHOPAEDICS, P.L.L.C., SENIORCARE EMERGENCY
MEDICAL SERVICES, INC., INTERFAITH MEDICAL CENTER,
INTERFAITH PROFESSIONAL PHYSICIAN SERVICES, P.C., DOV
J. BERKOWITZ, M.D., AUTORX, LLC, RAMAPO VALLEY
ANESTHESIA ASSOCIATES, L.L.C., JARVONE PAGE,
DESMOND JULIEN, KENNETH RICHBOW,

DECISION AND ORDER

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 67

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86

were read on this motion to/for EXTEND - ORDER

Upon the foregoing documents, it is ordered that the motions are decided as follows.

Motion sequence numbers 001 and 002 are consolidated for disposition herein.

In motion sequence number 001, plaintiff Hereford Insurance Company moves, pursuant to CPLR 3215, for leave to enter a default judgment against defendants Physical Medicine & Rehabilitation of New York, P.C. a/k/a Physical Medicine & Rehabilitation of NY, P.C. a/k/a PMR

of NY Bushwick a/k/a PMR of NY Rego Park (PMR); Lenox Hill Radiology and Medical Imaging Associates, P.C. a/k/a Lenox Hill Radiology Medical Imaging (Lenox Hill); Advanced Surgery Center, L.L.C. (Advanced Surgery); Katzman Orthopedics, P.C. (Katzman Orthopedics); Jason W. Brown, M.D., P.C. a/k/a Jason Brown, M.D., P.C. (Brown); Iconic Wellness Surgical Services, L.L.C. (Iconic Wellness); Jon Paul Dadaian, P.C. (Dadaian); Seniorcare Emergency Medical Services, Inc. (Seniorcare); Autorx, LLC (Autorx); Ramapo Valley Anesthesia Associates, L.L.C. (Ramapo Valley); Jarvone Page (Page); Desmond Julie (Julien); and Kenneth Richbow (Richbow).

In motion sequence number 002, PMR, Paige, Julien and Richbow move, pursuant to CPLR 2004 and CPLR 3012 (d), for an extension of time to answer the complaint and to compel plaintiff to accept their answer previously served on November 9, 2017.

FACTUAL AND PROCEDURAL BACKGROUND

This declaratory judgment action arises out of an alleged motor vehicle accident that occurred on July 11, 2016, when the livery cab insured by plaintiff and operated by nonparty Theirno Abdoul Bah (Bah), in which Paige, Julien and Richbow were passengers, was involved with a collision with another vehicle (complaint, ¶ 23). The accident occurred on Willoughby Avenue near Sandford Street in Brooklyn, New York (*id.*). Paige, Julien and Richbow (collectively, Claimants) were removed by ambulance to defendant Interfaith Medical Center, where they were treated for their injuries (*id.*). Claimants received further treatment at each of the defendant medical providers in the months following the accident.

Upon receiving Claimants' claims for no fault benefits, plaintiff undertook an investigation (complaint, ¶¶ 24 and 32). The results of the investigation led plaintiff to conclude that "Claimants

materially misrepresented the circumstances and facts surrounding the collision and had duly denied all claims submitted by them, or their assignees, on that basis” (*id.*, ¶ 32).

Plaintiff alleges that Claimants’ injuries were not causally related to the accident (*id.*, ¶ 34) based, in part, upon Bah’s statements that a man approached Claimants shortly after the accident, told them to “get back into the car, you guys can make some money,” and presented them with a business card before leaving the scene (Bah aff, at 2). After the accident, Claimants, who are friends, treated at the same medical facilities and received nearly identical treatment, and each underwent surgery on the right knee (complaint, ¶ 28). However, Bah stated that the collision resulted in “little to no damage” to either vehicle (Bah aff, at 2). The police accident report also noted that both vehicles sustained minor damage (affirmation of plaintiff’s counsel, exhibit C at 2). Additionally, Julien and Richbow sustained “prior losses” (complaint, ¶ 28). Julien testified that he was involved in a prior motor vehicle accident in which he injured his left knee and felt pain in his lower back (Julien tr at 75, lines 9-21) and Richbow testified that he had received medical treatment after falling as a child (Richbow tr at 55-56).

Bah opined that Claimants “seemed like trouble” and that he “knew they were not going to pay” the fare (Bah aff, at 1). He stated that Claimants directed him to “go up only two blocks” on Willoughby Street, which is where the accident occurred (*id.*).

Plaintiff commenced the instant action by filing a summons and complaint on March 31, 2017. Plaintiff seeks a declaration that it owes no duty to pay defendants’ no-fault claims with respect to the July 11, 2016 motor vehicle accident and a permanent stay of all arbitrations or lawsuits related to Claimants’ no fault claims.

Defendants Advanced Orthopaedics, P.L.L.C.; Dov J. Berkowitz, M.D.; Advanced Recovery Equipment and Supplies LLC; Interfaith Medical Center; and Interfaith Professional

Physician Services, P.C. all served answers to the complaint¹ (NY St Cts Electronic Filing [NYSCEF] Doc Nos. 25, 30, and 35). PMR and Claimants filed an answer with counterclaims on November 9, 2017 (NYSCEF Doc No. 50), which plaintiff rejected by letter dated November 16, 2017 (affirmation in opposition of plaintiff's counsel, exhibit C). Iconic and Advance Surgery filed an answer on December 21, 2017 (NYSCEF Doc No. 66), which plaintiff rejected by letter the same day (NYSCEF Doc No. 68). Plaintiff has discontinued its action against defendants Nu Age Med Solutions, Inc., Nicky Bhatia, MD, P.C., and New York Spine Specialists, LLP a/k/a New York Spine Specialist (NYSCEF Doc No. 40). The remaining defendants have not interposed answers or otherwise appeared in this action.

Plaintiff now moves for a default judgment against the defendants who have not appeared or timely answered the complaint. PMR and Claimants move for an extension of time and for an order compelling plaintiff to accept service of their late answer.

LEGAL CONSIDERATIONS

A. Leave to Enter a Default Judgment (Motion Sequence No. 001)

CPLR 3215 (a) provides, in part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” In order to obtain a default judgment, a moving party must submit proof of jurisdiction, a default, and “proof by affidavit made by the party of the facts constituting the claim” (*Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987] [internal quotation marks and citation omitted]; *see also* CPLR 3215 [f]). It is well settled that “a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim” shall suffice (*Beltre v Babu*, 32 AD3d 722, 723

¹ This Court may take judicial notice of undisputed court records or files (*see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 202 [1st Dept 2010]).

[1st Dept 2006]). In addition to meeting the additional notice requirements set forth in CPLR 3215 (g), the motion must be made within one year of the default (*see* CPLR 3215 [c]).

In support of the motion, plaintiff submits the summons and complaint; the affidavits of service for the defendants allegedly in default; an affidavit from Bah; a certified copy of the police accident report or MV104-AN; the transcripts of Claimants' examinations under oath; a notice of default dated November 16, 2017; and three reports concerning Claimants' military status.

The affidavits of service show that plaintiff served PMR, Lenox Hill, Advanced Surgery, Katzman Orthopedics, Jason Brown, Seniorcare, and Autorx in accordance with CPLR 311 and Business Corporation Law § 306 by delivering process to the Secretary of State on April 17, 2017 (affirmation of plaintiff's counsel, exhibit B at 1-5, 8 and 9). Plaintiff served Iconic Wellness in conformity with CPLR 311-a by personally delivering the summons and complaint to Sadyk Fayzulayev, an authorized agent, on May 1, 2017 (*id.* at 6). As to Ramapo Valley, the summons and complaint were personally delivered to "Tracey Preister" (Preister), a "Credentials Manager," at 100 Route 59, Suite 111, Suffern, New York on April 10, 2017 (*id.* at 10). Dadaian was served on April 11, 2017 by delivery of the summons and complaint to "Damaris Rivera as Managing Agent" for that corporation at an address in New Jersey (*id.* at 7).

Page was served by substituted service pursuant to CPLR 308 (2) on April 11, 2017, followed by an additional mailing of the summons and complaint to his last known address on April 14, 2017 (*id.* at 11). Richbow was served by substituted service pursuant to CPLR 308 (2) on April 13, 2017, followed by an additional mailing of the summons and complaint to his last known address the same day (*id.* at 13). Julien was served by nail-and-mail service pursuant to CPLR 308 (4) on April 18, 2017, after previous attempts at service made on a weekday evening,

a weekend morning and a weekday afternoon had failed (*id.* at 12). Claimants were not on active duty in the military at the time they were served (affirmation of plaintiff's counsel, exhibit G).

On November 17, 2017, plaintiff served upon each defendant who had not timely appeared a notice of default and a copy of the summons and complaint by mail (affirmation of plaintiff's counsel, exhibit F).

"[T]he affidavit of a process server constitutes prima facie evidence of proper service" (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). Plaintiff has established that PMR, Lenox Hill, Advanced Surgery, Katzman Orthopedics, Jason Brown, Seniorcare, Autorx, Iconic Wellness, Page, Richbow and Julien were all properly served with process, that these defendants have not answered the complaint, and that their time to do so has expired.

However, plaintiff has not demonstrated that service was properly effectuated upon Ramapo Valley. The affidavit of service reflects that the summons and complaint were delivered to Preister, who was identified as a Credentials Manager (affirmation of plaintiff's counsel, exhibit B at 10). Personal service upon a limited liability company requires service upon a member or manager in this state, an agent appointed to receive process, or any other person designated to receive process (*see* CPLR 311-a). As an alternative, service of process may be made pursuant to article three of the Limited Liability Law (*id.*). Here, the affidavit of service fails to state whether Preister was a member or an agent appointed or otherwise designated to accept service on behalf of Ramapo Valley.

Likewise, plaintiff has not established that service upon Dadaian was proper. According to the complaint, Dadaian is a professional association based in New Jersey "that has availed itself in New York State" (complaint ¶ 12). Business Corporation Law § 307 (a) dictates that service of process upon an unauthorized foreign corporation shall be made by either mailing or personally

delivering the summons and complaint to “the secretary of state . . . or his [or her] deputy, or with any person authorized by the secretary of state to receive such service at the office of the department of state in the city of Albany” Plaintiff served Dadaian’s managing agent with process in New Jersey (affirmation of plaintiff’s counsel, exhibit B at 7). This Court also notes that the affidavit of service, which was notarized in New Jersey, lacks a certificate of conformity (*see* CPLR 3409 [c]).

As to the merits of the complaint, CPLR 3001 provides, in part, that the “court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” Bah’s affidavit, together with the police accident report and Claimants’ testimony, provide adequate proof of the claim. However, “[a] declaratory judgment should not be granted where the action serves to increase rather than to decrease litigation or where it results in trying a controversy piecemeal” (*Smith v Western Union Tel. Co.*, 276 App Div 210, 211-214 [1st Dept 1949], *affd* 302 NY 683 [1951]). As several defendants timely answered the complaint, this Court finds that plaintiff is entitled only to a default judgment, rather than a judgment declaring the rights of the parties, at this time.

B. Extending PMR’s and Claimants’ Time to Answer (Motion Sequence No. 002)

PMR and Claimants move separately for an order extending their time to file an answer and compelling plaintiff to accept their late answer. Submitted in support of the motion are nearly identical affidavits from Claimants, who aver that they were served with process in this action. Claimants had retained an attorney to settle their claims against the driver of the other vehicle involved in the accident, but that attorney was unable to represent them in this action. Further, the

settlement check they received with respect to that claim has been held in escrow, and, as a result, Claimants aver that they lacked the funds to retain a new attorney to represent them. Additionally, they claim they did not know what this action was about. In September 2017, attorneys for PMR contacted Claimants and offered to represent them. It took additional time to execute retainer letters showing that they would not be charged for the services performed by PMR's attorneys. As to the merits of plaintiff's action, Claimants dispute Bah's version of the accident and argue that Bah appeared friendly to the other driver. They attribute any inconsistencies in their testimony at their examinations under oath to how "everybody remembers things a little differently" (Page aff, ¶ 17; Richbow aff, ¶ 17; Julien aff, ¶ 17).

PMR's principal, Dr. Guatam Khakhar (Dr. Khakhar) affirms that PMR "became aware of this pending litigation" at or near the time PMR attempted to file for no fault arbitration against Hereford (affirmation of Dr. Khakhar, ¶ 7). It took additional time for PMR's attorneys to locate Claimants and seek retainer letters. Dr. Khakhar states that PMR's delay in filing an answer was reasonable because he could not in "good conscience" file an answer until Claimants did so as well because they were being represented by the same attorneys (*id.*, ¶ 12). Moreover, Dr. Khakhar affirms that the treatment rendered by PMR to Claimants was causally related to the subject motor vehicle accident (*id.*, ¶ 13).

CPLR 3012 (d) states that "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In addition, CPLR 2004 permits the court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown."

Given the state's strong public policy of disposing an action on the merits (*see Berardo v Guillet*, 86 AD3d 459, 459 [1st Dept 2011]), this Court grants PMR's and Claimants' application (*see Matter of Salon Ignazia, Inc.*, 34 AD3d 821, 822 [2d Dept 2006] [vacating a default because the appellant's default was not willful but inadvertent and arose, in part, from her lack of legal representation, financial difficulties, and misunderstanding of the proceedings]). Although their excuses are less than compelling (*see Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept 2015]), there is no evidence that PMR's and Claimants' failures to timely answer were willful (*see Quinn Emanuel Urquhart & Sullivan, LLP v AVRA Surgical Robotics, Inc.*, 160 AD3d 480, 481 [1st Dept 2018]). Plaintiff also has not demonstrated that it suffered any prejudice from the delay. Indeed, plaintiff did not move for leave to enter a default judgment until after it rejected Claimants' late answer (*see Nason v Fisher*, 309 AD2d 526, 526 [1st Dept 2003]).

While CPLR 3012 (d) does not require a showing of meritorious defense (*see Interboro Ins. Co. v Perez*, 112 AD3d 483, 473 [1st Dept 2013]), PMR and Claimants have raised a potentially meritorious defense to the action. It is well settled that an insurer may disclaim coverage "premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]). Here, Dr. Khakhar affirms that the treatment Claimants received at PMR was causally related to the accident (affirmation of Dr. Khakhar, ¶¶ 6, 13) and plaintiff has provided no evidence to refute this contention.

In addition, "[a] deliberate collision by an insured is not a covered event under an insurance policy" (*Matter of Liberty Mut. Ins. Co. v Young*, 124 AD3d 663, 664 [2d Dept 2015] [collecting cases]). Although plaintiff alleges that the collision was an "intentional event," Bah does not support this contention with any certainty. In any event, Claimants dispute Bah's statement that

they would not pay the fare. Page stated that Bah “would not even let us in until I paid him cash up front” (Page aff, ¶ 19). Page also noted that Bah had a “friendly chat with the other driver right after the accident” (*id.*, at ¶ 18).

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

ORDERED that plaintiff’s motion for leave to enter a default judgment (motion sequence No. 001) is granted as against defendants Lenox Hill Radiology and Medical Imaging Associates, P.C. a/k/a Lenox Hill Radiology Medical Imaging, Advanced Surgery Center, L.L.C., Katzman Orthopedics, P.C., Jason W. Brown, M.D., P.C. a/k/a Jason Brown, M.D., P.C., Iconic Wellness Surgical Services, L.L.C., Seniorcare Emergency Medical Services, Inc., and Autorx, LLC (Autorx) and is denied as against defendants Ramapo Valley Anesthesia Associates, L.L.C., Jon Paul Dadaian, P.C., Physical Medicine & Rehabilitation of New York, P.C. a/k/a Physical Medicine & Rehabilitation of NY, P.C. a/k/a PMR of NY Bushwick a/k/a PMR of NY Rego Park, Javrone Paige s/h/a Javrone Page, Desmond Julie, and Kenneth Richbow; and it is further

ORDERED that entry of a declaratory judgment against defendants Lenox Hill Radiology and Medical Imaging Associates, P.C. a/k/a Lenox Hill Radiology Medical Imaging, Advanced Surgery Center, L.L.C., Katzman Orthopedics, P.C., Jason W. Brown, M.D., P.C. a/k/a Jason Brown, M.D., P.C., Iconic Wellness Surgical Services, L.L.C., Seniorcare Emergency Medical Services, Inc., and Autorx, LLC (Autorx) shall await the trial or other disposition of this action against the remaining defendants; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties within 20 days of the filing of this order on the New York State Courts Electronic Filing System (NYSCEF); and it is further

ORDERED that the motion of defendants Physical Medicine & Rehabilitation of New York, P.C. a/k/a Physical Medicine & Rehabilitation of NY, P.C. a/k/a PMR of NY Bushwick a/k/a PMR of NY Rego Park, Javrone Page, Desmond Julie, and Kenneth Richbow for leave to serve a late answer and for an order compelling plaintiff to accept their answer (motion sequence No. 002) is granted, and the Answer filed on November 9, 2017 (NYSCEF Doc No. 50) and annexed to the motion as Exhibit A is deemed timely served and filed nunc pro tunc; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 2, Room 280, 80 Centre Street, on December 4, 2018, at 2:15 p.m.; and it is further

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

10/11/2018
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

KATHRYN E. FREED, J.S.C.