

**Unitrin Advantage Ins. Co. v Advanced Orthopedics,  
PLLC**

2019 NY Slip Op 30019(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 150497/2017

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,  
- v -

Index No.  
150497/2017  
**DECISION  
and ORDER**  
Mot. Seq. 001

ADVANCED ORTHOPEDICS, PLLC., BI COUNTY MEDICAL  
DIAGNOSTICS, P.C., CHRISTOPHER POPP, LMT, DR. RONALD P.  
MAZZA, D.C., P.C., FAI CHU L.A.C., P.C., FRANKLIN HOSPITAL  
MEDICAL CENTER, LONG ISLAND JEWISH MEDICAL CENTER,  
NASSAU CHIROPRACTIC SERVICES, P.C., NEW YORK SPINE  
SPECIALISTS, LLP, NORTH AMERICAN PARTNERS IN ANESTHESIA,  
LLP, PROMPT MEDICAL SPINE CARE, PLLC, STAND UP MRI OF  
MELLVILLE, P.C., THERAPEUTIC PHYSICAL THERAPY, P.C.,  
ZWANGER & PESIRI RADIOLOGY GROUP, LLC., KUNJURAMAN  
CHANDRAMOHAN, M.D., ADVANCED RECOVERY EQUIPMENT and  
SUPPLIES LLC, and LISA JONES

Defendants.

-----X  
HON. MELISSA A. CRANE, J.S.C.

This case arises from an automobile accident that allegedly occurred on December 22, 2015, in Hempstead, New York, involving defendant Lisa Jones (the “claimant”), who resides in Westbury, New York. Claimant alleges she sustained serious bodily injuries as a result of the collision and submitted claims to plaintiff, Unitrin Advantage Insurance Company (“Unitrin”), for no-fault benefits. Claimant assigned the rights to collect no-fault benefits to co-defendants/medical providers. Plaintiff commenced an action on January 13, 2017, by a Summons and Complaint, seeking a declaratory judgment against claimant as well as numerous co-defendants/medical providers. Plaintiff has assigned claim number C000560NY16 to all claims relating to the collision.

Plaintiff now moves for a default judgment pursuant to CPLR § 3215 against defendants Advanced Orthopaedics, PLLC., and Advanced Recovery Equipment and Supplies, LLC, only.

In its motion, plaintiff rejects the Answers of Advanced Orthopaedics and Advanced Recovery as untimely. Defendants Advanced Orthopedics and Advanced Recovery did not file their Answer with counterclaims until November 1, 2017. Defendants Advanced Orthopaedics and Advanced Recovery cross-move for an Order to: (1) to vacate the default against defendants and grant defendants an extension to Answer the complaint; (2) require plaintiff to accept defendants previously filed and served Answer with counterclaims; and (3) change the place of Venue of this action from Supreme Court, New York County, to Supreme Court, Nassau County, pursuant to CPLR 510(1). The court denies plaintiff's default motion, and grants defendant's cross-motion.

Under CPLR 3012(d), "[U]pon the application of a party, 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 order to permit the service of an untimely answer as timely, defendants must provide both a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action (*see Juseinoski v Board of Educ. Of City of NY*, 15 AD3d 363 [2005]); *see also Bunch v Dollar Budget*, 12 AD3d 391 [2d Dept 2004] (affirming trial court's decision to grant defendant's motion to compel plaintiff to accept a late filed answer where "[t]he defendant's delay in appearing and answering was brief, the default was not willful, and there was no evidence that the plaintiff was prejudice" and because "public policy favors the resolution of cases on the merit").

Here, defendant Advanced Orthopedics and Advanced Recovery's delay was relatively short, and plaintiff has not shown prejudice. "Under these circumstances, defendants' excuse for the default is reasonable and will be accepted" (*Pieretti v Flair De Art, Inc.*, 99 AD2d 980, 981 [1st Dept 1984]; *Mendoza v Bi-County Paving*, 227 AD2d 302, 302-03 [1st Dept 1996]).

Additionally, “As a matter of general policy, disposition of controversies on the merits is favored” (*Warbett v Polokoff*, 250 NYS2d 633, 634 [1st Dept 1964]).

Defendants submit, *inter alia*, the attorney affirmation of Jonathan B. Seplowe, Esq. Seplowe states that he only learned of the lawsuit after review of plaintiff’s arbitration submission on October 11, 2017 to both defendants. An affidavit from Katherine Raskin, billing manager for Advanced Orthopaedics, denies receiving plaintiff’s summons and complaint (*see* Raskin Aff, Exh E, defendant’s cross-motion). An affidavit from Dan Horowitz, principal of Advanced Recovery, confirms that he did not learn of the lawsuit until November 1, 2017 from Seplowe (*see* Horowitz Aff, Exh A, defendant’s cross-motion). Seplowe also states that defendants have a meritorious defense – that plaintiff’s EUO no-show defense does not apply to defendants Advanced Orthopaedics and Advanced Recovery, and further, that plaintiff cannot prove that claimant’s injuries were not casually related to an insured incident.

Finally, the court finds Unitrin’s arguments against a change of venue to Nassau County, Supreme Court, unavailing. Plaintiff does not contest the merits of defendant’s demand for change of venue. Rather, plaintiff states that the issue is premature. The court disagrees. Defendant moves properly for a change of venue under CPLR 509 and CPLR 510. Further, as defendants argue, the accident allegedly occurred in Nassau County. Most of the co-defendant medical providers reside in Nassau County or Queens County, and, notably, none of the co-defendants reside in New York County. Lastly, plaintiff itself has no ties to New York County. On its Summons, plaintiff states its address as “5784 Widewaters Parkway, Dewitt, New York 13214.” Plaintiff “processed” the claims and issued denials from its Syracuse Regional Claim Office.

Accordingly, it is

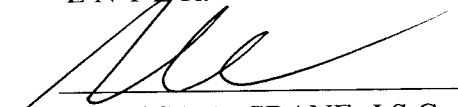
**ORDERED** that defendants Advanced Orthopaedics, PLLC and Advanced Recovery Equipment and Supplies, LLC cross-motion is granted in its entirety; and it is further

**ORDERED** that defendants' Answers filed on or about November 1, 2017, are deemed served nunc pro tunc; and it is further

**ORDERED** that venue of this case is changed from New York County, Supreme Court to Nassau County, Supreme Court. The court dismisses the action accordingly.

DATED: January 4, 2019  
New York, New York

ENTER:

  
MELISSA A. CRANE, J.S.C  
**HON. MELISSA A. CRANE**  
J.S.C.