

**Country-Wide Ins. Co. v Dominguez**

2020 NY Slip Op 30701(U)

February 14, 2020

Supreme Court, New York County

Docket Number: 654169/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. NANCY M. BANNON** PART IAS MOTION 42EFM

*Justice*

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INDEX NO. 654169/2018

COUNTRY-WIDE INSURANCE COMPANY,

MOTION DATE 11/18/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

ERICK DOMINGUEZ, CITIMEDICAL I, PLLC, OPTIMUM  
HEALTH ACUPUNCTURE, P.C., BIBIMED INC, CITIMED  
SERVICES, PA, HEALTHPLUS SUGERY CENTER, LLC,  
DYNAMIC SURGERY CENTER, LLC, LIMBER  
CHIROPRACTIC, P.C.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - DECLARATORY.

In this action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Erick Dominguez (the individual defendant), Bibimed Inc., Citimed Services, PA, Healthplus Surgery Center LLC, Dynamic Surgery Center LLC, and Limber Chiropractic PC (the non-answering health-care defendants), declaring that it is not obligated to pay no-fault benefits to the individual defendant or the non-answering health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on February 4, 2018 as the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). The defendants Citimed Services PA, Healthplus Surgery Center LLC, and Dynamic Surgery Center LLC oppose the motion. The motion is granted in part.

The defendants Citimed Services PA, Healthplus Surgery Center LLC, and Dynamic Surgery Center LLC interposed an untimely answer on January 17, 2019. The defendants did not cross-move to compel the acceptance of their answer pursuant to CPLR 3012(d), nor did they proffer a reasonable excuse for their default and the existence of a potentially meritorious defense to the action. See Fried v. Jacob Holding, Inc., 110 AD3d 56 (1<sup>st</sup> Dept. 2013); Nouveau

Elevator Industries, Inc. v Tracey Towers Housing Co., 95 AD3d 616 (1<sup>st</sup> Dept. 2012). However, the plaintiff failed to reject the answer as untimely, and instead moved for default judgment over six months later on July 31, 2019. It is well settled that the retention of an answer without objection will be deemed a waiver of objection as to untimeliness. See CPLR 2101(f); Wittlin v Schapiro's Wine Co. Ltd., 178 AD2d 160 (1<sup>st</sup> Dept. 1991); Celleri v Pabon, 299 AD2d 385 (2<sup>nd</sup> Dept. 2002); compare American Transit Ins. Co. v Baucage, 146 AD3d 413 (1<sup>st</sup> Dept. 2017) (motion for default judgment filed within fifteen days of an untimely response was sufficient to reject answer as untimely). Such a waiver precludes the grant of default judgment. See Matter of Romano v Ziegner, 99 AD2d 512 (2<sup>nd</sup> Dept. 1984). Therefore, the plaintiff is deemed to have accepted the untimely answer, and default judgment against Citimed Services PA, Healthplus Surgery Center LLC, and Dynamic Surgery Center LLC is denied. See Matter of Romano v Ziegner, supra.

The plaintiff's motion for default judgment is granted as against the remaining non-answering defendants inasmuch as the plaintiff has provided proof of timely service of the summons and complaint upon the defendants, proof of the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1<sup>st</sup> Dept. 2016]), timely moved for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1<sup>st</sup> Dept. 2015]), and satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that he was injured in a motor vehicle accident on February 4, 2018, and that he thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment under claim number 000334723-001, as assignees of the individual defendant, for no-fault benefits under insurance policy number RS814071417. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff received a series of at least twelve claims from March 20, 2018 through March 26, 2018. The plaintiff mailed its first notice for an EUO to be held on April 17, 2018 to the individual defendant on April 4, 2018. The individual defendant did not attend either the first EUO or the second rescheduled EUO on May 1, 2018. The plaintiff denied the insurance claims on May 4, 2018. The plaintiff now seeks default judgment stating that it is not required to pay the no-fault benefits as the individual defendant's coverage is vitiated.

The plaintiff's submissions demonstrate that the initial notice for an examination under oath (EUO) on April 4, 2018 was timely mailed to the individual defendant within 15 business days of its receipt of the health-care defendants' NF-3 forms, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1<sup>st</sup> Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1<sup>st</sup> Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1<sup>st</sup> Dept. 2015). They also show that the individual defendant did not appear for the initially scheduled EUO, and was provided timely notice of a rescheduled EUO, but failed to appear for that as well. The plaintiff consequently provided *prima facie* evidence that, by failing to appear, the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., *supra*; Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1<sup>st</sup> Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1<sup>st</sup> Dept. 2014).

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Woodson v Mendon Leasing Corp., 259 AD2d 304 (1<sup>st</sup> Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2<sup>nd</sup> Dept. 2003); Holt v Holt, 262 AD2d 530 (2<sup>nd</sup> Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3<sup>rd</sup> Dept. 1978). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., *supra*; Frolish v Ryder Truck Rental, *supra*.

Accordingly, it is

ORDERED that the plaintiff is deemed to have accepted the answer of defendants Citimed Services PA, Healthplus Surgery Center LLC, and Dynamic Surgery Center LLC as timely; and it is further,

ORDERED that the plaintiff's motion for default judgment as against defendants Citimed Services PA, Healthplus Surgery Center LLC, and Dynamic Surgery Center LLC is denied; and it is further,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the non-answering defendants Erick Dominguez, Bibimed Inc., and Limber Chiropractic PC is granted; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendant Erick Dominguez for injuries that he allegedly sustained in a motor vehicle accident on February 4, 2018, or to defendants Bibimed Inc. and Limber Chiropractic PC, to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries that he allegedly sustained in the motor vehicle accident of February 4, 2018; and it is further,

ORDERED that the action is severed and continued as against the remaining defendants Citimedical I, PLLC, Optimum Health Acupuncture PC, Citimed Services PA, Healthplus Surgery Center LLC, and Dynamic Surgery Center LLC; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order; and it is further,

ORDERED that the parties shall appear for a preliminary conference on April 30, 2020 at 2:30 p.m.

This constitutes the Decision and Order of the court.

2/14/2020  
DATE

CHECK ONE:  CASE DISPOSED  GRANTED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON