

**Country-Wide Ins. Co. v New
York-Presbyt./Queens**

2020 NY Slip Op 31544(U)

May 4, 2020

Supreme Court, New York County

Docket Number: 655564/2019

Judge: Melissa A. Crane

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

PRESENT: MELISSA A. CRANE PART 15
Justice

COUNTRY-WIDE INSURANCE COMPANY

INDEX NO. 655564/2019
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- v -

CINTIA LETICIA COLMAN BENITEZ
("Eligible Injured Party Defendant")

And

NEWYORK-PRESBYTERIAN/QUEENS F/K/A THE NEW TORK HOSPITAL MEDICAL CENTER OF QUEENS, NEW YORK PRESBYTERIAN AMBULANCE, METROPOLITAN MEDICAL & SURGICAL P.C., COMMUNITY MEDICAL IMAGING P.C., COMMUNITY MEDICAL IMAGING, P.C., QUEENS EMERGENCY MEDICAL ASSOC., ADVANCED SPINAL CARE REHABILITATION PA, HEALTH AND COMFORT RX INC., PDA NY CHIROPRACTIC, P.C., FRANK SAUCHELLI, MD, LIVING WATER ACUPUNCTURE, P.C., MDJ CHIROPRACTIC WELLNESS, P.C., M&D ELITE PHARMACY, LLC, BRONX MEDICAL HEALTH PROVIDER, P.C., VISITING OCCUPATIONAL THERAPY SERVICES, P.C., SABAS NY SERVICES INC, NEW YORK PAIN MANAGEMENT GROUP, PLLC, D/B/A NEW YORK PAIN MANAGEMENT ASSOCIATES, FLORAL PARK PHYSICAL THERAPY, P.C., ELEYINAFE MEDICAL CARE P.C., & FAMILY PHYSICAL THERAPY & REHAB P.C.,
("Medical Provider Defendants")

The following papers, numbered _ to _ were read on this motion to/for _____.

PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is

This case arises from an automobile accident that occurred on September 11, 2018, involving defendant Cintia Leticia Colman Benitez ("Benitez"). Benitez alleges that she sustained serious bodily injuries as a result of the collision that occurred on September 11, 2018, that involved the vehicle that she, the insured, owned. Benitez submitted claims to plaintiff, Countrywide Insurance Company ("Countrywide") for no-fault benefits under the insurance policy that plaintiff issued to the insured. Benitez assigned the rights to collect no-fault benefits to co-defendants/medical

providers. Plaintiff commenced an action on or about September 24, 2019, by a Summons and Complaint, seeking a declaratory judgment against claimant as well as numerous co-defendants/medical providers under Countrywide insurance policy RT 7109017 17, claim number 000339689-001.

First, plaintiff has discontinued this action against defendants FLORAL PARK PHYSICAL THERAPY, P.C., and LIVING WATER ACUPUNCTURE, P.C. (the “releasing defendants”).

Plaintiff now moves for a default judgment pursuant to CPLR 3215 against the non-answering defendants, CINTIA LETICIA COLMAN BENITEZ, NEWYORK-PRESBYTERIAN/QUEENS F/K/A THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, NEW YORK PRESBYTERIAN AMBULANCE, QUEENS EMERGENCY MEDICAL ASSOC., ADVANCED SPINAL CARE REHABILITATION PA, PDA NY CHIROPRACTIC, P.C., FRANK SAUCHELLI, MD, MDJ CHIROPRACTIC WELLNESS, P.C., M&D ELITE PHARMACY, LLC, VISITING OCCUPATIONAL THERAPY SERVICES, P.C., NEW YORK PAIN MANAGEMENT GROUP, PLLC, D/B/A NEW YORK PAIN MANAGEMENT ASSOCIATES, ELEYINAFE MEDICAL CARE P.C., & FAMILY PHYSICAL THERAPY & REHAB P.C. (hereinafter, the “nonanswering defendants”).

Plaintiff also moves for default against the following answering defendants: HEALTH AND COMFORT RX, INC., SABAS NY SERVICES, INC., METROPOLITAN MEDICAL & SURGICAL, P.C., and COMMUNITY MEDICAL IMAGING, P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C. (hereinafter, the “answering defendants”).

Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of defendant’s failure to answer or appear (*see* CPLR 3215; *see also*, *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649 [2nd Dept 2011]). Plaintiff demonstrates prima facie its denial of no-fault claims based on Benitez’s failure to appear for scheduled Examination Under Oaths (“EUO”) on January 4, 2019 and January 23, 2019. Plaintiff submits, *inter alia*: EUO request letters; an affidavit from Jessica Men-Sibrian, no-fault claims litigation/arbitration

supervisor at Countrywide who attests to the processing of bills, requests for additional verification, and issuance of denial of claim forms in this case; an affidavit from Annie Persaud, an Examination Under Oath (“EUO”) clerk at Countrywide, who attests to the mailing of the EUO scheduling letters; and Cody Robar, Esq, attorney for plaintiff, who attests to plaintiff’s non-appearance at the scheduled EUOs. Accordingly, the court grants plaintiff’s default motion against the non-answering defendants.

However, as to the answering defendants, HEALTH AND COMFORT RX, INC., SABAS NY SERVICES, INC., METROPOLITAN MEDICAL & SURGICAL, P.C., and COMMUNITY MEDICAL IMAGING, P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C, plaintiff rejects the answers as untimely (*see* NYSCEF doc no 29, 31 and 33). Plaintiff served defendants COMMUNITY MEDICAL IMAGING P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C., on October 7, 2019, and they answered on November 14, 2019. Plaintiff served defendants HEALTH AND COMFORT RX INC and SABAS NY SERVICES INC on October 7, 2019, and they answered on December 23, 2019. Plaintiff served defendant METROPOLITAN MEDICAL & SURGICAL, P.C., on October 7, 2019, and they answered on December 27, 2019.

Only answering defendants COMMUNITY MEDICAL IMAGING P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C., have opposed plaintiff’s default motion and cross-move for an order to (1) vacate their default, and (2) grant defendants an extension of time to appear and plead.

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, defendants COMMUNITY MEDICAL IMAGING P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C.’s delay in answering was relatively short (only a month after service), 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 COMMUNITY MEDICAL IMAGING P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C. argue that they were served via the Secretary of State, and that it is common practice to extend time between service on the Secretary of State, and defendant’s actual receipt of the pleadings, because the Secretary of State has to then serve the corporation. Defendants also note that the delay in answering was caused by limited resources at defendants’ law firm - that the volume of cases exceeds the number of staff. Further, defendants establish a meritorious defense: that plaintiff’s EUO no-show defense does not apply to defendants, and further, that plaintiff cannot prove that claimant’s injuries were not casually related to an insured incident. As to the remaining answering defendants, although they have answered, they have failed to provide a reasonable excuse for their delay and a meritorious defense, and therefore, the court grants a default judgment against those defendants: HEALTH AND COMFORT RX, INC., SABAS NY SERVICES, INC., METROPOLITAN MEDICAL & SURGICAL, P.C.

Accordingly, it is

ORDERED that plaintiff’s motion for default judgment is granted, in part, against defendants CINTIA LETICIA COLMAN BENITEZ, NEWYORK-PRESBYTERIAN/QUEENS F/K/A THE NEW TORK HOSPITAL MEDICAL CENTER OF QUEENS, NEW YORK PRESBYTERIAN

AMBULANCE, QUEENS EMERGENCY MEDICAL ASSOC., ADVANCED SPINAL CARE REHABILITATION PA, PDA NY CHIROPRACTIC, P.C., FRANK SAUCHELLI, MD, MDJ CHIROPRACTIC WELLNESS, P.C., M&D ELITE PHARMACY, LLC, VISITING OCCUPATIONAL THERAPY SERVICES, P.C., NEW YORK PAIN MANAGEMENT GROUP, PLLC, D/B/A NEW YORK PAIN MANAGEMENT ASSOCIATES, ELEYINAFE MEDICAL CARE P.C., & FAMILY PHYSICAL THERAPY & REHAB P.C. HEALTH AND COMFORT RX, INC., SABAS NY SERVICES, INC., and METROPOLITAN MEDICAL & SURGICAL, P.C. is granted without opposition; and it is further

ORDERED that the court grants defendants COMMUNITY MEDICAL IMAGING P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C.'s cross-motion; and it is further

ORDERED that defendants' COMMUNITY MEDICAL IMAGING P.C., and BRONX MEDICAL HEALTH PROVIDER, P.C.'s filed on or about November 14, 2019, is deemed served nunc pro tunc; and it is further

ADJUDGED AND DECLARED that defendants CINTIA LETICIA COLMAN BENITEZ, NEWYORK-PRESBYTERIAN/QUEENS F/K/A THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, NEW YORK PRESBYTERIAN AMBULANCE, QUEENS EMERGENCY MEDICAL ASSOC., ADVANCED SPINAL CARE REHABILITATION PA, PDA NY CHIROPRACTIC, P.C., FRANK SAUCHELLI, MD, MDJ CHIROPRACTIC WELLNESS, P.C., M&D ELITE PHARMACY, LLC, VISITING OCCUPATIONAL THERAPY SERVICES, P.C., NEW YORK PAIN MANAGEMENT GROUP, PLLC, D/B/A NEW YORK PAIN MANAGEMENT ASSOCIATES, ELEYINAFE MEDICAL CARE P.C., & FAMILY PHYSICAL THERAPY & REHAB P.C. HEALTH AND COMFORT RX, INC., SABAS NY SERVICES, INC., and METROPOLITAN MEDICAL & SURGICAL, P.C. are not entitled to no-fault coverage for the motor vehicle accident that occurred on September 11, 2018, involving individual defendant Cintia Leticia Colman Benitez ("Benitez"), for claims submitted under Countrywide insurance policy RT 7109017 17, claim number 000339689-

001, as referenced in the complaint, and plaintiff has no duty to provide, pay, honor, or reimburse any claims in any current or future proceedings, including without limitation arbitrations and/or lawsuits, seeking to recover no-fault benefits arising out of the September 11, 2018 accident; and it is further

ORDERED that the remaining parties are directed to contact the court at mlivings@nycourts.gov to schedule a phone status conference. Please note that the parties should include all sides on the email, as the court does not accept ex parte communications.

DATED: 5/4, 2020
New York, New York

ENTER:


MELISSA A. CRANE, J.S.C

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER SUBMIT ORDER
FIDUCIARY APPOINTMENT