

Liberty Mut. Ins. Co. v Perez
2020 NY Slip Op 32352(U)
July 17, 2020
Supreme Court, New York County
Docket Number: 655634/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

LIBERTY MUTUAL INSURANCE COMPANY and LIBERTY
MUTUAL FIRE INSURANCE,

Plaintiffs,

INDEX NO. 655634/2018

MOTION DATE 01/10/2020

MOTION SEQ. NO. 001

- v -

AARON PEREZ, A.C. MEDICAL, P.C., ADVANCED SPINAL
CARE REHABILITATION PA, AMERICAN KINETICS LAB
INC. (DISCONTINUED), COLUMBUS IMAGING CENTER
LLC, HAAR ORTHOPAEDICS & SPORTS MEDICINE,
P.C., MANHATTAN BEACH PHARMACY, INC., MAXIUM
CHIROPRACTIC P.C., METRO PAIN SPECIALISTS
PROFESSIONAL CORPORATION, MINGMEN
ACUPUNCTURE SERVICES, P.C., MONTEFIORE
MEDICAL CENTER, NU AGE MED SOLUTIONS INC., and
VITAL CHIROPRACTIC, P.C.,

Defendants.

-----X

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14,
15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45,
46, 47, 48

were read on this motion to/for

JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for a default judgment
against the defendants ADVANCED SPINAL CARE REHABILITATION PA,
MANHATTAN BEACH PHARMACY, INC., MINGEN ACUPUNCTURE SERVICES,
P.C., MONTEFIORE MEDICAL CENTER and NUAGE MED SOLUTIONS INC. is
GRANTED on default; and it is further

ORDERED, ADJUDGED, and DECLARED that plaintiffs LIBERTY
MUTUAL COMPANY and LIBEERTY MUTUAL FIRE INSURANCE are not

obligated to honor or pay claims for reimbursement to ADVANCE SPINAL CARE REHABILITATION PA, MANHATTAN BEACH PHARMACY, INC., MINGEN ACUPUNCTURE SERVICES, P.C., MONTEFIORE MEDICAL CENTER and NUAGE MED SOLUTIONS INC., assignees of the subject claimant insureds, and that the defaulting defendants have no rights to litigate or arbitrate for No-Fault benefits with respect to the alleged accident on September 3, 2017; and it is further

ORDERED that plaintiffs' motion for a default judgment against the defendants METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, COLUMBUS IMAGING CENTER, LCC, and defendant AARON PEREZ (withdrawn) is DENIED, and the action against such defendants is severed and shall continue; and it is further

ORDERED that the cross motion of defendants METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION and COLUMBUS IMAGING CENTER LLC to vacate their default in answering is GRANTED and the answer of such defendants, filed on November 12, 2019 (NYSCEF Document Number 29), shall be deemed served and filed upon service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the remaining parties are directed to appear for preliminary conference in IAS Part 59, Room 331, 60 Centre Street, on August 4, 2020, at 2:30 PM, via Skype for Business, upon filing by any counsel of the standard request for conference from (sfc-conferencerequest@nycourts.gov) at least two days in advance of such date.

DECISION

In this declaratory judgment action, plaintiffs move for a default judgment for the relief demanded in the Complaint pursuant to CPLR 3215 based upon the failure of defendants ADVANCED SPINAL CARE REHABILITATION PA, MANHATTAN BEACH PHARMACY, INC., MINGEN ACUPUNCTURE SERVICES, P.C., MONTEFIORE MEDICAL CENTER and NUAGE MED SOLUTIONS INC. to answer or appear.

Plaintiffs have withdrawn their motion seeking a default judgment against defendant Aaron Perez by Stipulation dated January 8, 2020 (NYSCEF Docket Number 48).

Plaintiffs have submitted proof of service of the summons and complaint and proof of service of this motion upon defendants ADVANCE SPINAL CARE REHABILITATION PA, MANHATTAN BEACH PHARMACY, INC., MINGEN ACUPUNCTURE SERVICES, P.C., MONTEFIORE MEDICAL CENTER and NUAGE MED SOLUTIONS INC. Defendants ADVANCE SPINAL CARE REHABILITATION PA, MANHATTAN BEACH PHARMACY, INC., MINGEN ACUPUNCTURE SERVICES, P.C., MONTEFIORE MEDICAL CENTER and NUAGE MED SOLUTIONS INC. have defaulted in appearance on this motion. Plaintiff has further submitted an affidavit of facts, as well as evidence of the default of defendants by attorney affirmation pursuant to CPLR 3215 (f). Plaintiff has also submitted proof of the additional mailings of the summons required by CPLR 3215(g)(4). This motion is brought within one year of the defaults. The court

shall therefore grant a declaratory judgment on default against the defaulting defendants for the relief sought in the Complaint.

As to defendants METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION and COLUMBUS IMAGING CENTER LLC, such defendants are correct that as no default judgment has yet been entered, "a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer" (Jones v 414 Equities, LLC, 57 AD3d 65, 81 [1st Dept. 2008]). In any event, cross movant Columbus Imaging defendant, by the affidavit of its managing member, does state a meritorious defense, in the form of his representation that, based on the company's books and records, plaintiffs did not issue the denials of its claims within the thirty day statutory deadline from its submission of such claims (see Hertz Vehicles, LLC v Best Touch PT, P.C., 162 AD3d 617, 618 [1st Dept. 2018]). The principal of defendant Metro Pain Specialists P.C. likewise states a meritorious defense, arguing that plaintiffs allegedly failed to timely send the verification requests.

With respect to a reasonable excuse, the affidavit of the managing member of defendant Columbus Imaging Center, LLC, wherein he asserts that Jackie Abreu was not authorized to accept service of process constitutes a reasonable excuse. See Ciafone v Queens Center for Rehabilitation and Residential Healthcare, 126 AD3d 62

(2d Dept. 2015). As defendant Columbus Imaging Center, LLC, does not seek a vacatur of tis default based on lack of personal jurisdiction under CPLR 5015(a)(4), instead, interposing lack of personal jurisdiction as a affirmative defense in the proposed Answer, the court will not now determine the question of whether process was legally served at this time. Compare Wells Fargo Bank, N.A. v Jones, 139 AD3d 520 (1st Dept. 2016).

As to defendant Metro Pain Specialists PC, its failure to update its address with the Secretary of State is not fatal to the grant of relief pursuant to CPLR 317. See Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 142 (1986) and Eastern Alloys, Inc. v Gleason Sec. Service, Inc., 133 AD2d 806 (2nd Dept. 1987). The length of time the such defendant failed to update the address was less than a year. As plaintiffs cannot show prejudice as a result of such delay, and such delay was clearly unintentional, the court exercises its discretion to relieve defendant from its default.

7/17/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE