# 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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ALLSTATE INSURANCE COMPANY

Plaintiff,

- v -

MANALAPAN SURGERY CENTER a/a/o HAPPI HONGLA,

Defendant.

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**INDEX NO.** 654451/2018

**MOTION DATE** 8/28/2020

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action pursuant to Insurance Law § 5106(c) for *de novo* review of a claim for no-fault benefits, this court, by order dated May 30, 2019, granted the plaintiff' s motion for leave to enter a default judgment against the defendant Manalapan Surgery Center a/a/o Happi Hongla, who allegedly sustained injuries in a motor-vehicle accident. The defendant now moves pursuant to CPLR 5015(a)(1) to vacate its default. The plaintiff opposes the motion.

CPLR 5015(a)(1) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person…on the ground of…excusable default if such motion is made within one year after the service of a copy of the judgment or order with written notice of its entry upon the moving party." To vacate a judgment entered on default under CPLR 5015 (a)(1) the moving party must demonstrate both a reasonable excuse for the failure to appear and a potentially meritorious defense to the proceeding. See CPLR 5015(a); Matter of Bendeck v Zablah, 105 AD3d 457 (1st Dept. 2013); Youni Gems Corp. v Bassco Creations Inc., 70 AD3d 454 (1st Dept. 2010). In order to establish a reasonable excuse, the movant must submit facts explaining the reason for its default, and it is "within the court's sound discretion to determine whether the excuse for the default is sufficient." Chevalier v 368 E.148th St. Assoc., LLC, 80 AD3d 411, 413 (1st Dept. 2011); see also Tandy Computer Leasing v Video X Home Library, 124 AD2d 530, 531 (1st Dept. 1986). The defendant has met its burden.

First, the motion is timely made. The plaintiff's affidavit of service avers that the prior order was served on defendant Manalapan by regular mail on June 12, 2019. As the instant motion was made on February 25, 2020, it was made within a year of the service prior order and thus is timely under CPLR 5015(a)(1). As to reasonable excuse for its failure to appear, the defendant denies receipt of the summons and complaint and argues that the plaintiff should have served the summons and complaint upon its attorney who the plaintiff knew was representing the defendant in the recent arbitration. The defendant avers that the plaintiff did that in an effort to conceal this action from the defendant's counsel. According to the affidavit of service, the plaintiff's process server served the defendant corporation by delivering the summons and complaint to an individual named Tara Eppinger at an address in Manalapan, New Jersey, and states that Ms. Eppinger is the "managing agent" for the defendant and is "authorized to accept service on behalf of the corporation."

When it moved for a default judgment, the plaintiff again served only the defendant, doing so by regular mail. See CPLR 3215 (g). The defendant also denies receipt of the default motion. Upon this court's order dated May 30, 2019, the plaintiff entered judgment on June 12, 2019 and mailed a copy of the order with notice of entry to the defendant. The defendant denies receipt of the order, denies knowledge of the action, and claims that, despite the multiple demands for payment it made to the plaintiff from June to October of 2019, the plaintiff not only ignored the demands but never mentioned the action. The defendant asserts that it first learned of the action and the default judgment in October 2019 when it was provided with a copy of this court's previous order by the plaintiff in response to yet an additional demand for payment.

The defendant does not deny that Eppinger was an employee but denies that she is authorized to accept service on behalf of the corporation. However, as correctly observed by the plaintiff, the defendant has not submitted an affidavit of Eppinger or anyone to address that issue. A mere claim that a defendant was not properly served and a conclusory denial of a receipt of certain mailings are insufficient to overcome the presumption of delivery created by the affidavit of service. See U.S. Bank Nat'l Ass'n v Martinez, 139 AD3d 548 (1st Dept 2016); 60 E. 9th St. Owners Corp. v Zihenni, 111 AD3d 511 (1st Dept.2013); Burr v Eveready Ins. Co., 253 AD2d 650 (1st Dept.1998). Nonetheless, the defendant also asserts that the plaintiff should have but did not serve the defendant's counsel with the summons and complaint despite the fact that the arbitration that ended in the defendant's favor had just concluded one month prior.

A similar situation was presented in Allstate Ins. Co. v N. Shore Univ. Hosp., 163 AD3d 745 (2nd Dept. 2018) revg Sup Ct, Nassau County, October 14, 2016, McCormack, J., Index No. 600593/2015. Plaintiff Allstate moved for a *de novo* review of an arbitration award made against it in January 2015 without informing or serving counsel for the defendant. The plaintiff was granted leave to enter a default judgment in April 2015 and the judgment was entered on June 8, 2015. In July 2016, the defendant moved pursuant to CPLR 5015(a)(1) to vacate the default based upon the plaintiff's failure to serve counsel. The trial court denied the motion to vacate, rejecting the argument that failure to serve the defendant's counsel constituted a reasonable excuse. The court found that the defendant was served with the summons and complaint and did not act with diligence in moving to vacate the default. However, on appeal, the Appellate Division, Second Department, reversed and granted the motion to vacate, finding that both a reasonable excuse and a potentially meritorious defense was established. See also Kanarick v Myshkoff, 299 AD3d 169 (1st Dept. 2002) [defendant who arbitrated *pro se* may not assert failure to serve counsel as reasonable excuse for failure to answer complaint]. Indeed, the facts here are even more compelling than in Allstate Ins. Co. v N. Shore Univ. Hosp., supra, in that the defendant here claims not only that counsel should have been served but also that the defendant was never served, and the delay in moving was shorter here. The defendant also asserts facts to support its contention that the plaintiff may have made a deliberate decision to not inform the defendant or counsel in that it failed to mention the action in response to, or even respond to, the defendants several demands for payment. In opposition, the plaintiff makes much of the fact that the defendant waited four months, from October 2019 to February 2020, to make the motion. However, even with the four-month delay, the motion is still timely. Moreover, the plaintiff fails to demonstrate any prejudice suffered by this brief delay. Conclusory assertions of prejudice are not enough. See Tri-State Envtl. Contracting, Inc. v M.H. Kane Const., Inc., 25 AD3d 436 (1st Dept. 2006). There appears to be no willfulness on the part of the defendant as it diligently sought payment of no-fault benefits, albeit to no avail.

In regard to a potentially meritorious defense, the defendant submits the affirmation of counsel, who has personal knowledge of the underlying arbitration proceedings, and the arbitrators' decisions themselves. The arbitrators' review of Happi Hongla's medical records showed "a clear and consistent, linear, progression of the symptomology and treatment from the time of the accident until…right shoulder arthroscopic surgery," and awarded the defendant in excess of $16,000. While the defendant may not ultimately succeed, these submissions

sufficiently demonstrate a potentially meritorious defense for purposes of the motion. See Peacock v Kalikow, 239 AD2d 188 (1st Dept. 1997).

Under the circumstances presented in this case, and in light of the strong public policy in this State of resolving disputes on the merits, granting of the defendant's motion is warranted. See Newyear v Beth Abraham Nursing Home, 157 AD3d 651 (1st Dept. 2018); Wimbledon Financing Master Fund, Ltd. v Weston capital Mgmt. LLC, 150 AD3d 427 (1st Dept. 2017); Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 (1st Dept. 2016).

Accordingly, it is hereby,

ORDERED that the defendant's motion pursuant to CPLR 5015(a)(1) is granted and this court's order dated May 30, 2019, granting the plaintiff's motion for leave to enter a default judgment against the defendant is hereby vacated; and it is further,

ORDERED that the defendant shall serve and file an answer to the complaint, if any, within 20 days of the date of this order, and it is further,

ORDERED that the parties are directed to commence discovery, in a cooperative fashion, employing remote technology whenever possible (see Administrative Order of the Chief Administrative Judge of the Courts AO/129/20) and contact the court on or before November 30, 2020 to schedule a preliminary conference.

This constitutes the Decision and Order of the court.

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

10/23/2020
DATE

| CHECK ONE: | | | | | | | |
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| | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | OTHER |