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| Hereford Ins. Co. v Dowd |
| 2020 NY Slip Op 33880(U) |
| November 20, 2020 |
| Supreme Court, New York County |
| Docket Number: 657520/2019 |
| Judge: Laurence L. Love |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

ANDREW DOWD, BLISS DRUGS INC.,CENTRAL DRUGS INC.,CITIMEDICAL I, PLLC,CMA PSYCHOLOGY, P.C.,CONCIERGE CHIROPRACTIC HEALTHCARE, P.C.,DEO MEDICAL SERVICES P.C.,DOS MANOS CHIROPRACTIC P.C.,FIFTH AVENUE SURGERY CENTER, LLC,HEALTHWISE MEDICAL SERVICES P.C.,HEART HEALTH OF THE SOUTH SHORE, P.C. A/K/A HEART HEALTH OF THE SO. SHORE, IGOR AMIGUD PHYSICIAN P.C.,INTEGRATED PAIN MANAGEMENT, PLLC,INTEGRATED SPECIALTY ASC LLC,JORDAN CHIROPRACTIC, P.C.,M & D ELITE PHARMACY, LLC,M & M SUPPLIES GROUP INC, M EL SAYED PHYSICAL THERAPY, P.C.,MEDAID RADIOLOGY LLC,MEDICAL SUPPLY OF NY CORP, MJG MEDICAL P.C.,PDA NY CHIROPRACTIC, P.C.,PRC SUPPLIES INC, PREMIER ANESTHESIA ASSOCIATES PA, SABAS NY SERVICES INC, SADDLE RIVER HEALTHCARE, STEPHENS ACUPUNCTURE P.C.,TOPLAB, TRIBOROUGH ORTHOPEDICS, P.C.,UNITED PHYSICIANS PLLC,YK SUPPLY INC, NEXRAY MEDICAL IMAGING, P.C.,TMVQS CORP. D/B/A TRINITY PHARMACY, FRANCINE ANDREWS, LUIS BUSTAMENTE, LYASIA ANDREWS, RAFAEL TAVAREZ

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 64, 69, 70, 71, 72, 73, 74, 75, 76, 78

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

Upon the foregoing documents, plaintiff’s motion seeking to enter a default judgment against the non-answering defendants and defendants, CITIMEDICAL I, PLLC, M&M SUPPLIES GROUP, INC., MEDICAL SUPPLY OF NY CORP., and STEPHENS ACUPUNCTURE, P.C.’s cross-motion seeking leave to file a late answer are decided as follows:

DECISION + ORDER ON MOTION

Plaintiff commenced the instant action by filing a summons and complaint on December 17, 2019 and thereafter filed an amended summons and complaint on January 2, 2020. As described in the amended complaint, on June 19, 2019, defendants Francine Andrews, Lyasia Andrews, and Luis Bustamente were passengers in a Hereford-insured livery vehicle, driven by defendant Rafael Tavarez. Said claimants allegedly sustained injuries and sought treatment from the defendant medical providers. Plaintiff seeks a declaratory judgment that it is not obligated to pay no-fault claims arising out of said accident based upon Luis Bustamente's failure to appear for IMEs and a founded belief that Francine Andrews, Lyasia Andrews and Rafael Tavarez's alleged injuries did not arise from the subject accident or that same made material misrepresentations concerning the accident to plaintiff. Prior to attempting service, this action was discontinued as against Heart Health of the South Shore P.C. a/k/a Heart Health of the SO. Shore. On January 25, 2020, Luis Bustamente was served pursuant to CPLR 308(4). On January 17, 2020, Rafael Tavarez was served pursuant to CPLR 308(2). On January 17, 2020, Lyasia Andrews was served pursuant to CPLR 308(1). Plaintiff fails to submit an affidavit of service relating to Francine Andrews. Plaintiff submits affidavits of service relating to all of the corporate defendants. All of the corporate defendant movants were served pursuant to BCL Section 306 on January 3, 2020. On February 24, the defaulting defendants were served with an additional copy of the summons and complaint pursuant to CPLR 3215(g). Plaintiff now moves for a default judgment.

In support of plaintiff's motion, plaintiff submits Claimants' NF-2 forms, the EUO Transcripts of Rafael Tavarez, Lyasia Andrews and Francine Andrews, three affidavits of mailing directing Luis Bustamente to appear for an IME and two affidavits confirming his failure to do so, The affidavit of Stephen Englert, employed by plaintiff as a Special Investigative Unit investigator, which describes plaintiff's "founded belief" that claimant's injuries did not arise out of the subject

accident and/or that the subject accident was not a covered event and the Affidavit of Tony Singh, a No-Fault Claims Supervisor employed by plaintiff, establishing the receipt of one bill relating to Mr. Bustamente from MJG Medial, PC on August 12, 2019. Aside from allegations that plaintiff received thousands of dollars worth of bills related to the claimants, said bills are not submitted with the instant motion nor are dates for the receipt of same detailed.

An initial IME is proper if scheduled by letter mailed within 15 business days of receiving a claim on behalf of that claimant. See *Hertz Vehicles LLC v. Significant Care, PT*, 157 A.D.3d 600, 601 (N.Y. App. Div., 1st Dep't 2018) (citing 11 N.Y.C.R.R. § 65- 3.5(b)). If a claimant fails to appear at the first scheduled IME, a follow-up letter rescheduling the IME is timely if mailed within 10 calendar days of the first nonappearance. See *id.* (citing 11 N.Y.C.R.R. § 65-3.6(b)) A request for an EUO constitutes an additional request for verification, and is thus subject to the same deadlines (*O & M Med., PC v Travelers Indem. Co.*, 47 Misc 3d 134[A], 2015 NY Slip Op 50476[U] [App Term, 2d, 11th, & 13th Jud Dists 2015]; Here, plaintiff fails to establish when the claims at issue were received, establishing only receipt of a bill from MJG Medical on August 12, 2019. As plaintiff does not establish when the claims at issue or NF-2 forms were received by plaintiff, the Court cannot evaluate whether plaintiff's verification requests were timely and as such, the motion must be denied.


A defendant seeking to vacate a default pursuant to CPLR 3215 must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action (see, e.g., *Gray v B. R. Trucking Co.*, 59 NY2d 649, 650; *Blake v City of New York*, 90 AD2d 531). CPLR 3012(d) provides that "[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 support of its motion, moving defendants submit an attorney affirmation alleging that moving defendants' counsel did not receive the summons and complaint in a timely manner based upon plaintiff's use of the Secretary of State as its method of service upon the moving defendants. In support of this claim, counsel submits the affidavit of its paralegal, Carmella Londono, who alleges that she called the New York's Secretary of State Office and that "a representative at the Office informed me that there was a backlog of Summons and Complaints on which to serve defendants, and that this backlog caused the Office to delay service of Summons and Complaints on defendants." The affiant fails to detail when this call was made, who she spoke to, and contains no non-hearsay allegations. Movant also submits the affidavit of Dolores McGovern, a Paralegal in the Declaratory Judgment Department at The Rybak Firm, PLLC, which states "At some point after a healthcare provider who is represented by the Firm receives the Summons and Complaint, that provider will forward the Summons and Complaint to the Firm. In turn, an attorney in my Department will assign me the case for the purpose of preparing an Answer." Affiant then prepares an answer and if necessary, a motion seeking to compel acceptance of a late answer. Ms. McGovern further states "To the extent that the filing of an Answer may have occurred past 30 days from receipt of the Summons and Complaint, such delay was caused by the volume of No-Fault Declaratory Judgment cases at the Firm. This volume exceeds the number of paralegals and attorneys at the Firm that is necessary to respond on behalf of each provider in each case pursuant to the timeframe set forth in CPLR § 320(a)."

The submitted affidavits utterly fail to establish a reasonable excuse for counsel's delay in responding to this action. Service upon the moving defendants was accomplished on January 3, 2020 and defendants were mailed an additional copy of the summons and complaint and served with a motion to enter default on February 24, 2020 yet did not move to vacate their default until

October 9, 2020. The submissions in support of the motion fail to detail when the moving defendants received actual notice of this action and despite plaintiff having established that the moving defendants were notified of their default over seven months prior.

Plaintiff's motion and defendants' cross-motion are hereby DENIED with leave to renew upon proper papers.

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| <u>11/20/2020</u> DATE | | |  LAURENCE L. LOVE, J.S.C. | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | OTHER |
| | | | <input type="checkbox"/> | REFERENCE |