

Country-Wide Ins. Co. v Javier
2021 NY Slip Op 30004(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 650188/2020
Judge: Nancy M. Bannon
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**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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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

HEIDI JAVIER, RIGHT AID MEDICAL SUPPLY, CORP,
GOLDSTAR EQUIPMENT, INC., METRO PAIN
SPECIALISTS, P.C., WHIPLASH CHIROPRACTIC, P.C.,
PRIMAVERA PHYSICAL THERAPY, P.C., PARKSIDE
CHIROPRACTIC, P.C., ACTIVE RANGE PT, PC,
TREMONT DIAGNOSTIC IMAGING PC, WEST
ACUPUNCTURE P.C., SUTPHIN SUPPLY INC

Defendants.

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INDEX NO. 650188/2020
MOTION DATE 12/1/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 39, 40, 41, 42, 43, 44, 45

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

In this action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Heidi Javier (the individual defendant), Whiplash Chiropractic PC, Parkside Chiropractic PC, Active Range PT PC, Tremont Diagnostic Imaging PC and Sutphin Supply Inc. (the non-answering health-care defendants). The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to the individual defendant or to 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 on the grounds that the eligible injured party defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). Defendants Whiplash Chiropractic PC and Parkside Chiropractic PC (Whiplash and Parkside) oppose the motion and cross-move pursuant to CPLR 3012(d) to compel the plaintiff's acceptance of their late answer. The cross-motion is granted, and the motion is granted to the extent discussed herein.

A. Whiplash and Parkside's Cross-Motion to Compel Acceptance of Late Answer

In determining a motion pursuant to CPLR 3012(d), the court takes into account the excuse offered for the defendant's delay in answering, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001).

Here, the default in answering by Whiplash and Parkside does not demonstrate any indication of willfulness or bad faith. Whiplash and Parkside submit affidavits from Avi Weinberger and Leron Collins, their respective owners, each averring that they never received any summons or complaint in this action. Although the affidavits concede that the plaintiff did serve them via the Secretary of State, they contend that they never received the summons and complaint and were not served at the P.O. Box addresses and places of service provided on the previous claims forms and bills they sent to the plaintiff. They further aver that the plaintiff was aware of these addresses, as it sent the denial of claims forms in this action to those addresses. The affidavits also aver that Whiplash and Parkside learned of this action through counsel when Parkside brought a separate action seeking to recover for the unpaid bills in this action in Civil Court. Therefore, the court is inclined to find such a failure to be a reasonable excuse, particularly inasmuch as it would independently warrant a basis for vacatur of a default judgment pursuant to CPLR 317. See Brickhouse Masonry, LLC v Windward Builders, Inc., 101 AD3d 919 (2nd Dept. 2012); Stein v A. Matarasso & Co., 143 AD2d 825 (2nd Dept. 1988); Celifarco v Command Bus Co., 107 AD2d 785 (2nd Dept. 1985). Nor is there any discernible prejudice to the plaintiff in accepting the late answer. While the defenses asserted in the proposed answer are not certain to succeed, at least one is potentially meritorious. Further, the court is mindful of the strong public policy favoring resolution of disputes on the merits. See 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); Jones v 414 Equities LLC, *supra*.

Thus, the cross-motion is granted and the answer attached to Whiplash and Parkside's motion papers is deemed to have been timely served. As the cross-motion is granted, the plaintiff's motion for leave to enter a default judgment against those defendants is denied.

B. Plaintiff's Motion for Leave to Enter Default Judgment as Against the Remaining Defendants

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept. 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st Dept. 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that she was injured in a motor vehicle accident on February 4, 2018, and that she 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 000334196-002, as assignees of the individual defendant, for no-fault benefits under insurance policy number VS 9647231-17. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff received a series of at least five claims from March 30, 2018 through April 12, 2018. The plaintiff mailed its first

notice for an EUO on April 13, 2018 scheduling the individual defendant's EUO on April 26, 2018. The individual defendant did not attend either the first EUO or the second rescheduled EUO on May 17, 2018. The plaintiff denied the insurance claims on May 18, 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 12, 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 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1st 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 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014).

In opposition, Whiplash and Parkside argue that the proof submitted by the plaintiff does not establish that i) the plaintiff's EUO scheduling letters were timely or properly mailed within its receipt of all of the health-care defendants' NF-3 forms, or ii) that the individual defendant failed to appear for her EUO. These contentions are without merit.

The affidavit of Jessica Mena-Sibrian is sufficient to establish a rebuttable presumption of proper mailing. Timely mailing can be established by an affidavit from an employee with knowledge of the party's standard office practices and procedures designed to ensure the items were properly addressed and timely mailed. See Am. Transit Ins. Co. v Lucas, 111 AD3d 423 (1st Dept. 2013). To rebut proper mailing an opposing party must show that that the routine office practice was not followed in this instance or that the scheduling letters were never mailed. See Nassau Ins. Co. v Murray, 46 NY2d 828 (1978). The opposing defendants fail to make any allegations of a deviation from routine office practice or non-mailing, or otherwise rebut the presumption. Moreover, the plaintiff's submission of the affidavit of Annie Persaud, the administrative assistant for the plaintiff who prepares and mails the EUO notices, is sufficient to demonstrate that pursuant to log sheets kept in the regular course of business Javier failed to appear for her duly scheduled EUOs.

Furthermore, to the extent that the opposing defendants argue that the first EUO letter was not sent within 15 business days of all of the NF-3 claims forms, and thus the claims made outside of that time limit must be paid, such a position is belied by the Appellate Division's holding in Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011). A failure to request an EUO within the 15-day limit under 11 NYCRR 65-3.5(b) only serves to reduce the 30-day time limit imposed under New York Insurance Law § 5106 and 11

NYCRR 65.15(g)(3). However, under Unitrin, any assignor's failure to appear for a requested EUO voids the policy *ab initio* such that an insurer may retroactively deny claims to the date of loss regardless of whether the denials were timely issued.

C. Severing Action Against Answering Defendants

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 (1st Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003); Holt v Holt, 262 AD2d 530 (2nd Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3rd 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 cross-motion of defendants Whiplash Chiropractic PC, Parkside Chiropractic PC is granted and the answer attached to their motion papers is deemed to have been timely served and the plaintiff shall accept the same pursuant to CPLR 3012(d), and the plaintiff's motion for leave to enter a default judgment is granted as against the remaining non-answering defendants Heidi Javier, Active Range PT PC, Tremont Diagnostic Imaging PC and Sutphin Supply Inc., and is otherwise denied; and it is further,


ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendant Heidi Javier for injuries that she allegedly sustained in a motor vehicle accident on February 4, 2018, or to defendants Active Range PT PC, Tremont Diagnostic Imaging PC and Sutphin Supply Inc., to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant, under policy number VS 9647231-17, claim number 000334196-002 for injuries that she allegedly sustained in the motor vehicle accident of February 4, 2018; and it is further,

ORDERED that this action is severed and continued as against answering defendants Right Aid Whiplash Chiropractic PC, Parkside Chiropractic PC, Medical Supply Corp., Goldstar Equipment Inc., Metro Pain Specialists PC, Primavera Physical Therapy PC, and West Acupuncture PC; and it is further,

ORDERED that the remaining parties are to jointly contact chambers on or before February 11, 2021 to schedule a preliminary/settlement conference; 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.

This constitutes the Decision and Order of the court.



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

1/4/2020

 DATE

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"/>	<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