SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 36**

Justice

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INDEX NO. 152084/2019

MOTION SEQ. NO. 004

HEREFORD INSURANCE COMPANY,
Plaintiff,

- v -

GENTLE CARE ACUPUNCTURE, P.C., PDA NY CHIROPRACTIC, P.C., REHAB CARE PHYSICAL THERAPY P.C., FIVE BOROUGH SUPPLY INC, LONGEVITY MEDICAL SUPPLY, INC., CITIMEDICAL I, PLLC, CORE BASICS PT, P.C., ALEXANDRE GRIGORIAN, MMA PHYSICAL THERAPY, P.C., ROSS A. FIALKOV DC, P.C., BRONX-LEBANON HOSPITAL CENTER, PREFERRED MEDICAL, P.C., RIGHTWAY PHARMACY, INC., NEW YORK CITY HEALTH AND HOSPITAL, AMELOY LAFORD, JEAN-CARLOS MENDEZ-MOREL, YORKIN MAXIM, ADVANCED SPINAL CARE REHAB, TITAN PHARMACY, BERGENFIELD SURGICAL CENTER, LLC, CPM MED SUPPLY, INC., PREMIER ANESTHESIA ASSOCIATES, P.A., DYNAMIC SURGERY CENTER, MEDIGNA, INC., DLA PHYISICAN ASSISTANT and BMB SOLUTIONS,
Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

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

In this declaratory judgment action, defendants Ameloy Laford ("Laford") and Jean-Carlos Mendez-Morel ("Mendez-Morel") (collectively "claimants") move by order to show cause, pursuant to CPLR 5015(a)(1) and 2005, for an order vacating the default judgment previously entered against them on March 16, 2020, and compelling plaintiff to accept their answer. (NYSCEF Doc. Nos. 98-136). Plaintiff opposes the motion. (NYSCEF Doc. Nos. 137-148). After a review of the relevant statutes and caselaw, the motion is decided as follows.

As relevant background, on May 23, 2018, claimants were occupants of a livery vehicle insured by plaintiff and driven by non-party Christopher Aybar, that was allegedly involved in a collision with another vehicle in the Bronx. Thereafter, claimants sought medical treatment for injuries allegedly sustained from the collision and plaintiff assigned claim number 75561 to all claims arising from the accident. Following an examination under oath ("EUO"), plaintiff commenced this action seeking a declaration that it owed no duty to pay no-fault benefits for

medical treatment sought relating to the subject accident. (NYSCEF Doc. No. 101, *summons and complaint*).[1]

Plaintiff submitted affidavits of service reflecting that, after several attempts to serve claimants with process at their usual place of abode, a copy of the pleadings was served on claimants by "nail and mail" on March 4, 2019. The affidavits of service, however, did not include the times that personal service on claimants was attempted. (NYSCEF Doc. No. 103, *March 4, 2019 affidavits of service*). On March 22, 2019, plaintiff also attempted to effectuate personal service on Laford by delivering a copy of the pleadings to Ana Martinez, a person of suitable age and discretion, at Laford's residence. (NYSCEF Doc. No. 106, *March 22, 2019 affidavit of service on Laford*). On March 26, 2019, plaintiff also served Mendez-Morel at his residence, by delivering the pleadings to his father Geraldo Mendez. (NYSCEF Doc. No. 107, *March 29, 2019 affidavit of service on Mendez-Morel*).

Claimants failed to answer or otherwise appear in this action and, by decision and order filed March 16, 2020, this Court granted plaintiff a default as against several defendants, including claimants, declaring, *inter alia*, that it owed no duty to pay for no-fault benefits relating to the May 2018 collision; that claimants had no injuries arising from said accident; and that any current or future actions or proceedings brought by claimants relating to the May 2018 collision was stayed and dismissed. (NYSCEF Doc. No. 102, *March 2020 decision and order*).

Claimants now move to vacate the default judgment entered against them, arguing that the March 4, 2019 affidavits of service were defective insofar as they failed to mention the times that service was attempted and, thus, insufficient to comply with CPLR 308(4). (NYSCEF Doc. No. 99 ¶ 9). Additionally, claimants argue that plaintiff failed to effectuate proper service pursuant to CPLR 308(2) on March 22 and 26, 2019. (NYSCEF Doc. No. 99 ¶ 11-16). Specifically, in an affidavit submitted in support of the instant motion, Laford affirms that, although plaintiff's March 22, 2019 affidavit of service indicates that "Ana Martinez" received service on her behalf, she denies knowing the identity of this individual; maintains that no one was in her apartment on this date that would meet this description; and that she did not receive any legal papers in the mail. (NYSCEF Doc. No. 104, *Laford's affidavit*).

Similarly, Mendez-Morel affirms that service on him was deficient because the pleadings were served on Geraldo Mendez, his father, who does not speak, write or understand English. Like Laford, Mendez-Morel maintains that he did not receive any legal papers in the mail. (NYSCEF Doc. No. 105, *Mendez-Morel's affidavit*). In an affidavit, Geraldo Mendez affirms that, although he was provided with the legal papers, he did not understand that they were intended for his son and, thus, did not provide them to Mendez-Morel. (NYSCEF Doc. No. 108, *Geraldo Mendez's affidavit*). Moreover, claimants assert that plaintiff's counsel knew that they were represented by counsel, given that they appeared with legal representation at their respective EUOs, and that plaintiff's counsel could have easily reached out to them about their appearance in this action. (NYSCEF Doc. No. 99 ¶ 15).

[1] A related matter, captioned *Ameloy Laford and Jean-Carlos Mendez Morel v Christopher Aybar et al.*, Index No. 23812/2019E, was commenced by claimants in the Bronx against the drivers of the vehicles involved in the May 2018 collision to recover damages for personal injuries allegedly sustained.

Claimants also maintain that their reported injuries were legitimate, establishing a meritorious defense. Furthermore, claimants assert that, in its default judgment motion, plaintiff failed to submit admissible evidence to establish its burden for a declaratory judgment because the complaint was not verified; the police report and the report of motor vehicle accident ("MV-104") were not certified; and the EUO testimony is unsworn and, thus, amounts to hearsay. (NYSCEF Doc. No. 99 ¶ 17-25).[2]

In opposition to the instant application, plaintiff argues that claimants fail to establish a reasonable excuse for their default because, contrary to their contention, there is no requirement that the March 4, 2019 affidavits of service set forth the specific times of their attempt to serve claimants at their residence so as to comply with CPLR 308(4). Plaintiff further argues that, assuming, *arguendo*, the "nail and mail" service was defective, service was properly effectuated pursuant to CPLR 308(2). Service on Ana Martinez, claims plaintiff, was proper because the "affidavit is facially valid and [the process server] is not in the position to determine the legitimacy of the name provided to him when he served process." (NYSCEF Doc. No. 137 ¶ 38, *affirmation in opposition*). According to plaintiff, Mendez-Morel's reliance on his father's inability to speak, write and understand English to establish a reasonable excuse strains credulity because this does not explain why Geraldo Mendez would not understand that an envelope addressed to Mendez-Morel should be delivered to him. (NYSCEF Doc. No. 137 ¶ 41-46). Moreover, the process server who effectuated service on Geraldo Mendez furnishes an affidavit wherein he affirms that he is fluent in Spanish and recalls no difficulties communicating with Geraldo Mendez, who informed him that he was Mendez-Morel's father. (NYSCEF Doc. No. 139, *affidavit of Pedro Rodriguez*).

Addressing the issue of meritorious defense, plaintiff argues, *inter alia*, that claimants improperly rely on the standard of admissible proof for summary judgment motions, which is inapplicable here. Furthermore, plaintiff asserts that the affidavit of its investigator Stephen Englert was sufficient to demonstrate a founded belief disclaimer in the context of a motion for default. The affidavits submitted by claimants, argues plaintiff, "are conclusory and insufficiently detailed so as to establish they were injured in the alleged loss." (NYSCEF Doc. No. 137 ¶ 52-60).

It is well-settled that a party may move to vacate a default if he or she can demonstrate both a reasonable excuse for the default and a meritorious defense. (*see* CPLR 5015[a]; *Liparulo v NY City Health & Hosps. Corp.*, ___AD3d___, ____, 2021 NY Slip Op 02464, *1 [1st Dept 2021]; *Kanat v Ochsner*, 301 AD2d 456, 457 [1st Dept 2003].)

Here, as an initial matter, this Court agrees with claimants that the March 4, 2019 affidavits of service reflecting service by "nail and mail" fails to satisfy the more strenuous standard of CPLR 308(4). CPLR 308(4) applies only when service under CPLR 308(1) and CPLR 308(2) cannot be made after "due diligence." It is well-established that this provision must be "strictly observed" and that the affidavit must demonstrate that service was attempted during times when it could be reasonably expected that defendant was at his or her residence. (*see Farias v Simon*, 73 AD3d 569, 570 [1st Dept 2010]; *County of Nassau v Letosky*, 34 AD3d

[2] The Court declines to consider claimants' reply papers in light of the fact that the Order to Show Cause did not authorize the filing of reply papers and claimants did not seek the permission of this Court to file a reply.

414, 415 [2d Dept 2006].) Since the March 4, 2019 affidavits of service fail to supply any such details about the times when service was attempted, they are defective.

Notwithstanding the foregoing, the claims raised by claimants with respect to personal service under CPLR 308(2) are insufficient to rebut the presumption of proper service created by the March 22 and 29, 2019 affidavits of service. (*see San Lim v MTA Bus Co.*, 190 AD3d 493, 493 [1st Dept 2021]; *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008].) Laford does not dispute that the address reflected in the March 22, 2019 affidavit was her residence. Thus, Laford's bald assertions to the contrary, without more, fail to rebut that an individual at her residence, of suitable age and discretion, provided the process server with the name Ana Martinez and received service on her behalf. This Court also finds unavailing the argument that Geraldo Mendez's inability to speak and understand English rendered service on Mendez-Morel improper. The process server affirms that he had no problem communicating with Geraldo Mendez, which is corroborated by the March 29, 2019 affidavit of service reflecting that he was able to ascertain Geraldo Mendez's relationship to Mendez-Morel. Moreover, Geraldo Mendez's claim that he did not "understand that the papers were for [Mendez-Morel] or that they were important" is wholly rejected. Furthermore, claimant's allegations that additional copies of the pleadings were not mailed to them is belied by the affidavits of service and "[m]ere denial of receipt is not enough to rebut this presumption." (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *see ATM One, LLC v Landaverde*, 2 NY3d 472, 478 [2004].) Equally without merit is the argument that plaintiff had an obligation to inform counsel that represented claimants in their EUO about this litigation.

This Court need not address whether claimants have established a meritorious defense because "[a]bsent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense." (*Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016].) Accordingly, it is hereby

ORDERED that the motion by defendants Ameloy Laford and Jean-Carlos Mendez-Morel is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve all parties with a copy of this decision and order with notice of entry; and it is further

ORDERED that the remaining parties are to appear for a remote conference on June 16, 2021, details for which will be communicated by e-mail no later than June 9, 2021.

This constitutes the decision and order of this Court.

May 6, 2021

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION			
APPLICATION:	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	