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| Liberty Mut. Ins. Co. v Valera |
| 2021 NY Slip Op 31636(U) |
| May 12, 2021 |
| Supreme Court, New York County |
| Docket Number: 650376/2020 |
| Judge: Arthur F. Engoron |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650376/2020

MOTION DATE 02/18/2021

MOTION SEQ. NO. 001

- v -

SANDRA VALERA, ACTIVE CHIROPRACTIC SPINE CARE
PC,AFFINITY RX INC.,AMAZING ANESTHESIA
PC,AZCARE INC.,BIG APPLE MED EQUIPMENT
INC.,CENTRAL SUPPLIES OF NY CORP., CLIFFSIDE
PARK IMAGING & DIAGNOSTIC CENTER LLC,CUSTOM
RX PHARMACY LLC,HEALING SERVICES INC.,JA
PHYSICAL THERAPY PC,LONG ISLAND NY
ACUPUNCTURE PC,METRO PAIN SPECIALISTS,
OPTIMUM HEALTH ACUPUNCTURE PC,RAOUF AKL PT,
RAPID IMAGING CORP., ROXBURY ANESTHESIA
LLC,SURGICORE OF JERSEY CITY LLC,WHIPLASH
CHIROPRACTIC PC,WINTER PT, PC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

Upon the foregoing documents and for the reasons stated hereinbelow, (1) the instant motion, pursuant to CPLR 3215, by plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, for a default judgment is granted in part, on default and on the merits, and denied in part; and (2) the instant joint cross-motion by medical provider defendants Central Supplies of NY Corp and Long Island NY Acupuncture PC is granted.

Background

Plaintiff LM General Insurance Company issued an insurance policy (number AOS22806291940) that was in effect from May 16, 2019 through May 16, 2020 to the claimant-defendant, Sandra Valera. The claimant-defendant used the address 5 Redwood Lane, Wappingers Falls, NY 12590 to obtain the subject insurance policy. On June 24, 2019, the claimant-defendant was allegedly injured in a motor vehicle accident that occurred at or near the intersection of Bronxdale Avenue and White Plains Road in Bronx, New York. The claimant-defendant sought medical treatment for her alleged injuries from the medical provider defendants, namely, Active Chiropractic Spine Care PC; Affinity Rx Inc.; Amazing Anesthesia PC; Azcare Inc.; Big Apple Med Equipment Inc.; Central Supplies of NY Corp; Cliffside Park

Imaging & Diagnostic Center LLC; Custom Rx Pharmacy LLC; Healing Services Inc.; JA Physical Therapy PC; Long Island NY Acupuncture PC; Metro Pain Specialists; Optimum Health Acupuncture, PC; Raouf Akl PT; Rapid Imaging Corp; Roxbury Anesthesia LLC; Surgicore of Jersey City LLC; Whiplash Chiropractic PC; and Winter PT, PC. In their capacities as the claimant-defendant's assignees under the subject insurance policy, the medical provider defendants submitted bills totaling \$64,254.68 for No-Fault reimbursement to plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company. (NYSCEF Doc. 1.)

Plaintiffs then investigated the claimant-defendant's residency and discovered that she listed her address as 2226 Loring Place North, Bronx, New York on her No-Fault application. Due to the discrepancies in the claimant-defendant's address, plaintiffs requested an Examination Under Oath ("EUO") of the claimant-defendant. On October 23, 2019, the claimant-defendant appeared for her scheduled EUO and testified that she resides at 2226 Loring Place North, and her sister resides at 5 Redwood Lane. Plaintiffs concluded that the claimant-defendant misrepresented her address as 5 Redwood Lane to obtain a motor vehicle insurance policy with plaintiffs at a lower rate than that which she could have obtained with the 2226 Loring Place North address. Plaintiffs thus denied all bills that the medical provider defendants, in their capacities as the claimant-defendant's assignees under the subject insurance policy, submitted to plaintiffs. (NYSCEF Doc. 1.)

On December 27, 2019, plaintiffs commenced the instant action, seeking a judgment against defendants (1) declaring that plaintiffs have no duty to provide coverage to and/or pay claims for No-Fault benefits submitted by or on assignment of the claimant-defendant; (2) declaring that plaintiffs are entitled to a permanent injunction against, and ultimate dismissal of, all pending litigation and arbitration arising out of No-Fault bills submitted under the subject insurance policy; (3) barring the medical provider defendants, in their capacities at the claimant-defendant's assignees under the subject insurance policy, from submitting any new bills to plaintiffs and from commencing any new litigation or arbitration for previously-submitted bills that plaintiffs denied; (4) declaring that plaintiffs properly issued their denial of the subject bills; and (5) awarding costs and disbursements to plaintiffs (NYSCEF Doc. 1, at 17). Between February 14 and March 9, 2020, plaintiff served all defendants with the pleadings and with the CPLR 3215(g) additional notice (NYSCEF Documents 14-15).

On March 2, 2020, medical provider defendants Amazing Anesthesia PC and Whiplash Chiropractic PC jointly answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 2).

On April 6, 2020, medical provider defendants Affinity Rx Inc. and Big Apple Med Equipment Inc. jointly answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 3).

On April 7, 2020, medical provider defendant Active Chiropractic Spine Care, P.C. answered the instant complaint with various admissions, denials, thirty Affirmative Defenses, and a counter-claim (essentially for attorney's fees) (NYSCEF Doc. 5). On May 28, 2020, plaintiff replied to said counter-claim (NYSCEF Doc. 7).

On August 12, 2020, medical provider defendants Metro Pain Specialists and Optimum Health Acupuncture, PC jointly answered the instant complaint with various admissions and denials (NYSCEF Doc. 9).

On January 14, 2021, plaintiffs moved, pursuant to CPLR 3215, for a default judgment as against the claimant-defendant and medical provider defendants Azcare Inc.; Central Supplies of NY Corp; Cliffside Park Imaging & Diagnostic Center LLC; Custom Rx Pharmacy LLC; Healing Services Inc.; JA Physical Therapy PC; Long Island NY Acupuncture PC; Raouf Akl PT; Rapid Imaging Corp; Roxbury Anesthesia LLC; Surgicore of Jersey City LLC; and Winter PT, PC; (1) permanently staying and enjoining each and every part of any arbitration or court hearing that the aforementioned defendants brought for No-Fault benefits arising out of the subject alleged accident; and (2) declaring that plaintiffs' denials of all claims that the aforementioned defendants submitted for No-Fault benefits arising out of the subject alleged accident were valid (NYSCEF Doc. 10).

On February 10, 2021, defendants Central Supplies of NY Corp and Long Island NY Acupuncture, PC ("the cross-moving defendants") jointly cross-moved (1), pursuant to CPLR 5015(a)(1), to vacate their default in the instant matter and, upon said vacatur, (2), pursuant to CPLR 3012(d), for an Order extending the cross-moving defendants' time to appear and plead in the instant matter; and (3) to compel plaintiffs to accept, as timely, the cross-moving defendants' answer (NYSCEF Doc. 29). The cross-moving defendants assert, inter alia, the following: (1) the Secretary of State experienced a backlog of pleadings and thus delayed serving the subject pleadings on the cross-moving defendants; and (2) any additional delay arose from the cross-moving defendants' law firm's limited resources, which the COVID-19 pandemic exacerbated (NYSCEF Doc. 30).

On February 18, 2021, plaintiffs opposed the instant cross-motion, asserting, inter alia, the following: (1) on February 12, 2020, plaintiffs served the cross-moving defendants with the CPLR 3215(g)(4) additional notice at the addresses that the cross-moving defendants provided; and (2) the affidavit from the subject law firm's paralegal that the cross-moving defendants submitted in support of their instant cross-motion has insufficient detail (i.e. it does not address when the subject paralegal spoke with the Secretary of State and/or the extent of the Secretary of State's backlog) (NYSCEF Doc. 38).

On February 25, 2021, medical provider defendant Surgicore of Jersey City LLC answered the instant complaint with a denial, thirty-one Affirmative Defenses, and five counter-claims (essentially for attorney's fees, costs, and disbursements) (NYSCEF Doc. 40). On March 8, 2021, plaintiffs responded to said counterclaims (NYSCEF Doc. 42).

On February 26, 2021, medical provider defendant Custom Rx Pharmacy LLC answered the instant complaint with various admissions, denials, and twenty-four Affirmative Defenses (NYSCEF Doc. 41).

On March 8, 2021, plaintiffs rejected, as untimely, medical provider defendant Surgicore of Jersey City LLC's aforementioned February 25, 2021 answer, asserting that said medical

provider defendant failed (1) to seek leave to file a late answer; (2) to demonstrate a reasonable excuse for its subject default; and/or (3) to establish a meritorious defense (NYSCEF Doc. 44).

On March 10, 2021, plaintiffs rejected, as untimely, medical provider defendant Custom Rx Pharmacy LLC's aforementioned February 26, 2021 answer (even when taking New York State COVID-19-related tolling orders into account), asserting that said medical provider failed (1) to seek leave to file a late answer; (2) to demonstrate a reasonable excuse for its subject default; and/or (3) to establish a meritorious defense (NYSCEF Doc. 48).

On March 23, 2021, Amazing Anesthesia PC; Long Island NY Acupuncture PC; Metro Pain Specialists; Raouf Akl PT; Rapid Imaging Corp; and Winter PT, PC jointly answered the instant complaint with various admissions, denials, and twenty-three Affirmative Defenses (NYSCEF Doc. 51). On April 14, 2021, plaintiffs rejected, as untimely, that answer (NYSCEF Doc. 52).

Discussion

The Instant Cross-Motion

The First Department has explained that "a strong public policy exists in this State for resolving disputes on their merits ... a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that the parties may have their day in court." Mate Picnic v Seatrain Lines, Inc., 117 AD2d 504, 508 (1st Dept. 1986).

The cross-moving defendants have established a reasonable excuse and meritorious defense for their delay. Apparently, the Secretary of State had a backlog of pleadings that postponed the cross-moving defendants' receipt of the subject pleadings. The February 10, 2021 affidavits of Carmella Londono and Karina Brandon, paralegals for the cross-moving defendants' law firm, sufficiently support the cross-moving defendants' assertions that the Secretary of State's subject backlog and the subject law firm's limited resources, especially during the COVID-19 pandemic, delayed notice to the cross-moving defendants. (NYSCEF Documents 34-35.)

This Court has considered plaintiffs' other arguments on these issues and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will (1) grant the cross-moving defendants' joint cross motion; (2) vacate the cross-moving defendants' defaults in the instant matter; (3) deem the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 31 as timely served and filed; and (4) compel plaintiffs to accept, as timely, the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 31.

The Instant Motion for a Default Judgment

The (1) February 25, 2021 answer by medical provider defendant Surgicore of Jersey City LLC (NYSCEF Doc. 40); (2) February 26, 2021 answer by medical provider defendant Custom Rx Pharmacy LLC (NYSCEF Doc. 41); and (3) March 23, 2021 joint answer by Amazing Anesthesia PC; Long Island NY Acupuncture PC; Metro Pain Specialists; Raouf Akl PT; Rapid Imaging Corp; and Winter PT, PC. (NYSCEF Doc. 51), are untimely, and, as said medical provider defendants have failed to oppose or otherwise respond to plaintiff's instant motion for a default judgment against them, said medical provider defendants are in default.

Plaintiffs have established that they are entitled to the relief that they seek in the subject complaint and to a default judgment as against the claimant-defendant and medical provider defendants Azcare Inc.; Cliffside Park Imaging & Diagnostic Center LLC; Custom Rx Pharmacy LLC; Healing Services Inc.; JA Physical Therapy PC; Raouf Akl PT; Rapid Imaging Corp; Roxbury Anesthesia LLC; Surgicore of Jersey City LLC; and Winter PT, PC, only, (the immediately aforementioned medical provider defendants and the claimant-defendant, collectively, “the defaulting defendants”) by complying with CPLR 3215(f) and (g) by submitting the following, among other documents: copies of the subject summons and verified complaint (NYSCEF Doc. 13); copies of the subject affidavits of service and the CPLR 3215(g) additional notice (NYSCEF Documents 14-15); and the May 22, 2020 affidavit of Lee Ann Fink, an investigator in the Special Investigations Unit for plaintiff Liberty Mutual Insurance Company (NYSCEF Doc. 18).

To date, the defaulting defendants have failed to answer the instant complaint timely and/or oppose or otherwise respond to the instant motion, and their time to do so has expired.

Therefore, this Court will grant plaintiffs’ motion for a default judgment as against the defaulting defendants and will deny plaintiffs’ motion for a default judgment as against the cross-moving defendants.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion by plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, pursuant to CPLR 3215, for a default judgment is hereby granted, on the merits and on default, as against the claimant-defendant, Sandra Valera, and medical provider defendants Azcare Inc.; Cliffside Park Imaging & Diagnostic Center LLC; Custom Rx Pharmacy LLC; Healing Services Inc.; JA Physical Therapy PC; Raouf Akl PT; Rapid Imaging Corp; Roxbury Anesthesia LLC; Surgicore of Jersey City LLC; and Winter PT, PC, only, and is hereby denied as against medical provider defendants Central Supplies of NY Corp and Long Island NY Acupuncture, PC. The instant joint cross-motion by medical provider defendants Central Supplies of NY Corp and Long Island NY Acupuncture, PC is hereby granted, and, accordingly, this Court hereby (1) vacates the cross-moving defendants’ defaults in the instant matter; (2) deems the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 31 as timely served and filed; and (3) compels plaintiffs to accept, as timely, said answer.

Accordingly, the Clerk is hereby directed to enter judgment (1) declaring that plaintiffs have no duty to provide coverage to and/or pay claims for No-Fault benefits submitted by the claimant-defendant and/or by the defaulting medical provider defendants, in their capacities as the claimant-defendant’s assignees, under the subject insurance policy (number AOS22806291940); (2) declaring that plaintiffs are entitled to a permanent injunction and ultimate dismissal of all pending litigation and arbitration arising out of No-Fault billing submitted under the subject insurance policy, arising out of the alleged June 24, 2019 motor vehicle accident; (3) barring the defaulting medical provider defendants, in their capacities as the claimant-defendant’s assignees under the subject insurance policy, from submitting any new bills to plaintiffs and from commencing any new litigation or arbitration for previously-submitted bills that plaintiffs

denied; (4) declaring that plaintiffs' denials of all claims that the defaulting defendants submitted for No-Fault benefits under the subject insurance policy, arising out of the alleged June 24, 2019 motor vehicle accident, were valid and properly issued; and (5) awarding costs and disbursements to plaintiffs.

The Court requests that, if appropriate, plaintiffs and medical provider defendants Active Chiropractic Spine Care PC; Affinity Rx Inc.; Amazing Anesthesia PC; Big Apple Med Equipment Inc.; Metro Pain Specialists; Optimum Health Acupuncture, PC; Whiplash Chiropractic PC; Central Supplies of NY Corp and Long Island NY Acupuncture, PC (who answered the instant complaint timely) contact our Part Clerk, Margie Ramos-Ciancio, via email at mciancio@nycourts.gov to schedule a preliminary conference, remembering to copy all parties.

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5/12/2021
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE