

Country-Wide Ins. Co. v Fernandez
2021 NY Slip Op 31826(U)
May 27, 2021
Supreme Court, New York County
Docket Number: 651128/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

INDEX NO. 651128/2018
MOTION DATE 09/09/2020
MOTION SEQ. NO. 002

- v -

EDWIN FERNANDEZ, ROOSEVELT FAMILY
CHIROPRACTIC, P.C., ALL COUNTY, LLC, NOVA
CHIROPRACTIC SERVICES P.C., KETAN D. VORA, DO,
P.C., COMMUNITY MEDICAL IMAGING P.C., JY
ACUPUNCTURE P.C., SUNNYVALE PHYSICAL THERAPY,
PLLC, TRI STATE ANESTHESIA GROUP LLC, MAIN
AVENUE CLIFTON SURGERY CENTER, LLC, WH MED
EQUIPMENT INC., CHARLESTON MEDICAL P.C.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

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

Upon the foregoing documents, Community Medical Imaging, P.C. and JY Acupuncture, P.C.'s (collectively the Providers) motion to vacate the decision and order (the Prior Decision; NYSCEF Doc. No. 46), dated December 5, 2018, is granted solely as against the Providers. This action concerns no-fault claims related to a motor vehicle accident involving Edwin Fernandez on July 20, 2016 (the Accident). On April 14, 2017, Country-Wide Insurance Company (the Plaintiff) mailed Mr. Fernandez a letter requesting that he attend an examination under oath on May 4, 2017. He did not appear. On May 8, 2017, the Plaintiff mailed Mr. Fernandez a second letter requesting that he attend an examination under oath on May 26, 2017. He again failed to appear. Thereafter, the Plaintiff denied coverage on June 12, 2018 for Mr. Fernandez's failure to attend the examinations under oath.

On March 9, 2018, the Plaintiff commenced this action against the Providers, among other defendants, to obtain a declaratory judgment that no duty was owed to the defendants for the payment of no-fault claims related to the Accident. The Providers were served through the Secretary of State on March 21, 2018 (NYSCEF Doc. Nos. 5-6). The Plaintiff then moved for default judgment against all defendants on September 24, 2018, which motion was granted pursuant to the Prior Decision on December 5, 2018. The Plaintiff filed an order and judgment with notice of entry on October 17, 2019 (NYSCEF Doc. No. 48). The Providers filed an answer on December 23, 2019 and moved to vacate the Prior Decision on September 9, 2020.

A defendant that seeks to vacate its default under CPLR § 5015 (a)(1) must demonstrate a reasonable excuse for its delay in appearing and a meritorious defense to the action (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). The Providers have set forth a reasonable excuse for their delay in filing an answer. The Providers' counsel adduce an affidavit of their former paralegal, Carmella Londono, attesting that the Office of the New York Secretary of State advised her that there was a backlog of complaints for service and that this backlog caused a delay in timely service of the complaint on the Providers in the instant action (NYSCEF Doc. No. 57). Another paralegal for the Providers' counsel, Dolores McGovern, attests that the firm did not receive the complaint until after the court had rendered the default judgment (NYSCEF Doc. No. 59, ¶ 7). Ms. McGovern also explained that any additional delay in filing an answer was caused by law office failure due to the high volume of no-fault declaratory judgment cases at the firm (*id.*, ¶ 8). Under the circumstances, the Providers' default was not willful but the result of law office failure (*see Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]).

The Providers have also set forth a meritorious defense to the Plaintiff's action. It is well settled that the failure of a person eligible for no-fault benefits to appear for a properly noticed examination under oath constitutes a breach of a condition precedent vitiating coverage (*Natl. Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]). An insurer is nevertheless required to follow the claim procedure under 11 NYCRR § 65-3.5 to properly request an examination under oath. Pursuant to 11 NYCRR § 65-3.5(b), an insurer that receives completed verification forms from providers must request any additional verification to establish proof of claim within 15 business days of receipt of the prescribed verification forms. The Plaintiff did not explain whether it requested the examination under oath within 15 days after receiving the prescribed verification forms, but simply stated that the examination under oath was requested "within a reasonable time from the receipt of bills from the Provider Defendants" (NYSCEF Doc. No. 61, ¶ 29). In addition, the Plaintiff made no showing that there was a "specific objective justification" supporting the use of an examination under oath pursuant to 11 NYCRR § 65-3.5(e) (*see Progressive Northeastern Ins. Co. v Arguelles Med. P.C.*, 2009 NY Slip Op 32353[U] [Sup Ct, NY County 2009]). In the absence of any demonstrable prejudice to the Plaintiff, the strong public policy of this state favors deciding this matter on the merits (*Stephenson v Hotel Empls. & Rest. Empls. Local 100*, 293 AD2d 324, 325 [1st Dept 2002]). Accordingly, the Providers' motion to vacate the Prior Decision against them is granted.

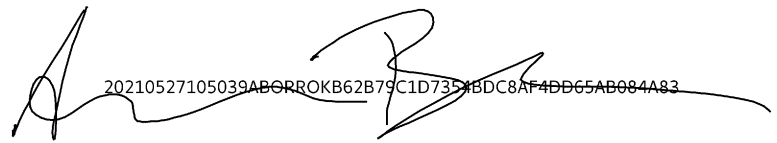
Notwithstanding the foregoing, a review of the papers indicates that the action does not appear to fall within the jurisdictional threshold of the Commercial Division. Therefore, this action is respectfully referred to the general clerk for reassignment to a general IAS part.

Accordingly, it is

ORDERED that Providers’ motion to vacate its default pursuant to the Prior Decision solely as against them is granted on condition that Providers serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that Providers shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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5/27/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE