

Liberty Mut. Ins. Co. v Staples
2022 NY Slip Op 30644(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 656604/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 656604/2020

MOTION DATE 12/27/2021

MOTION SEQ. NO. 001

- v -

ANETTE STAPLES, HOPELAND STAPLES, ALBERTSON
PHARMACY INC, ALEXIOS APAZIDIS MD PC, ALP
SUPPLY INC, ALTERNATIVE PLM ACUPUNCTURE PC,
BETTER HANDS PHYSICAL THERAPY PC, BODY
LOGICS REHAB PT PC, BRIDGES PSYCHOLOGICAL
SERVICES PC, GLENRIDGE CHIROPRACTIC PC,
INTEGRATED CHIROPRACTIC PC, METRO PAIN
SPECIALISTS PROFESSIONAL CORPORATION, MKR
MEDICAL PC, NEXRAY MEDICAL IMAGING
PC, PEACEFUL HEALTH SUPPLIES INC, PERFORMANCE
CHIROPRACTIC PC, RAINE M PESIDAS PHYSICAL
THERAPY PC, RELIABLE ONE SERVICES INC, RENAN
MACIAS, S&M PHARMACY INC

DECISION + ORDER ON
MOTION

Defendants.

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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, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,
44

were read on this motion to/for DEFAULT JUDGMENT.

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave
to enter a default judgment against Anette Staples, Hopeland Staples (the individual
defendants), Albertson Pharmacy Inc, ALP Supply Inc, Better Hands Physical Therapy PC,
Bridges Psychological Services PC, Integrated Chiropractic P, MKR Medical PC, Nexray
Medical Imaging PC, Peaceful Health Supplies Inc, Raine M Pesidas Physical Therapy, and
S&M Pharmacy Inc (collectively, the non-answering medical provider defendants). The plaintiffs
seek a declaration that they are not obligated to pay no-fault benefits under policy number
AOS22800417870, claim number 0414456190002, in connection with injuries that the individual
defendants allegedly sustained in a November 23, 2019 motor vehicle accident, or to reimburse
the non-answering medical provider defendants for treatment they rendered or equipment and

supplies they provided to him for his alleged injuries. The ground alleged is that the individual defendants failed to appear for duly scheduled Examinations Under Oath (EUOs). The plaintiff also moves to permanently stay any arbitrations or court hearings brought by the defendants for no-fault benefits stemming from the alleged November 23, 2019 accident involving the individual defendants. Defendant Bridges Psychological Services PC opposes the motion and cross-moves pursuant to CPLR 3012(d) to compel the acceptance of its late answer. No other defendant opposes the motion. The motion and cross-motion are denied.

As an initial matter, the court notes that the plaintiffs discontinued the action as against defendants Renan Macias MD, Alexios Apazidis MD PC, and Performance Chiropractic PC by stipulations dated February 4, 2021, April 28, 2021, and May 12, 2021, respectively.

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2nd Dept. 2008]).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22–3215.27].” Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., *supra*. While the “quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006).

In support of their motion, the plaintiffs submit, *inter alia*, the pleadings, proof of service, an attorney’s affirmation, the individual defendants’ NF-2 forms, both dated December 16, 2019, and at least one NF-3 form. Notably absent from these submissions are the dates upon which the plaintiffs received these forms. Although counsel, in his affirmation, states the dates upon which certain forms were received, his affirmation is without probative value or evidentiary significance on this motion since counsel claims no personal knowledge of the relevant underlying facts. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East

Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Although the plaintiffs also submit the affidavits of Dawn Smith and Karen Kuitwaard, employees of the plaintiffs, neither states the dates upon which the relevant NF-2 and NF-3 forms were received. As discussed below, this is fatal to the plaintiffs' motion.

The plaintiffs additionally submit the first EUO notices both dated February 7, 2020, scheduling EUOs for February 28, 2020, subsequent EUO notices both dated March 5, 2020, scheduling EUOs for March 24, 2020, and additional EUO notices dated April 1, 2020 scheduling EUOs for April 21, 2020, May 27, 2020, scheduling EUOs for June 15, 2020, and June 17, 2020, scheduling EUOs for July 9, 2020, as well as statements on the record made on some the dates and times the individual defendant was scheduled to appear, which indicate that the individual defendants failed to appear. The plaintiffs also submit an affidavit of their attorney, who was present for the scheduled July 15, 2020, and July 9, 2020 EUOs, at which he states the individual defendants failed to appear. The plaintiffs also submit the NF-10 denial form, which indicates that the claims were denied due to the violation of policy conditions. The denial form states, in pertinent part, that the individual defendants failed to appear for EUOs and that the failure to do so, *i.e.*, comply with conditions of the policy, prevented the plaintiff from obtaining proper proof of the claim.

The plaintiffs' motion must be denied as they failed to submit proof establishing that they complied with the timeliness requirements of 11 NYCRR 65-3.5. The plaintiffs do not establish that the initial notices for EUOs were timely mailed to the individual defendants within 15 days of the receipt of relevant claim forms, such as NF-2 or NF-3 forms, as required by 11 NYCRR 65-3.5(b). Hertz Vehicles, LLC v Best Touch PT, P.C., 162 AD3d 617 (1st Dept. 2018); Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); Am. Transit Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1st Dept. 2015) (citing Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 [1st Dept. 2011]).

Although the plaintiffs do establish that the EUO notices were generated and that the individual defendant did not appear on either date, the plaintiffs fail to demonstrate that the scheduling of the EUOs complied with 11 NYCRR 65-3.5(b) and thus the plaintiffs do not establish a *prima facie* case. Kemper Independence Ins. Co., *supra*; Am. Transit Ins. Co.; *supra*; Unitrin Advantage Ins. Co., *supra*. Thus, even assuming the plaintiffs submitted proof of

service of the summons and complaint and proof of the defendants' default, they failed to submit sufficient proof of the facts constituting the claim. See CPLR 3215(f).

The court turns to the cross-motion of defendant Bridges Psychological Services PC pursuant to CPLR 3012(d). In making a determination under CPLR 3012(d), the court must take into account the excuse offered for the delay in responding to the summons, the extent of the delay, any possible prejudice to the plaintiffs, 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).

As to the excuses for its delay, defendant Bridges Psychological Services PC contends that (i) plaintiffs elected to serve pursuant to BCL § 306 and the Secretary of State is experiencing a backlog that caused a delay in defendant Bridges Psychological Services PC receiving the summons and complaint, and (ii) while counsel received the summons and complaint in January 2021, a paralegal inadvertently failed to draft and file an answer on behalf of defendant Bridges Psychological Services PC, and only realized this oversight on October 8, 2021, upon receiving the notice of motion. As the plaintiffs point out, defendant Bridges Psychological Services PC did not immediately seek to cure its oversight. Rather, it waited a week to file a proposed answer on October 15, 2021.

The court does not find the excuses proffered for the delay to be reasonable. See Pichardo-Garcia v. Josephine's Spa Corp., 91 AD3d 413, 414 (1st Dept. 2012); Perez v New York City Hous. Auth., 47 AD3d 505 (1st Dept. 2008) ("conclusory and perfunctory claim of law office failure," including "inability to keep track . . . does not constitute a reasonable excuse"); Rosenzweig v. Gubner, 194 AD3d 1086 (2nd Dept. 2021) ("conclusory denial of receipt of the summons and complaint failed to rebut the presumption of proper service created by the executed affidavit of service upon the Secretary of State"). Moreover, court notes that service upon the Secretary of State constitutes valid service. See, e.g., Union Indem. Ins. Co. of New York v 10-01 50th Ave. Realty Corp., 102 AD2d 727, 728 (1st Dept. 1984) (citing BCL 306[b]; CPLR 311[1]; Colonial Sand & Stone Co. v Enrico & Sons Contractors, Inc., 66 AD2d 705 [1st Dept. 1978]). While the court is mindful of the public policy that favors resolving cases on the merits, it need not carry the day where the excuses proffered for the delay are, as here, unreasonable. Thus, the application of defendant Bridges Psychological Services PC pursuant to CPLR 3012(d) is denied.

The remaining appearing parties are encouraged to explore settlement.

Accordingly, it is

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice and without costs, as against defendants Renan Macias MD, Alexios Apazidis MD PC, and Performance Chiropractic PC, upon the parties' stipulations dated February 4, 2021, April 28, 2021, and May 12, 2021, respectively; and it is further

ORDERED that the plaintiffs' motion pursuant to CPLR 3215 for leave to enter a default judgment is denied; and it is further

ORDERED that the cross-motion of defendant Bridges Psychological Services PC pursuant to CPLR 3012(d) to compel the late acceptance of its answer is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


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

03/01/2022
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
SEQ 001	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
X-MOT SEQ 001	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHR
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> REFERENCE
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