

**State Farm Fire & Cas. Co. v Accelerated Surgical
Ctr. of N. Jersey, L.L.C.**

2022 NY Slip Op 33341(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 150108/2020

Judge: William Franc Perry

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM FRANC PERRY PART 23

Justice

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

- v -

ACCELERATED SURGICAL CENTER OF NORTH JERSEY, L.L.C., ACCU REFERENCE MEDICAL LAB, L.L.C., ALEXIA'S PHARMACY, INC., ALL BEST TRADING, INC., AMSC, L.L.C., BURKE PHYSICAL THERAPY, P.C., CAREWELL PHYSICAL THERAPY, P.C., CENTER FOR NEURORESTORATIVE MEDICINE, L.L.C., CITIMEDICAL I, PLLC, COLUMBUS IMAGING CENTER, L.L.C., COMPREHENSIVE MEDICAL ASSIST, P.C., COUNTY LINE PHARMACY, L.L.C., CVS PHARMACY, INC., CVS RX, INC., DANIMARK PHYSICAL THERAPY, P.C., DAVID ISRAEL, M.D., ALBERT GRAZIOSA M.D., P.C., BRONX SC, L.L.C., JULY GAYSYNSKY, M.D., G.M. WELLNESS MEDICAL, P.C., HAPPY APPLE MEDICAL SERVICES, P.C., HEALTHPLUS SURGERY CENTER, L.L.C., THE HUDSON REGIONAL HOSPITAL FOUNDATION, INC., JK SPINE HEALTH CHIROPRACTIC, P.C., LLOYD PSYCHOLOGICAL SERVICES, P.L.L.C., NYC MADISON MEDICAL, P.C., M&D ELITE PHARMACY, L.L.C., MDJ CHIROPRACTIC WELLNESS, P.C., MODERN CHIROPRACTIC SOLUTIONS, L.L.C., MODERN SERVICES PAIN MANAGEMENT, P.C., MOONLIGHT ACUPUNCTURE, P.C., NORTHERN OASIS ACUPUNCTURE, P.C., PREMIER ANESTHESIA ASSOCIATES, P.A., PROTECHMED, INC., QBS SOLUTIONS, INC., QUALITY MEDICAL SURGICAL SUPPLIES, L.L.C., REHAB CARE PHYSICAL THERAPY, P.C., RIDGEWOOD DIAGNOSTIC LABORATORY, L.L.C., ARON ROVNER M.D., P.L.L.C., SC CHIROPRACTIC CARE, P.C., SEDATION VACATION PERIOPERATIVE MEDICINE, P.L.L.C., SHERMAN-ABRAMS LABORATORY, INC., SYNERGY CHIROPRACTIC, L.L.C., TRI-STATE MULTI-SPECIALTY MEDICAL SERVICES, P.C., UNICAST, INC., WESTCHESTER RADIOLOGY & IMAGING, P.C., YBD UNIVERSAL CORP., YOU FIRST PHARMACY, INC., JERRY TORAIN, MOHAMED NAGI, MONASIA HENLEY, BRIANA BAUTISTA, ROBERT BROWN

Defendants.

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INDEX NO. 150108/2020
MOTION DATE 09/30/2021
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 129

were read on this motion to/for

REARGUMENT/RECONSIDERATION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for

JUDGMENT - DEFAULT

Plaintiff State Farm Fire and Casualty Company seeks a declaratory judgment that it owes no duty to pay No-Fault benefits pertaining to an alleged motor vehicle collision that occurred July 12, 2018, involving Defendants/Claimants Monasia Henley, Briana Bautista, and Robert Brown, on the grounds that the collision was intentional and that Claimants failed to appear for examinations under oath.

In motion sequence 002, Defendants Burke Physical Therapy PC, Citimedical 1 PLLC, Columbus Imaging Center LLC, Danimark Physical Therapy PC, Modern Chiropractic Solutions LLC, Synergy Chiropractic LLC, and Westchester Radiology & Imaging PC (“Defendants”) move, pursuant to CPLR 2221[d], for leave to reargue and renew Plaintiff’s prior motion for default judgment, which was granted on December 16, 2020 by the Hon. Carol Ruth Feinman, on the grounds that she failed to consider the opposition papers of the Defendants. (NYSCEF Doc No. 103, Ms002 Memo, at ¶¶ 6-7; NYSCEF Doc No. 98, Ms001 D&O.)¹

In motion sequence 003, Plaintiff moves for default judgment against Defendant/Claimant Robert Brown. (NYSCEF Doc No. 117, Ms003 Memo.)

¹ The decision granted default judgment against all Defendants except for County Line Pharmacy LLC, NYC Madison Medical PC, ProTechMed Inc., Unicast Inc., All Best Trading Inc., You First Pharmacy Inc., YBD Universal Corp., Quality Medical Surgical Supplies LLC, and Robert Brown.

Notably, however, the action had already been discontinued against NYC Madison Medical PC (NYSCEF Doc No. 55), ProTechMed Inc. and Unicast Inc. (NYSCEF Doc No. 66), and County Line Pharmacy LLC. (NYSCEF Doc No. 67.)

The action has since been discontinued against All Best Trading Inc. and You First Pharmacy Inc. (NYSCEF Doc No. 100.)

Motion sequence 002

In granting Plaintiff's motion sequence 001 for default judgment, the Hon. Carol Ruth Feinman stated that the "defaulting defendants have not appeared in the instant action, have not opposed the instant motion, and have neither provided a reasonable excuse for default, nor a meritorious defense." (Ms001 D&O at 5.)

Defendants move for reargument on the grounds that the court "clearly overlooked the fact that [] Defendants submitted an Opposition [on November 20, 2020]... which included both a reasonable excuse and meritorious defense." (Ms002 Memo at ¶ 24.)

The motion is denied as untimely. CPLR 2221[d][3] provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, the order determining motion sequence 001 was served upon Defendants on December 21, 2020 (NYSCEF Doc No. 99), giving Defendants until January 21, 2021 to make the instant motion for leave to reargue. Defendants did not move for relief until February 3, 2021. (NYSCEF Doc No. 102.) Accordingly, the motion is denied. (*Trump v Cheng*, 2009 WL 76146 [Sup Ct, NY County 2009] [denying motion to reargue as untimely when made six days late].) The motion is also denied to the extent that it seeks relief pursuant to CPLR 2221[e], as it is not "based upon new facts not offered on the prior motion[.]"

Motion sequence 003

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant's default in answering or appearing. (*SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified

complaint need only allege enough facts to enable a court to determine that a viable cause of action exists.” (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)


Plaintiff submits an affidavit of service demonstrating that service was made upon Robert Brown (NYSCEF Doc No. 119), who, to date, has failed to appear. Plaintiff also meets its burden of submitting “[s]ome proof of liability” (*Feffer v Malpeso*, 210 AD2d 60, 60 [1st Dept 1994]), by submitting an affidavit of merit demonstrating that Brown failed to appear for duly scheduled examinations under oath and that Plaintiff maintains a well-founded belief that the underlying loss was not an insured event. (NYSCEF Doc No. 117 at 22-42.) Accordingly, the motion is granted. It is hereby

ORDERED that motion sequence 002 for leave to renew is denied; and it is further

ORDERED that motion sequence 003 for default judgment against Defendant Robert Brown is granted; and it is further

ORDERED and ADJUDGED that Plaintiff has no duty to pay any no-fault claims submitted by Defendant/Claimant Robert Brown with regard to the alleged July 12, 2018 motor vehicle collision referenced by Plaintiff’s claim number 32-4882-P45; and it is further

ORDERED that the action is severed and continued as to the remaining Defendants, YBD Universal Corp. and Quality Medical Surgical Supplies LLC.

<u>10/04/2022</u> DATE					 WILLIAM FRANC PERRY, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART	<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