

**State Farm Fire & Cas. Co. v 101 Ave. Physical
Therapy P.C.**

2022 NY Slip Op 34297(U)

December 19, 2022

Supreme Court, New York County

Docket Number: Index No. 152715/2020

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO

PART

33M

Justice

-----X

STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff,

- v -

101 AVENUE PHYSICAL THERAPY P.C., SONIA ARMENGOL, ALBERT GRAZIOSA MD, P.C., ALFORD A. SMITH M.D., P.C., AMSC, LLC, ATLAS PT, P.C., BEST HANDS-ON PHYSICAL THERAPY, P.C., BODYBLOOM SERVICES INC, CHANG HEALTH PHYSICAL THERAPY P.C., DAVID ISRAEL, M.D., GO CHIROPRACTIC P.C., HAPPY APPLE MEDICAL SERVICES, P.C., HEAL-RITE PT P.C., KIM CHIROPRACTIC, P.C., LDU THERAPY, INC., MEDAID RADIOLOGY, LLC, PRISCILLA ROSE SANTANA, PURE MIND ACUPUNCTURE P.C., RIVERSIDE MEDICAL SERVICES P.C., SANFORD CHIROPRACTIC, P.C., SPINAL PRO CHIROPRACTIC P.C., SUPPORTIVE PRODUCTS CORP, SYOSSET ACUPUNCTURE, P.C., VAN LOON DME USA INC., CRISTEL MEDINA, HECTOR DIAZ, CINDY RAMIREZ-ANTIGUA, PEDRO JIMENEZ, ANTHONY LUCERO, MANUEL LUCERO

Defendant.

-----X

INDEX NO. 152715/2020
MOTION DATE 09/30/2022
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131

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

Upon the foregoing documents, Defendants' Alford A. Smith, M.D., P.C. ("Smith"), Sanford Chiropractic, P.C. ("Sanford"), Spinal Pro Chiropractic, P.C. ("Spinal"), and Riverside Medical Services, P.C. ("Riverside) (collectively "Moving Defendants") motion to vacate the default judgment entered against them by order of Justice Alexander M. Tisch dated July 2, 2021 (NYSCEF Doc. 96) is denied.

I. Factual and Procedural Background

Plaintiff State Farm Fire & Casualty Company ("State Farm") brought this action on March 12, 2020, seeking a declaratory judgment against the Moving Defendants, amongst others, that it does not owe coverage for an automobile collision that occurred on March 7, 2019 (NYSCEF Doc. 1). Defendants 101 Avenue Physical Therapy P.C., Bodybloom Services Inc., David Israel, M.D., Go Chiropractic P.C., Happy Apple Medical Services, P.C., Kim Chiropractic P.C., and Pure Mind Acupuncture P.C., all filed an Answer on March 24, 2020 (NYSCEF Doc. 2). Defendant Medaid Radiology LLC filed an Answer on June 23, 2020 (NYSCEF Doc. 70). All corporate answering Defendants were filed via the Secretary of State on April 1, 2020, and the answering defendant David Israel, M.D. was served personally on March 19, 2020 (NYSCEF Docs. 4, 11, 15, 16-17, 22, 26, and 28). The Moving Defendants were also each served via the Secretary of State on April 1, 2020 (NYSCEF Docs. 6, 30-31, and 37). On March 15th, 2021, Moving Defendants and a variety of other defendants who had defaulted in answering or filing an appearance were served with a notice of default (NYSCEF Doc. 88).

Despite the notice of default, Moving Defendants and variety of other defendants defaulted in answering or filing an appearance. Therefore, on March 18, 2021, State Farm moved for default judgment against the moving defendants as well as defendants Sonia Armengol, Albert Graziosa MD, P.C., AMSC, LLC, Atlas PT, P.C., Best Hands-On Physical Therapy, P.C., Change Health Physical Therapy P.C., Heal-Rite PT P.C., LDU Therapy, Inc., Priscilla Rose Santana, Supportive Products Corp, Syosset Acupuncture, P.C., Van Loon DME USA Inc, Cristel Medina, Hector Diaz, Cindy Ramirez-Antigua, Pedro Jimenez, Anthony Lucero, and Manuel Lucero (collectively "Defaulting Defendants") (NYSCEF Doc. 82). A notice of motion was served on all of the aforementioned defendants on March 19, 2021 (NYSCEF Doc. 93).

Although the motion for default was filed on March 19, 2021, the Court did not grant default judgment against Defaulting Defendants until an order dated July 2, 2021 by Justice Alexander M. Tisch was filed on NYSCEF on July 7, 2021 (NYSCEF Doc. 96). State Farm filed a notice of entry of the decision and order granting default judgment on September 13, 2021 (NYSCEF Doc. 103). On September 14, 2021, the decision and order granting default judgment was served via mail to all Defaulting Defendants (NYSCEF Doc. 104). A stipulation of settlement dated October 6, 2021 was filed on NYSCEF on November 4, 2021 (NYSCEF Doc. 110). In that stipulation, State Farm settled this action with Defendants 101 Avenue Physical Therapy P.C., Bodybloom Services Inc., David Israel, M.D., Go Chiropractic P.C., Happy Apple Medical Services, P.C., Kim Chiropractic, P.C., and Pure Mind Acupuncture P.C. (*id.*).

On March 11, 2022, State Farm moved to strike Defendant Medaid Radiology LLC's ("Medaid") pleadings and enter default pursuant to CPLR § 3126 (NYSCEF Doc. 111). That motion was unopposed, and Medaid's pleadings were stricken and default was entered by decision and order of this Court dated September 9, 2022 (NYSCEF Doc. 118).

On September 13, 2022, Moving Defendants filed a motion to vacate default judgment pursuant to CPLR § 5015(a)(1) (NYSCEF Doc. 119). State Farm opposed, arguing Moving Defendants have impermissibly waited over a year after default judgment was granted, have failed to proffer any reasonable excuse for their default or delay in moving to vacate, and do not have any meritorious defenses to State Farm's claims (NYSCEF Doc. 128-129).

II. Discussion

Pursuant to CPLR §5015(a)(1), entry of default judgment may be vacated if the defaulting party proffers a reasonable excuse for default, a meritorious defense to a plaintiff's claims, and moves within one year after service of a copy of the default judgment with written notice of entry

(*Towncenter Partners LLC v A.A. Castro Complex Litigation*, 203 AD3d 528 [1st Dept 2022]; *Northern Source, LLC v Kousouros*, 106 AD3d 571 [1st Dept 2013]).

State Farm's affidavit of service for notice of entry of the order granting default judgment was dated September 14, 2021 (NYSCEF Doc. 104). Moving Defendants filed the instant notice of motion on September 13, 2022 (NYSCEF Doc. 119). Therefore, although Moving Defendants waited until the last day to move to vacate, they have timely moved to vacate default judgment (see *Diane v Ricale Taxi, Inc.*, 64 AD3d 432, 433 [1st Dept 2009] [one year time limit begins to run after service of notice of entry]).

However, the Court agrees with State Farm that Moving Defendants have failed to provide a reasonable excuse for their default. First, Riverside did not properly provide an affidavit from someone with personal knowledge in support of its motion to vacate. Indeed, Riverside's affidavit was filed October 5, 2022, after State Farm had already served its opposition to Riverside's motion (NYSCEF Doc. 131). An argument raised for the first time in reply, when the other party has no chance to respond, should not be considered (*TGT, LLC v Advance Entertainment, LLC*, 209 AD3d 552 [1st Dept 2022]; *Simon v FrancInvest, S.A.*, 192 AD3d 565, 569 [1st Dept 2021]). Even if the Court were to consider Riverside's affidavit, it still would not raise a reasonable excuse for Riverside's default. Moving Defendants each submitted an affidavit executed by their respective principals which are, in sum and substance, identical to one another (NYSCEF Doc. 125 and 131). The affidavits do not dispute that service was ever effectuated on the Secretary of State, nor do they state that State Farm did not have the correct mailing address for the notice of default and notice of default motion letters (*id.*). While the affidavits contend that they never received the summons and complaint from the Secretary of State, they do not deny receiving the notice of default letter prior to State Farm moving for default judgment.

Moreover, the affidavits each identically state: “With respect to the instant matter, I learned of this action until sometime after mid-May 2021, when I was advised by counsel that the action had been filed in this Court, Plaintiff had filed a motion for default judgment against my business, and that the Return Date for this Motion had passed [*sic.*] (NYSCEF Doc. 125 at ¶ 11 and 131 at ¶ 11). Based on this statement, the Moving Parties admit they had all been informed by counsel that there was a pending motion for default judgment that had not been entered, and yet took no action for at least a month and a half to prevent default judgment from being entered against them. There is no excuse proffered as to why, upon learning about a pending motion for default judgment that had not been entered, the parties did not file an appearance or otherwise attempt to prevent default judgment from being entered. There is similarly no excuse as to why they waited until the eve of the expiration of the one-year time limit before moving to vacate the default judgment (*Hertz Vehicles, LLC v Gejo, LLC*, 161 AD3d 549, 549 [1st Dept 2018] [finding no reasonable excuse to vacate default judgment where newly retained counsel did not address pending default judgment motion and waited almost another year to move to vacate the default judgment]).

Further, although the Moving Defendants claim that its operations were shut down during the height of the COVID-19 global pandemic which might explain why they did not receive the summons and complaint from the Secretary of State, the Moving Defendants admit that they were operational in March 2021 when State Farm sent a notice of default and a notice of default judgment to the Moving Defendants (NYSCEF Doc. 125 at ¶ 14 and 131 at ¶ 14). Although Moving Defendants claim they were not “fully operational”, in March 2021, they do not provide any detail or specific facts about their mail operations at that time which might allow this Court to find that they have proffered a reasonable excuse for default (*Towncenter Partners LLC v A.A. Castro Complex Litigation*, 203 AD3d 528 [1st Dept 2022] [no reasonable excuse where

conclusory statements in affidavit not backed up by further details or evidence to support statements]; *Andrews v Wartburg Receiver, LLC*, 203 AD3d 1000, 1001 [2d dept 2022] [mere denial of receipt of the summons and complaint, without more, is insufficient to demonstrate a reasonable excuse for a default pursuant to CPLR § 5015(a)(1)]. Finally, where, as here, the Moving Parties have been dilatory in asserting their rights, they are not entitled to a favorable exercise of the Court's discretion (*ADL Constr., LLC v Chandler*, 78 AD3d 407, 407 [1st Dept 2010]; *Hyundai Corp. v Republic of Iraq*, 20 AD3d 56, 63 [1st Dept 2005] *lv dismissed* 5 NY3d 783 [2005]).

Without a reasonable excuse for their default, Moving Defendants are not entitled to vacate default judgment (*Bardwil v Bardwil*, 208 AD3d 1087, 1088 [1st Dept 2022]). However, even if the Court were to analyze whether Moving Defendants provided a meritorious defense, the Court would still not be able to grant Moving Defendants the relief they seek. Indeed, in support of their purported meritorious defenses, Moving Defendants have not submitted a single exhibit aside from conclusory and self-serving affidavits (*see Northern Source, LLC v Kousouros*, 106 AD3d 571, 572 [1st Dept 2013] [failure to submit exhibits as evidence of meritorious defenses prevented vacatur under CPLR § 5015(a)(1)]). The only argument submitted in each of the Moving Defendants' affidavits was that State Farm failed to timely deny the mailing of the bills and that the bills remain unpaid; however, none of the bills were produced, nor was proof of mailing of the bills, or any ledger reflecting that the bills had not been paid (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997] [in order to demonstrate meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts and that individual must make sufficient factual allegations which are more than conclusory allegations or vague assertions]). Here, the Moving Defendants' affidavits (which are almost completely identical) do not state any specific facts

related to their treatment of the insured, when they mailed in claims for payment, when the claims for payment were denied, or any other fact which might aid this Court in finding a meritorious defense. The conclusory and cookie-cutter affidavits are insufficient to vacate default judgment.

Accordingly, it is hereby,

ORDERED that Defendants Alford A. Smith, M.D., P.C., Sanford Chiropractic, P.C., Spinal Pro Chiropractic, P.C., and Riverside Medical Services, P.C.'s motion to vacate default is denied; and it is further

ORDERED that within 10 days of entry, counsel for State Farm serve, with notice of entry, a copy of this decision and order on all parties to this action; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the Decision and Order of the Court.

12/19/2022
DATE

Mary V. Rosado JSC
HON. MARY V. ROSADO, 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