

Liberty Mut. Ins. Co. v Mercado
2023 NY Slip Op 30116(U)
January 12, 2023
Supreme Court, New York County
Docket Number: Index No. 650161/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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LIBERTY MUTUAL INSURANCE COMPANY and LIBERTY
MUTUAL FIRE INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 650161/2020

MOTION DATE 02/25/2021

MOTION SEQ. NO. 001

- v -

DILIA ESCANO MERCADO, JOSE MERCADO, MIGUEL
ANGEL SANTIAGO, ALL BEST TRADING INC., BEST
HANDS PHYSICAL THERAPY PC, BRONX MEDICAL
HEALTH PROVIDER, PC, BURKE PHYSICAL THERAPY
PC, CHANG HEALTH PHYSICAL THERAPY PC, KIM
CHIROPRACTIC PC, MAX JEAN-GILLES PHYSICAN
PC, RIDGEWOOD DIAGNOSTIC LABORATORY,
RIVERSIDE MEDICAL SERVICES PC, SUPPORTIVE
PRODUCTS CORP., and SYOSSET ACUPUNCTURE PC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

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

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that the motion of plaintiffs
LIBERTY MUTUAL INSURANCE COMPANY and LIBERTY MUTUAL FIRE
INSURANCE COMPANY seeks a default declaratory judgment against
DILIA ESCANO MERCADO, JOSE MERCADO, MIGUEL ANGEL SANTIAGO, BEST
HANDS PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY PC, MAX
JEAN-GILLES PHYSICAN PC, RIDGEWOOD DIAGNOSTIC LABORATORY,
RIVERSIDE MEDICAL SERVICES PC, SUPPORTIVE PRODUCTS CORP., and

SYOSSET ACUPUNCTURE PC, such motion is granted, without opposition; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiffs LIBERTY MUTUAL INSURANCE COMPANY and LIBERTY MUTUAL FIRE INSURANCE COMPANY are not obligated to honor or pay claims for reimbursement as assignees of defendant DILIA ESCANO MERCADO, JOSE MERCADO and MIGUEL ANGEL SANTIAGO to defendant medical providers and defendant medical providers ALL BEST TRADING INC., BEST HANDS PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY PC, MAX JEAN-GILLES PHYSICIAN PC, RIDGEWOOD DIAGNOSTIC LABORATORY, RIVERSIDE MEDICAL SERVICES PC, SUPPORTIVE PRODUCTS CORP., and SYOSSET ACUPUNCTURE PC and defendants ALL BEST TRADING INC., BEST HANDS PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY PC, KIM CHIROPRACTIC PC, MAX JEAN-GILLES PHYSICIAN PC, RIDGEWOOD DIAGNOSTIC LABORATORY, RIVERSIDE MEDICAL SERVICES PC, SUPPORTIVE PRODUCTS CORP., and SYOSSET ACUPUNCTURE PC have no rights to litigate or arbitrate for No-Fault benefits with respect to the April 15, 2019 alleged accident under policy number A02-228-284802-40; and it is further

ORDERED that the action against the remaining defendants is severed and shall continue; and it is further

ORDERED that to the extent that it seeks a default declaratory judgment against KIM CHIROPRACTIC PC, BRONX MEDICAL

HEALTH PROVIDER, PC, and BURKE PHYSICAL THERAPY PC, the motion of plaintiffs is denied; and it is further

ORDERED that the cross motion of defendants BRONX MEDICAL HEALTH PROVIDER, PC, and BURKE PHYSICAL THERAPY PC to vacate their default in answering and to compel plaintiffs to accept their answer dated December 28, 2020 (NYSCEF Doc No 31) is granted, and such answer is deemed filed and served effective upon service of a copy of this Order with Notice of Entry; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary discovery conference order or proposed competing preliminary discovery conference order(s) at least two days before February 21, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

In this declaratory judgment action, plaintiffs LIBERTY MUTUAL INSURANCE COMPANY and LIBERTY MUTUAL FIRE INSURANCE COMPANY move for a default judgment for the relief demanded in the Complaint pursuant to CPLR 3215 based upon the failure of defendants DILIA ESCANO MERCADO, JOSE MERCADO, MIGUEL ANGEL SANTIAGO, BEST HANDS PHYSICAL THERAPY PC, BRONX MEDICAL HEALTH PROVIDER, PC, BURKE PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY PC, KIM CHIROPRACTIC PC, MAX JEAN-GILLES PHYSICAN PC,

RIDGEWOOD DIAGNOSTIC LABORATORY, RIVERSIDE MEDICAL SERVICES PC, SUPPORTIVE PRODUCTS CORP., and SYOSSET ACUPUNCTURE PC to answer or appear.

Plaintiffs have submitted proof of service of the summons and complaint and proof of service of this motion upon each such defendant. Defendants DILIA ESCANO MERCADO, JOSE MERCADO, MIGUEL ANGEL SANTIAGO, BEST HANDS PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY PC, MAX JEAN-GILLES PHYSICAN PC, RIDGEWOOD DIAGNOSTIC LABORATORY, RIVERSIDE MEDICAL SERVICES PC, SUPPORTIVE PRODUCTS CORP., and SYOSSET ACUPUNCTURE PC have defaulted in appearance on this motion. Plaintiffs have further submitted an affidavit of facts pursuant to CPLR 3215 (f), as well as evidence of the default of such defendants by attorney affirmation. Plaintiffs have also submitted proof of the additional mailings of the summons required by CPLR 3215(g)(4). This motion is brought within one year of the default. The court shall therefore grant a declaratory judgment on default against the foregoing defendants for the relief sought in the Complaint.

The court denies the motion of the plaintiffs to the extent that it seeks a default declaratory judgment against defendant KIM CHIROPRACTIC PC, BRONX MEDICAL HEALTH PROVIDER, PC and BURKE PHYSICAL THERAPY PC. In its opposition and on their cross motion to vacate their defaults, defendants defendant KIM

CHIROPRACTIC PC, BRONX MEDICAL HEALTH PROVIDER, PC and BURKE PHYSICAL THERAPY PC., respectively, demonstrate a reasonable excuse and meritorious defense. The short staffing of counsel at the outset of COVID-19 pandemic has been held to constitute a reasonable excuse. See Park v Kim, 205 AD3d 429 (1st Dept 2022). As argued by counsel for defendant KIM CHIROPRACTIC PC, the motion of plaintiffs is premature as the toll for service of the answer under Executive Order 202.8 had not yet expired when such motion was filed. As for a meritorious defense, defendants assert that plaintiffs did not comply with the no-fault regulations, such as the timeframes for mailing of the examinations under oath notices. See Viviane Etienne Medical Care, PC v Country-Wide Ins Co, 25 NY3d 498 (2015).

Debra A. James

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1/12/2023

DATE

DEBRA A. JAMES, 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