

**State Farm Mut. Auto. Ins. Co. v Diouf**

2023 NY Slip Op 31804(U)

May 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 525477/2019

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 25th day of May 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Index No. 525477/2019

Plaintiff,

-against-

INDIVIDUAL DEFENDANTS

SAMBA DIOUF., MARCELINO CASTRO-MARTINEZ., ATAHUALPA RODRIQUEZ., JASON SANCHEZ JUARBE., JOHN M. HIRALDO TORRES., GUSTAVO GUTIERREZ., COURIER CAR RENTAL, INC.,

HEALTH CARE DEFENDANTS

AZCARE, INC., BODYBLOOM SERVICES, INC., BRONX COUNTY ACUPUNCTURE, P.C., CONRAD F. CEAN, M.D., CITIMEDICAL I, PLLC., CUSTOM RX PHARMACY, LLC., ELMWOOD PARK MEDICAL GROUP, P.C., FLEX CHIROPRACTIC, P.C., GOLDSTAR EQUIPMENT, INC., LODES ACUPUNCTURE AND PHYSICAL THERAPY, PLLC., MCCULLOCH ORTHOPAEDIC SURGICAL SERVICES, P.L.L.C, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION., MOGUL SUPPLIES, INC., PRIMAVERA PHYSICAL THERAPY, P.C., OPTIMUM HEALTH CHIROPRACTIC, P.C., PREFERRED MEDICAL, P.C., PRIMAVERA ACUPUNCTURE, P.C., RAPID IMAGING, LLC., SHORE PARKWAY CHIROPRACTIC, P.C., and THIRD AVENUE MEDICAL CARE, P.C.,

Defendants.

The following e-filed papers read herein:

NYSCEF Doc. No.

Notice of Motion for Default and Affidavits (Affirmations) and Exhibits.....	33-70
Notice of Cross-Motion and Opposition/Affidavit and Exhibits.....	75-82
Opposing Affidavit (Affirmation) to Cross-Motion and Exhibits.....	83-86
Letter to the Court.....	88

This action, commenced on November 21, 2019, seeks a declaratory judgment for the following relief: (a) that State Farm Mutual Automobile Insurance Company ("plaintiff") is not obligated to provide any coverage, reimbursements, or pay any monies, sums, or funds to any defendants named herein for any and all No-Fault related services for which claims/bills have been, or may in the future be, submitted by defendants to plaintiff, by or on behalf of Marcelino Castro-Martinez and Atahualpa Rodriguez; (b) that the alleged motor vehicle incident of December 8, 2018 (State Farm claim number 32-7123- M82) was not the product of a covered event as defined by the applicable policy of insurance issued by plaintiff because the incident of December 8, 2018 was the product of a staged and/or intentional event; and (c) that State Farm, by reason of no coverage and since the alleged incident of December 8, 2018 (State Farm claim number 32-7123- M82) was the product of a staged and/or intentional event, is not required to pay any sums, monies, damage awards and/or benefits to any defendants named herein, their agents, employees, assignors and/or heirs arising out of any current or future proceedings, all uninsured/underinsured motorist lawsuits and arbitrations, arbitrations and lawsuits seeking to recover no-fault benefits, third-party lawsuits and arbitrations, and all claims for property damage arising out of the alleged incident of December 8, 2018.

After the time to answer expired, plaintiff moved, in motion sequence #1, pursuant to CPLR 3215, for a default judgment against defendants Samba Diouf, Marcelino Castro-Martinez, Atahualpa Rodriguez, John M. Hiraldo Torres, Azcare, Inc., Bronx County Acupuncture, P.C., Custom Rx Pharmacy, LLC, Elmwood Park Medical Group, P.C., Flex Chiropractic, P.C., Lodes Acupuncture and Physical Therapy, PLLC, McCulloch Orthopaedic Surgical Services, PLLC, Mogul Supplies, Inc, Optimum Health Chiropractic, P.C., Preferred Medical, P.C., Shore Parkway Chiropractic, P.C., and Third Avenue Medical Care, P.C. Defendant Lodes Acupuncture and Physical Therapy PLLC ("Lodes Acupuncture") opposed the motion and cross-moved, in motion sequence #2, pursuant to CPLR 5015(a)(1) and CPLR

3012(d), to vacate its default and extend the time to appear and file an answer. State Farm opposed the cross-motion.

### Motion

“On a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant’s default.” *Travelon, Inc. v. Maekitan*, \_\_ N.Y.S.3d \_\_, 2023 NY Slip Op 01816 (2d Dept. 2023). Moreover, “[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.” CPLR 3215(g)(4)(i).

Upon review of the papers submitted, including proof that defendants failed to appear or answer the verified complaint, affidavits of service, proof of compliance with CPLR 3215(g)(4)(i), the police report, conflicting examinations under oath from defendants involved in the collision, an investigative claim report, and an affidavit from a State Farm Claims Specialist, who concluded that the collision was a staged event, plaintiff demonstrated its entitlement to a default judgment against defendants Samba Diouf, Marcelino Castro-Martinez, Atahualpa Rodriguez, John M. Hiraldo Torres, Azcare, Inc., Bronx County Acupuncture, P.C., Custom Rx Pharmacy, LLC, Elmwood Park Medical Group, P.C., Flex Chiropractic, P.C., Lodes Acupuncture and Physical Therapy, PLLC, McCulloch Orthopaedic Surgical Services, PLLC, Mogul Supplies, Inc, Optimum Health Chiropractic, P.C., Preferred Medical, P.C., Shore Parkway Chiropractic, P.C., and Third Avenue Medical Care, P.C.

### Cross-Motion

In order "[t]o extend the time to answer the complaint and to compel [a] plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action." *Cumanet, LLC v. Murad*, 188 A.D.3d 1149, 137 N.Y.S.3d 412 (2d Dept 2020). See CPLR 5015(a); *259 Milford, LLC v. FV-1, Inc.*, 211 A.D.3d 658, 179 N.Y.S.3d 707 (2d Dept 2022); *Bank of New York Mellon v. Tedesco*, 174 A.D.3d 490, 104 N.Y.S.3d 193 (2d Dept. 2019); *LaSalle Bank Nat. Ass'n v. Calle*, 153 A.D.3d 801, 61 N.Y.S.3d 104 (2d Dept. 2017).

Plaintiff served the summons and verified complaint upon Lodes Acupuncture via the Secretary of State on December 4, 2019. The additional CPLR 3215(g)(4)(i) notice was mailed to Lodes Acupuncture on January 14, 2020. The principal of Lodes Acupuncture indicated that his counsel, The Rybak Firm, PLLC, informed him of the action and the pending default judgment motion in or around January 2021. He had no recollection of personally receiving the summons and verified complaint from the Secretary of State or anyone else. Still, it is possible that his staff received it but did not bring it to his attention. He also stated that had the summons and verified complaint been brought to his attention, he would have directed his staff to forward it to his counsel, and even if the summons and verified complaint was not brought to his attention, his staff would have processed and forwarded the summons and verified complaint to his counsel.

In addition, a paralegal from The Rybak Firm, PLLC indicated she contacted the Secretary of State and was informed that there was a backlog of summonses and complaints to be served on defendant. The paralegal did not state when she contacted the Secretary of State, whether the instant summons and verified complaint was included within the backlog or provide proof thereof. Neither the principal nor the paralegal indicated whether the Secretary of State eventually forwarded the summons and verified complaint after the alleged delay. State

Farm noted that The Rybak Firm, PLLC represents several of the medical provider defendants in this action. The firm filed an answer for those defendants in March of 2020.

Here, Lodes Acupuncture failed to demonstrate a reasonable excuse for its delay in answering the verified complaint. Service upon the Secretary of State creates a presumption of proper service. *See Tan v. AB Capstone Dev., LLC*, 163 AD3d 937, 83 N.Y.S.3d 86 (2d Dept 2018). While the Court is aware that delays were reported concerning the Secretary of State's actual delivery of process to corporations, Lodes Acupuncture failed to substantiate that the Secretary of State delayed forwarding this summons and verified complaint and, as a result, caused Lodes Acupuncture's failure to timely answer. Considering that Lodes Acupuncture did not demonstrate a reasonable excuse, the Court need not consider whether a potentially meritorious defense exists. *See Dawkins v. Isole*, 206 A.D.3d 878, 171 N.Y.S.3d 517 (2d Dept 2022).

#### Conclusion

Accordingly, plaintiff State Farm Mutual Automobile Insurance Company is granted entry of a default judgment against defendants Samba Diouf, Marcelino Castro-Martinez, Atahualpa Rodriguez, John M. Hiraldo Torres, Azcare, Inc., Bronx County Acupuncture, P.C., Custom Rx Pharmacy, LLC, Elmwood Park Medical Group, P.C., Flex Chiropractic, P.C., Lodes Acupuncture and Physical Therapy, PLLC, McCulloch Orthopaedic Surgical Services, PLLC, Mogul Supplies, Inc, Optimum Health Chiropractic, P.C., Preferred Medical, P.C., Shore Parkway Chiropractic, P.C., and Third Avenue Medical Care, P.C.

Defendants Samba Diouf, Marcelino Castro-Martinez, Atahualpa Rodriguez, John M. Hiraldo Torres, Azcare, Inc., Bronx County Acupuncture, P.C., Custom Rx Pharmacy, LLC, Elmwood Park Medical Group, P.C., Flex Chiropractic, P.C., Lodes Acupuncture and Physical Therapy, PLLC, McCulloch Orthopaedic Surgical Services, PLLC, Mogul Supplies, Inc, Optimum Health Chiropractic, P.C., Preferred Medical, P.C., Shore Parkway Chiropractic, P.C., and Third Avenue Medical Care, P.C. are not entitled to no-fault benefits with regard to the

alleged motor vehicle incident of December 8, 2018, and State Farm Mutual Automobile Insurance Company is not obligated to honor or pay any claims for reimbursement submitted by these defaulting defendants to State Farm Mutual Automobile Insurance Company, by or on behalf of Marcelino Castro-Martinez and Atahualpa Rodriguez, under State Farm claim number 32-7123- M82.

Defendant Lodes Acupuncture and Physical Therapy, PLLC's cross-motion to vacate its default and extend the time to appear and file an answer is denied.

The case is reassigned to an IAS Part.

Plaintiff shall settle or submit judgment on notice.

This constitutes the Decision and Order of the Court.

For Clerks use only  
MG\_\_\_\_  
MD\_\_\_\_  
Motion Seq.#: 1, 2

ENTER  
J.S.C.  
**HON. GENINE D. EDWARDS**