

**State Farm Mut. Auto. Ins. Co. v Accurate
Monitoring, LLC**

2023 NY Slip Op 32311(U)

July 10, 2023

Supreme Court, New York County

Docket Number: Index No. 156739/2019

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 156739/2019

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

MOTION SEQ. NO. 002

Plaintiff,

- v -

ACCURATE MONITORING, LLC, ACTIVE RANGE P.T.,
P.C., ADVANCED PHARMACY, INC., ADVANCED SPINAL
CARE REHABILITATION PA, ALL CITY FAMILY
HEALTHCARE CENTER, INC., A.M.A. SUPPLY, INC.,
BLISS DRUGS, INC., CUSTOM RX PHARMACY, LLC,
EXCELL CLINICAL LAB, INC., FORWARD
CHIROPRACTIC, P.C., GOLDSTAR EQUIPMENT, INC.,
HARLEM HOSPITAL CENTER AUXILIARY, INC. A/K/A
HARLEM HOSPITAL CENTER, HERSCHEL KOTKES,
M.D., LENCO DIAGNOSTIC LABORATORIES, INC., LIFE
EQUIPMENT, INC., METRO PAIN SPECIALISTS
PROFESSIONAL CORPORATION, MOUNT SINAI
MEDICAL SUPPLY, INC., NEUROPHYSIOLOGIC
INTERPRETIVE MEDICINE, PLLC, PARKSIDE
CHIROPRACTIC, P.C., PRIMAVERA PHYSICAL
THERAPY, P.C., SEDATION VACATION PERIOPERATIVE
MEDICINE, PLLC, TOWERS NY, INC., WELCOME
CHIROPRACTIC, P.C., WEST ACUPUNCTURE, P.C.,
WESTCHESTER RADIOLOGY & IMAGING, P.C.,
DOMANIC GILL, MICHAEL GUINYARD, ANDREW
EDMONDSON,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76,
77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

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

In this declaratory judgment action, defendants All City Family Healthcare Center, Inc.,
Goldstar Equipment, Inc., Metro Pain Specialists Professional Corporation, Primavera Physical
Therapy, P.C., West Acupuncture, P.C., and Westchester Radiology & Imaging, P.C. (collectively,
defendant movants) move, pursuant to CPLR 317 and 5015(a), to vacate this Court's prior order
granting a default judgment against them and compel plaintiff to accept a late answer.

Factual and Procedural Background

This case arises from a motor vehicle accident on November 10, 2017 (NYSCEF Doc No. 1). Plaintiff commenced this action against defendants in July 2019 seeking a declaratory judgment that it was not obligated to cover various insurance claims submitted by defendants as a result of the accident (Doc No. 1). Shortly thereafter, after defendants failed to answer or otherwise appear in this action, plaintiff moved for a default judgment against them (Doc No. 36). By decision and order of December 4, 2020, plaintiff's motion was granted and a default judgment was issued (Doc No. 62). Defendant movants now move for an order vacating the default judgment against them and compelling plaintiff to accept a late answer (Doc No. 72).

Legal Conclusions

Defendant Movants Request to Vacate the Default Judgment Pursuant to CPLR 317

Defendant movants contend that vacatur of the default judgment under CPLR 317 is warranted because they did not personally receive the summons and complaint from the Secretary of State, and they submitted affidavits from their principals averring as much. However, defendant movants' affidavits are conclusory and offer no specific details regarding why they never received the summons and complaint. "[Such] conclusory denial of receipt of the summons and complaint from the Secretary of State, although the address used was . . . [the] correct business address, is insufficient to rebut the presumption of service created by the Secretary of State's affidavit of service" (*Country-Wide Ins. Co. v Power Supply, Inc.*, 179 AD3d 405, 406 [1st Dept 2020] [affirming denial of motion to vacate where defendant served via Secretary of State because defendant's denial of service was conclusory]; see *Gonzalez v City of New York*; 106 AD3d 436, 437 [1st Dept 2013] [similar]; cf. *Darbeau v 136 W. 3rd St., LLC*, 144 AD3d 420, 421 [1st Dept 2016] [vacating default judgment despite service upon Secretary of State because Secretary did

not mail summons and complaint to defendant's address on file, notices to defendant were misaddressed, and affidavit from defendant's mail carrier established that it failed to follow certified mail procedures in delivering summons and complaint to defendant]).

Thus, defendant movants fail to establish that they lacked notice of this action, and there is no basis under CPLR 317 to vacate the default judgment against them (*see Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020] [denying motion to vacate default judgment because defendant failed to show lack of actual notice of action]).

Defendant Movants' Request to Vacate the Default Judgment Pursuant to CPLR 5015(a)

Defendant movants also contend that the default judgment must be vacated pursuant to CPLR 5015(a) because they have a reasonable excuse for their delay in responding to the complaint and a meritorious defense to plaintiff's claims. Regarding their reasonable excuse, they reiterate that they never received the summons and complaint from the Secretary of State, and also assert "that their staff may have left the [s]ummons and [c]omplaint unattended because they mistakenly believed" the matter was being litigated in Civil Court instead of Supreme Court (Doc No. 73). With respect to their meritorious defense, they contend, among other things, that plaintiff failed to comply with various insurance regulations.

Unlike CPLR 317, "[a] party seeking to vacate a judgment entered upon default under CPLR 5015(a)(1) must show a reasonable excuse for the default as well as a potentially meritorious defense" (*Perez v Table Run Estates, Inc.*, 191 AD3d 416, 416 [1st Dept 2021]; *accord Soffer v Montanez*, 198 AD3d 606, 606 [1st Dept 2021]). However, "[a] determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court" (*Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 [1st Dept 2018]; *see Rivera v Shypri Realty Corp.*, 198 AD3d 448, 448 [1st Dept 2021]).

As stated above in discussing CPLR 317, defendant movants' affidavits contain only conclusory denials that they never received the summons and complaint from the Secretary of State, and it is well established that "[a] conclusory denial of receipt of process does not constitute a reasonable excuse" (*Country-Wide Ins. Co.*, 179 AD3d at 407), especially when, as here, there is a "presumption of service created by the affidavit of service reflecting service through the Secretary of State" (*Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431, 431 [1st Dept 2017] [affirming denial of motion to vacate default judgment because defendant made conclusory denial that it received summons and complaint]).

Defendant movants' assertion that they have a reasonable excuse because their staff *may* have mistakenly forgotten to attend to the summons and complaint is also availing, even viewing such assertion as "akin to law office failure" (*Klein v Actors & Directors Lab*, 95 AD2d 757, 758 [1st Dept 1983], *lv dismissed* 60 NY2d 1015 [1983]). Although law office failure may amount to a reasonable excuse (*see e.g. Heijung Park v Nam Yong Kim*, 205 AD3d 429, 429-430 [1st Dept 2022]; *Cornwall Warehousing, Inc. v Lerner*, 171 AD3d 540, 540 [1st Dept 2019]), "conclusory references to law office failure . . . , without detail or evidentiary support," are insufficient (*Urban D.C. Inc. v 29 Green St. LLC*, 205 AD3d 634, 634 [1st Dept 2022] [internal quotation marks omitted]; *cf. Kapoor v Interzan LLC*, 172 AD3d 519, 520 [1st Dept 2019] [finding reasonable excuse where defaulting party provided documentary evidence of law office failure and affidavit from CEO averring that he expected his corporate counsel to defend matter]).

None of the affidavits submitted by defendant movants are from an individual with personal knowledge of why the summons and complaint were left unattended, they are from a principal who merely averred that it was "possible" that a member of his or her staff may have seen the summons and complaint and forgot to bring them to the attention of defendant movants.

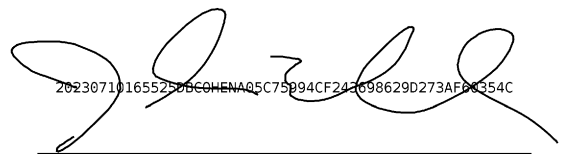
This sort of speculation fails to show a reasonable excuse for their delay (see *Urban D.C. Inc.*, 205 AD3d at 634 [finding no reasonable excuse where defaulting party failed to provide details or evidentiary support for “conclusory references” to law office failure]; *Hereford Ins. Co. v Forest Hills Med., P.C.*, 172 AD3d 567, 568 [1st Dept 2019] [finding no reasonable excuse because defaulting party assertion of law office failure “unsubstantiated”]).

Because defendant movants fail to demonstrate a reasonable excuse, “[this Court] need not consider whether it established a potentially meritorious defense” in connection with its request for relief pursuant to CPLR 5015(a) (*Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 402 [1st Dept 2022]; see *Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016] [“Absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense” (citations omitted)]).

Accordingly, it is hereby:

ORDERED that the motion by defendants All City Family Healthcare Center, P.C., Goldstar Equipment, Inc., Metro Pain Specialists Professional Corporation, Primavera Physical Therapy, P.C., West Acupuncture, P.C., and Westchester Radiology, P.C. to vacate the default judgment against them and compel plaintiff to accept a late answer is denied in its entirety.

7/10/2023
DATE


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DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: