

**State Farm Mut. Auto. Ins. Co. v All City Family  
Healthcare Ctr., Inc.**

2023 NY Slip Op 33465(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 154735/2020

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12**

*Justice*

STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY,

Plaintiff,

INDEX NO. 154735/2020  
MOTION DATE 07/26/2023  
MOTION SEQ. NO. 004

- v -

ALL CITY FAMILY HEALTHCARE CENTER, INC., ATALS  
PHYSICAL THERAPY, INC., BACK TO BALANCE  
ACUPUNCTURE, P.C., CENTER FOR  
NEURORESTORATIVE MEDICINE, PA, CLASSIC  
MEDICAL DIAGNOSTIC REHAB, P.C., EXCELL CLINICAL  
LAB, INC., MICHELE B. GLISPY, L.A.C., GORDON C.  
DAVIS, MEDICAL, P.C., HEAL-RITE P.T., P.C., HMP  
ORTHOPAEDICS, P.C., MAX JEAN-GILLES, PHYSICIAN,  
P.C., JOSEPH A. RAIA, M.D., P.C., LONGEVITY MEDICAL  
SUPPLY, INC., MYOCARE P.T., P.C., NEW MILLENNIUM  
MEDICAL IMAGING, P.C., NEW YORK PHYSICAL  
THERAPY CARE, P.C., PDA NY CHIROPRACTIC, P.C., ST.  
MARY FAMILY PHYSICAL THERAPY, P.C., PRC  
SUPPLIES, INC., NEXTSTEP HEALING, INC., JOHN  
FRANCOIS, JEFF LOUIS, JOSUE MARCEUS, MARIE  
SYLVERT

Defendant.

**DECISION + ORDER ON  
MOTION**

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

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

This declaratory judgment action concerns claims for no-fault insurance benefits made in connection with an alleged automobile crash that occurred on February 5, 2019 (the subject accident). Plaintiff State Farm Mutual Automobile Insurance Company (plaintiff) moved for a default judgment against all defaulting defendants, which Justice Barbara Jaffe denied on June 24, 2021. *See* NYSCEF doc. no. 125.

On June 28, 2022, the First Department, Appellate Division reversed Justice Jaffe's decision and order. *See* NYSCEF doc. no. 126. The First Department granted a judgment, on

default, against the non-appearing defendants, declaring that they are not entitled for no-fault insurance benefits for the subject crash. *Id.*

Defendant, Josue Merceus (defendant Merceus), now seeks an order vacating the default judgment entered against him pursuant to CPLR 5015 (a) (1). No opposition has been submitted to the instant motion.

A default judgment can be vacated pursuant to CPLR 5015 (a) (1), under which provision a motion must be made within one year of service of a copy of the judgment with notice of entry. Defendant has the burden of demonstrating both a reasonable excuse for the default and a meritorious defense to the action. *See Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 (1st Dept 2001); *Cedeno v Wimbledon Building Corp.*, 207 AD2d 297, 297 (1st Dept 1994). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court. *Chevalier v 368 E. 148<sup>th</sup> St. Assoc., LLC*, 80 AD3d 411 (1st Dept 2011).

Defendant Merceus argues that he has a reasonable excuse for his default in that he had not timely been made aware of the current action, because service of the summons and verified complaint was made at an incorrect address. Specifically, the affidavit of service upon defendant Merceus, which was filed on August 11, 2020, notes that service was made upon a “person of suitable age and discretion” at 723 East 27th Street, Apartment 1C, Brooklyn, NY 11210 on July 23, 2020. *See* NYSCEF doc. 123.

In support of his motion, defendant Merceus provides sworn deposition testimony on December 9, 2021, in a separate action filed in Kings County Supreme Court regarding the subject accident. *See* NYSCEF doc. no. 127. During the deposition, defendant Merceus testified that while he did reside at the 723 East 27th Street address at one point in time, he was no longer residing at said address for over a year at the time of attempted service. *Id.* at 6, 9, 10. The deposition

testimony in the separate, but related, tort action suggests, without opposition, that defendant Marceus was no longer residing at 723 East 27th Street, Apartment 1C, Brooklyn, NY 11210 at the time this current action was commenced or when service of process was attempted by plaintiff on July 21, 2020. Therefore, as defendant Marceus claims he has not been properly served, he has a reasonable excuse for not timely appearing in this action.

Further, defendant Marceus asserts that he has meritorious defenses to this action, as evidenced by his deposition testimony from the separate tort action. In both actions, defendant Marceus disputes plaintiff's claim that the subject accident was staged. In his deposition testimony in the related accident, he testified regarding details surrounding the accident, such as that parked cars blocked the driver's vision, partially leading to the accident, and that the accident happened quickly and could not have been avoided. *See* NYSCEF doc. no. 127. Given defendant Marceus's firsthand testimony that his injuries resulted from an accident that could not have been avoided, he asserts a potentially meritorious defense that the accident at issue was not staged.

As defendant Marceus has demonstrated a reasonable excuse for his default and a meritorious defense to the action, and as no party has opposed the motion, his motion to vacate is granted.

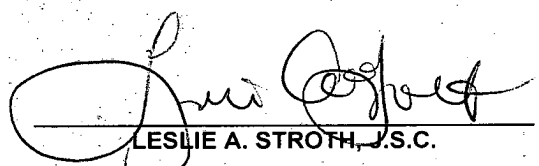
Accordingly, it is

ORDERED that defendant's motion to vacate its default herein is granted on condition that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

9/27/2023  
DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	