SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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ROCHELLE DECONCILIO,

Plaintiff,

- v -

NORTHWELL HEALTH INC., and VICKEN PAMOUKIAN, M.D.,

Defendants.

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INDEX NO. 805088/2023

MOTION DATE 09/29/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 28, 29

were read on this motion to/for LEAVE TO FILE LATE ANSWER.

In this action to recover damages for medical malpractice, the defendant Vicken Pamoukian, M.D., moves pursuant to CPLR 3215, 2214(c), 2004, and 3012(d) and, in effect, pursuant to CPLR 5015(a)(1), for leave to vacate his defaults in answering or appearing in the action and in opposing the plaintiff's motion for leave to enter a default judgment against him, and thereupon for permission to serve a late answer. The plaintiff opposes the motion. The motion is granted to the extent that Pamoukian's default in appearing in the action is vacated, and he is granted leave to appear in the action and serve a late answer, and to compel the plaintiff to accept service of that late answer. The motion is otherwise denied as academic.

On March 14, 2023, the plaintiff commenced this action against Pamoukian and the defendant Northwell Health, Inc. (Northwell), alleging that Pamoukian, while working for Northwell, negligently installed and placed an inferior vena cava filter during a procedure, thus causing her to undergo additional unnecessary procedures and sustain numerous injuries. The relevant affidavit of service established that, on March 27, 2023, the plaintiff served process

upon Pamoukian at his medical offices, located at 166 East 88th Street, New York, New York 10128, by (a) "delivering and leaving a true copy or copies of the aforementioned documents with GREG (DOE) (REFUSED FULL NAME), RECEPTIONIST, a person of suitable age and discretion," and (b) thereafter mailing additional copies of the summons and complaint on March 30, 2023 to that address in an envelope marked "personal and confidential" and not indicating that the contents were sent by an attorney or involved a lawsuit. Inasmuch as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]), the plaintiff made a prima facie showing that Pamoukian was properly served with process pursuant to CPLR 308(2).

The plaintiff filed the relevant affidavit of service on March 31, 2023 and, hence, service upon Pamoukian was deemed "complete" within the meaning of CPLR 308(2) on April 10, 2023, which was 10 days after that filing (*see* CPLR 308[2]; General Construction Law § 20). Pamoukian thus had 30 days after April 10, 2023 (*see* CPLR 3012[c]), or until May 10, 2023, within which to answer, move with respect to the complaint, or otherwise appear in the action. Pamoukian neither answered, moved, nor appeared in a timely manner on or before May 10, 2023, and thus was in default as of May 11, 2023. On July 7, 2023, and thus within one year after Pamoukian had defaulted (*see* CPLR 3215[a], [c]), the plaintiff moved pursuant to CPLR 3215(a) and (b) for leave to enter a default judgment against Pamoukian on the issue of liability and for an inquest to assess damages (MOT SEQ 001). Pamoukian did not timely oppose that motion, which was deemed fully submitted on July 24, 2023, and was administratively adjourned by the court until August 8, 2023. In an order dated October 20, 2023, this court denied the plaintiff's motion on the ground that she failed to support it with an expert's affirmation or affidavit, which is required in connection with default motions in medical malpractice actions.

On September 14, 2023, Pamoukian made the instant motion, seeking to vacate his defaults in appearing in the action and opposing the plaintiff's default motion, and for leave to submit opposition to the motion, appear in the action, and thereupon serve a late answer.

CPLR 5015(a)(1) provides that

> "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry."

"A party seeking to vacate his or her default in answering the complaint pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action" (*U.S. Bank N.A. v Hunte*, 215 AD3d 887, 888 [2d Dept 2023]; *see Cirillo v Macy's*, 61 AD3d 538, 538 [1st Dept 2009]; *Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]; *see also Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co*., 67 NY2d 138, 141 [1986]; *Toos v Leggiadro Intl., Inc.,* 114 AD3d 559, 561 [1st Dept 2014] [movant must show a "reasonable excuse and a potentially meritorious" claim or defense]; *Navarro v A. Trenkman Estate, Inc*., 279 AD2d 257, 258 [1st Dept 2001]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]). "The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court" (*Goldman v Cotter*, 10 AD3d at 291; *see Navarro v A. Trenkman Estate, Inc*., 279 AD2d at 258; *see also Matter of Owens v Integon Natl. Ins. Co*., _____AD3d_____, 2023 NY Slip Op 04773, *2 [2d Dept, Sep. 27, 2023] [in connection with motion to vacate default in answering a complaint, "[w]hether an excuse is reasonable is a determination that rests within the sound discretion of the Supreme Court"]).

> "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits"

(*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005]). Nonetheless, as Pamoukian correctly pointed out, "[a]n affidavit of merit is not required on a motion for leave to serve a late answer where, as here, no default order or judgment has been entered" (*Cirillo v Macy's*, 61 AD3d at 540; *Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]).

According to the attorney for Northwell, who now seeks also to appear as Pamoukian's attorney, although his law firm timely filed an answer on behalf of Northwell on May 8, 2023, it did not file an answer on behalf of Pamoukian since, "at that time . . . our office was informed that said defendant was not employed by Northwell at the time of the filing of the complaint and[,] therefore[,] we would not be representing said defendant." Counsel further explained that, after the plaintiff dispatched an additional copy of the summons and complaint to Pamoukian on May 10, 2023, advising him that if he did not serve an answer within 30 days, she would seek a default judgment, counsel and Northwell had another discussion about whether his law firm also would represent Pamoukian. On August 11, 2023, after a subsequent discussion with Northwell, the firm representing Northwell was given authorization to represent Pamoukian. According to counsel, "Northwell made an error pertaining to the date of [Pamoukian's] employment[,] as they used the date of the filing of the instant matter, rather than the date of the alleged malpractice." On August 11, 2023, and, thus, after the plaintiff's default motion had already been fully submitted, defense counsel requested the plaintiff to withdraw that motion and accept Pamoukian's late answer. The plaintiff declined the request and, after counsel filed an answer on Pamoukian's behalf, the plaintiff rejected the answer as untimely.

The court concludes that, inasmuch as it appears that Pamoukian seasonably tendered the summons and complaint to Northwell and its insurance carrier to request a defense, their mistake in determining whether to defend and indemnify Pamoukian constitutes a reasonable excuse for his default in timely answering the complaint or appearing in the action (*see Merchants Ins. Group v Hudson Val. Fire Protection Co., Inc.,* 72 AD3d 762, 763-764 [2d Dept 2010] [insurance broker's delay in forwarding complaint to carrier may be considered in connection with whether excuse is reasonable]; *Harcztark v Drive Variety, Inc.*, 21 AD3d at 876-877 [insurance company delay may be considered in connection with whether excuse is reasonable] *Munz v La Guardia Hosp.*, 109 AD2d 731, 731-732 [2d Dept 1985] [insurance company's disclaimer constitutes a factor in determining whether there is reasonable excuse for

delay in answering complaint]). In the instant case, Pamoukian waited only three months after his default, and only one additional month after he secured Northwell's carrier's assent to representing him, before he moved to vacate his default and compel the plaintiff to accept his answer (*cf. Thompson v Steuben Realty C*orp., 18 AD3d 864 [2d Dept 2005] [rejecting defendant's proffered excuse of insurance disclaimer, where it delayed more than eight months after disclaimer before cross-moving for leave to serve late answer, and then only in response to plaintiff's default motion, which was itself made several months after the defendant's default]). The short delay here was not unreasonable, and presented no prejudice to the plaintiff.

Although Pamoukian was not obligated to demonstrate a potentially meritorious defense on this motion, he nonetheless submitted his own expert affirmation, in which he explained that he performed the IVC filter placement in full compliance with all accepted standards of care, and had discussed the risks and benefits of the procedure with the plaintiff prior to performing the procedure. Although a defendant physician, as "a party who is qualified by reason of education or training in a specific field, may serve as his or her own expert" (*Bade v Partridge*, 2009 NY Slip Op 52435[U],*5, 25 Misc 3d 1236[A] [Sup Ct, Nassau County, Nov. 23, 2009]; *see Rodriguez v Pacificare, Inc*., 980 F2d 1014, 1019 [5th Cir 1993]), CPLR 2106(a) permits only nonparty attorneys, physicians, osteopaths, and dentists to employ affirmations in lieu of affidavits, and precludes party attorneys and physicians from availing themselves of this privilege (*see Samuel & Weininger v. Belovin & Franzblau,* 5 AD3d 466, 466 [2d Dept 2004] [party attorney]; *Radiology Today, P.C. v Mercury Ins. Co.,* 34 Misc 3d 145[A], 2012 NY Slip Op 50148[U], *1, 2012 NY Misc LEXIS 418, *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Jan. 24, 2012] [party physician]; *Fitzgerald v Willes*, 83 Misc 2d 853, 854 [App Term, 1st Dept 1975] [party attorney]). While declarants who have religious objections to taking an oath may also employ affirmations, such affirmations nonetheless must be notarized to have evidentiary value (*see Slavenburg Corp. v Opus Apparel,* 53 NY2d 799 [1981]; *Diaz v Tumbiolo*, 111 AD3d 877 [2d Dept 2013]; *People v Eisenstadt*, 48 Misc 3d 56 [App Term, 2d Dept, 9th & 10th Jud Dists

2015]; CPLR 2300), and Pamoukian expressed no religious objection to swearing to his statement in the first instance. Hence, his affirmation does not constitute evidence in admissible form, and may not be considered in connection with this motion, unless he resubmits it affidavit form, which the court deems to be unnecessary in any event.

The branch of Pamoukian's motion seeking to vacate his default in opposing the plaintiff's motion to enter a default judgment against him (SEQ 001), and permit him to submit late opposition to that motion, is denied as academic, inasmuch as the court denied that motion because the plaintiff failed to submit sufficient proof of the facts underlying the merits of her claims against Pamoukian. The court notes that, on September 27, 2023, the plaintiff ultimately submitted an expert's affirmation in connection with the instant motion, setting forth the merits of those claims. This affirmation was not timely submitted in connection with her motion for leave to enter a default judgment, and the court has not considered it for the purpose of rectifying the insufficiencies in the proof submitted in connection with that motion.

Accordingly, it is,

ORDERED that the motion of the defendant Vicken Pamoukian, M.D., is granted to the extent that his default in answering the complaint or otherwise appearing in the action is vacated, and he is permitted to serve a late answer and compel the plaintiff to accept that late answer, and the motion is otherwise denied as academic; and it is further,

ORDERED that the answer served and filed by Vicken Pamoukian, M.D., as uploaded on August 14, 2023 as docket entry 21 in the New York State Court Electronic Filing system, is deemed to have been timely served and filed, nunc pro tunc.

This constitutes the Decision and Order of the court.

10/20/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE