

**PV Holding Corp. v Abdul-Massih Family Health
Nurse Practitioner. P.C.**

2024 NY Slip Op 30719(U)

March 7, 2024

Supreme Court, New York County

Docket Number: Index No. 157124/2022

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

INDEX NO. 157124/2022

PV HOLDING CORP. INCLUDING ALL OF ITS
SUBSIDIARIES AND AFFILIATES, INCLUDING BUT NOT
LIMITED TO AVIS BUDGET, LLC, AVIS CAR RENTAL,
LLC, BUDGET CAR RENTAL, LLC, BUDGET TRUCK
RENTAL, LLC, PAYLESS CAR RENTAL, INC. AND
ZIPCAR, INC.,

MOTION DATE 05/08/2023

MOTION SEQ. NO. 001

Plaintiff,

- v -

ABDUL-MASSIH FAMILY HEALTH NURSE
PRACTITIONER, P.C. A/K/A ABDUL-MASSIH FAMILY
HEALTH NP, P.C., CHI CHINESE ACUPUNCTURE,
P.C., CITIMED COMPLETE MEDICAL CARE
P.C., DORRETT BRYAN, N.P., GRACE MEDICAL HEALTH
PROVIDER, P.C., HARVEY LEVITAN, M.D. A/K/A HARVEY
LEVITAN MEDICAL, P.C., IDY LIANG, N.P., INTEGRATED
MEDICAL REHABILITATION AND DIAGNOSTICS, P.C.
A/K/A INTEGRATED MEDICAL REHABILITATION AND
DIAGNOSTIC, P.C., MEADOWS RX, INC., MOHAMMAD
FEIZI LIGHVAN, N.P., NEW YORK PHYSICAL THERAPY
TOUCH, PLLC, NORTHEAST MEDICAL DEVICES, LLC, NY
UNION PHARMACY, INC., OLUBUSOLA BRIMMO, M.D.,
PRISTINE RX CORP., QS MEDICAL SERVICES,
P.C., ROCKLAND AND BERGEN SURGERY CENTER,
LLC, SANFORD R. WERT M.D., P.C., SERGEY
KALITENKO, M.D. A/K/A SERGEY A. KALITENKO,
PHYSICIAN, P.C., SHERRIE RAWLINS MEDICAL,
P.C., SPINAL PAIN & REHAB MEDICAL, P.C., WALMED
EQUIPMENT, LLC, ZWH MEDICAL CARE, P.C., LEESHON
VICTOR, AKIM PAUL, JEAN RACINE, ERIC KENWORTHY

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49,
50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77,
79

were read on this motion to/for JUDGMENT - DEFAULT

[The remainder of this page is intentionally left blank]

Upon the foregoing documents, Plaintiff PV Holding Corp.'s, including all of its subsidiaries and affiliates, including but not limited to Avis Budget, LLC, Avis Car Rental, LLC, Budget Car Rental, LLC, Budget Truck Rental, LLC, Payless Car Rental, Inc. and Zipcar, Inc, ("Plaintiff") motion for leave to enter a default judgment against Defendants Abdul-Massih Family Health Nurse Practitioner, P.C. a/k/a Abdul-Massih Family Health NP, P.C., Chi Chinese Acupuncture, P.C., Citimed Complete Medical Care P.C., Grace Medical Health Provider, P.C., Harvey Levitan, M.D. a/k/a Harvey Levitan Medical, P.C., Integrated Medical Rehabilitation and Diagnostics, P.C. a/k/a Integrated Medical Rehabilitation and Diagnostic, P.C., Meadows RX, Inc., New York Physical Therapy Touch, PLLC, Northeast Medical Devices, LLC, NY Union Pharmacy, Inc., Pristine RX Corp., QS Medical Services, P.C., Rockland and Bergen Surgery Center, LLC, Sanford R. Wert M.D., P.C., Sergey Kalitenko, M.D. a/k/a Sergey A. Kalitenko, Physician, P.C., Sherrie Rawlins Medical, P.C., Spinal Pain & Rehab Medical, P.C., Walmed Equipment, LLC, ZWH Medical Care, P.C., Eric Kenworthy, M.D., Akim Paul and Jean Racine (collectively, "Defendants"), is denied.

Defendants Abdul-Massih Family Health Nurse Practitioner, P.C. a/k/a Abdul Massih Family Health NP, P.C., Grace Medical Health Provider, P.C., Citimed Complete Medical Care, P.C., Dorrett Bryan, N.P., and Rockland and Bergen Surgery Center, LLC's (the "Provider Defendants") cross-motion to vacate their default in this matter, and, upon vacatur, for an Order granting the Provider Defendants an extension of time to appear in this matter, and to compel Plaintiff to accept the Provider Defendants' Answers, is granted.

[The remainder of this page is intentionally left blank]

I. Plaintiff's Motion for Default Judgment

An applicant for default judgment against a defendant must submit: (i) proof of service of the summons and complaint, (ii) proof of the facts constituting the claim, and (iii) proof of the defaulting defendant's failure to answer or appear (*PV Holding Corp v AB Quality Health Supply Corp*, 189 AD3d 645 [1st Dept 2020]). Affidavits submitted in support of default judgment need only allege enough facts to allow a court to assess where a viable cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The Court is mindful that "defaulters are deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them (*Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007]).

To adequately support a motion for default judgment, CPLR 3215(f) requires either a Complaint verified by the party seeking default judgment or an affidavit in support of the motion executed by a party with personal knowledge of the merits of a movant's claims (*Beltre v Babu*, 32 AD3d 722 [1st Dept 2006]).

i. Plaintiffs' Verified Amended Complaint is Improper

Preliminarily, pursuant to CPLR 3025(a) "[a] party may amend his pleadings once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days of a pleading responding to it." Further, pursuant to CPLR 320(a),

[a]n appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf or if it was served pursuant to section 303, subdivision two, three, four or five of section 308, or sections 313, 314 or 315, the appearance shall be made within thirty days after service is complete.

Here, Plaintiff filed its initial Complaint on August 19, 2022 (NYSCEF Doc. 1). Plaintiff's Affidavits of Service evidence service of the initial Summons and Complaint upon the Provider Defendants on September 15, 2022 (NYSCEF Doc. 50). Subsequently, Plaintiff filed a Verified Amended Complaint on November 7, 2022 (NYSCEF Doc. 25). Plaintiff's Verified Amended Complaint was not filed within twenty days of service of the original Complaint, was not served before the time period for responding to the original Complaint had expired and was filed before any responsive pleading to the original Complaint was made. While CPLR 3025(b) permits a party to amend or supplement their pleadings at any time by leave of court or by stipulation of all parties, Plaintiff was not granted leave of the court and no stipulation to amend the pleadings is found in the record. Accordingly, the Verified Amended Complaint filed by Plaintiff (NYSCEF Doc. 25) is of no consequence, and the original Complaint (NYSCEF Doc. 50) remains controlling.

ii. Plaintiff's Motion for Default Judgment is Denied

Here, Plaintiff's motion is supported by an Affirmation from Plaintiff's attorney (NYSCEF Doc. 47), and a representative of Sedgwick Claims Management Services, Inc. a third-party claims administration company (NYSCEF Doc. 48), and Plaintiff's Complaint (NYSCEF Doc. 1) is verified by Plaintiff's counsel (NYSCEF Doc. 1). However, Plaintiff has failed to provide an affidavit in support of Plaintiff's motion executed by a party with personal knowledge.

Although Plaintiff's Complaint is verified by Plaintiff's counsel, it is well established that "a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215...Indeed, a judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim renders that judgment a nullity" (*Beltre v Babu*, 32 AD3d

722 [1st Dept 2006]). Further, it is well established that an attorney's affirmation "is insufficient to support the entry of a default judgment" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]).

As Plaintiff has failed to provide an affidavit in support of its motion executed by a party with personal knowledge, Plaintiff's motion is denied without prejudice, with leave to renew within 90 days upon the proper supporting papers.

II. Provider Defendants' Cross-Motion to Compel Plaintiff to Accept the November 18, 2022 Answer and the Proposed Answer dated May 26, 2023, is Granted

In New York, public policy favors resolving cases on their merits (*Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]). Moreover, CPLR 3012(d) provides that "upon the application of a party, the Court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Granting an extension of time to answer is within the discretion of the Court (*Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]).

Here, the Court finds that the Provider Defendants' delay in appearing in this action was not willful or intended to prejudice Plaintiff, but rather inadvertent. The Affidavit of Karina Brandon ("Brandon"), a paralegal in the Declaratory Judgment Department in the office of Provider Defendants' counsel (the "Firm"), states that she contacted the Office of New York's Secretary of State (the "Office") and was informed that the Office "was experiencing a backlog of Summons and Complaints on which to serve defendants of approximately three (3) months," and that "any backlog would cause the Office to delay service of Summons and Complaints on Defendants" (NYSCEF Doc. 68 at ¶ 6). Although Plaintiff's attached Affidavits of Service evidencing service upon the Provider Defendants on September 15, 2022, as a result of the backlog at the Office, Brandon did not obtain notice that the Provider Defendants had been served with the

Summons and Complaint until mid-November 2022 (*Id.* at ¶ 11).¹ Thereafter, on November 18, 2022 counsel for the Provider Defendants served an Answer upon Plaintiffs on behalf of Defendants Abdulmassih Family Health NP, P.C. and Grace Medical Health Provider, P.C. (NYSCEF Doc. 66).²

The Firm was subsequently retained by Defendants Citimed Complete Medical Care and Dorrett Bryan, N.P. in March 2023, and did not learn that these providers, along with Rockland and Bergen Surgery Center, LLC³, were included in Plaintiff's motion until the Firm received Plaintiff's motion in early May 2023 (NYSCEF Doc. 68 at ¶ 12).⁴ The Provider Defendants have attached a Proposed Answer on behalf of Defendants Citimed Complete Medical Care, Dorrett Bryan, N.P., and Rockland and Bergen Surgery Center, LLC dated May 26, 2023 (NYSCEF Doc. 69) (the "Proposed Answer").

In light of the foregoing, the Court finds that there is reasonable excuse for delay in the Provider Defendants appearance in this matter. Further, as the delay in appearing has been brief and the parties have not yet engaged in any discovery (NYSCEF Doc. 72 at ¶ 23), no substantial prejudice will be suffered by compelling Plaintiffs to accept the November 18, 2022 Answer filed on behalf Defendants Abdulmassih Family Health NP, P.C. and Grace Medical Health Provider, P.C. (NYSCEF Doc. 66), and the Proposed Answer on behalf of Defendants Citimed Complete Medical Care, Dorrett Bryan, N.P., and Rockland and Bergen Surgery Center, LLC dated May 26, 2023 (NYSCEF Doc. 69).

¹ Plaintiffs filed an Amended Summons and Complaint on November 7, 2022 (NYSCEF Doc. 65).

² Plaintiffs filed a Notice of Rejection rejecting the November 18, 2022 Answer on November 22, 2022 (NYSCEF Doc. 30).

³ The Firm inadvertently overlooked Bergen Surgery Center, LLC when drafting and serving the November 18, 2022 Answer.

⁴ Plaintiffs did not move for a default judgment against Defendant Dorrett Bryan, N.P.

Accordingly, the Provider Defendants cross-motion to compel Plaintiffs to accept the Answer filed November 18, 2022 (NYSCEF Doc. 66) and the Proposed Answer dated May 26, 2023 (NYSCEF Doc. 69) is granted, and the Proposed Answer will be deemed served upon service of this Decision and Order.

III. Plaintiff is Ordered to Accept Defendant Walmed Equipment LLC's Answer Dated December 28, 2022

On May 26, 2023, Defendant Walmed Equipment LLC ("Walmed") submitted an Affirmation in Opposition to Plaintiff's instant motion (NYSCEF Doc. 72).

To successfully oppose a motion for default judgment, a Defendant must demonstrate both a reasonable excuse for the default and a meritorious defense to Plaintiff's claims (*Genao v Salcedo Maintenance Corp.*, 168 AD3d 528, 528-529 [1st Dept 2019]). Further, as stated above, the Court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

The "Supreme Court has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve a timely answer" (*Cirillo v Macy's*, 61 AD3d 538, 540 [1st Dept 2009]). Moreover, it is well settled that a delay in receiving a copy of the summons and complaint from the Secretary of state is a valid excuse for a delay in filing an answer (*Siwek v Phillips*, 71 AD3d 469 [1st Dept 2010]).

Here, the Court finds that Walmed's delay in appearing in this action was not willful or intended to prejudice Plaintiff, but was inadvertently caused by late receipt of the Summons and Complaint. Although Plaintiff filed an Affidavit of Service of its Summons and Complaint upon Walmed through the Secretary of State on September 15, 2022 (NYSCEF Doc. 21), Walmed has demonstrated that the Department of State did not forward the Summons and Complaint to

Walmed until December 8, 2022 (NYSCEF Doc. 73). Shortly thereafter, Walmed filed its Answer and Demand for Verified Interrogatories on December 28, 2022 (NYSCEF Doc. 74). As Walmed's delay in filing its Answer was brief and the parties have not engaged in any discovery, no substantial prejudiced will be suffered by compelling Plaintiffs to accept Walmed's Answer dated December 28, 2022 (NYSCEF Doc. 74).

Accordingly, it is hereby,

ORDERED that Plaintiff PV Holding Corp.'s motion for default judgment is denied without prejudice, with leave to renew within 90 days upon the proper supporting papers; and it is further

ORDERED that the Provider Defendants Abdul-Massih Family Health Nurse Practitioner, P.C. a/k/a Abdul Massih Family Health NP, P.C., Grace Medical Health Provider, P.C., Citimed Complete Medical Care, P.C., Dorrett Bryan, N.P., and Rockland and Bergen Surgery Center, LLC's cross-motion is granted, and Plaintiff PV Holding Corp. is Ordered to accept the Answer filed on behalf of Defendants Abdul-Massih Family Health Nurse Practitioner, P.C. a/k/a Abdul Massih Family Health NP, P.C., and Grace Medical Health Provider, P.C. dated November 18, 2022 (NYSCEF Doc. 66), and the Proposed Answer of Defendants Citimed Complete Medical Care, P.C., Dorrett Bryan, N.P., and Rockland and Bergen Surgery Center, LLC dated May 26, 2023 (NYSCEF Doc. 69); and it is further

ORDERED that the Proposed Answer of Defendants Citimed Complete Medical Care, P.C., Dorrett Bryan, N.P., and Rockland and Bergen Surgery Center, LLC dated May 26, 2023 (NYSCEF Doc. 69) shall be deemed served on Plaintiff PV Holding Corp. upon service of this Decision and Order; and it is further

ORDERED that Plaintiff PV Holding Corp. shall accept Defendant Walmed Equipment LLC's Answer dated May 26, 2023 (NYSCEF Doc. 72); and it is further

ORDERED that the parties are directed to submit a proposed Preliminary Conference Order to the Court on or before April 9, 2024 via e-mail to SFC-Part53-Clerk@nycourts.gov. If the parties are unable to agree to a proposed Preliminary Conference Order, the parties are directed to appear for an in-person preliminary conference with the Court on April 10, 2024 at 9:30 a.m. in 60 Centre Street, Room 442, New York, New York; and it is further

ORDERED that within ten (10) days of entry, counsel for the Provider Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action via-first class mail at their last known business or residential address; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

3/7/2024			<i>Mary V. Rosado JSC</i>
DATE			HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE