SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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UNITRIN SAFEGUARD INSURANCE COMPANY,

Plaintiff,

- v -

A TO Z SUPPLY SERVICES, INC.,APPLE CHIROPRACTIC OF NY PC,ATTIA REHABILITATION PT, PC,CADS ANESTHESIA SERVICES, PLLC,CHAI DIAGNOSTICS, LLC,CITIMED COMPLETE MEDICAL CARE PC,COMPREHENSIVE PSYCHOLOGICAL EVALUATION, PC,DIAGNOSTIC NEUROLOGY, PC,FAMILY HEALTH NP PC,GRACE MEDICAL HEALTH PROVIDER PC,IDEAL CARE PHARMACY INC.,INTERVENTIONAL PHYSICAL MEDICINE & REHAB OF NY PLLC,JORDAN FERSEL, MD, PC,M EL SAYED PHYSICAL THERAPY, PC,MARK H. VINE, METRO SCRIPTS, LLC,MORNING STAR PT, PC,NEWLINE RX, INC, NEXT GENERATION DIAGNOSTIC IMAGING, PC,OLUBUSOLA BRIMMO, PARS MEDICAL, PC,RAF SPORTS CHIROPRACTIC, PC,RIDGEWOOD DIAGNOSTIC LABORATORY LLC,SCOB, LLC,SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC,VITAL CARE GROUP, INC, ZUCCO WELL ACUPUNCTURE, PC,CHAZRICK ALVES, JAHASPHA JOHNSON, NEVILLE DUFFUS

Defendant.

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INDEX NO. 157886/2022

MOTION DATE 07/29/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 110, 111, 112, 113, 114, 115

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

In 2021, plaintiff Unitrin Safeguard Insurance Company (hereinafter, "Unitrin") commenced this declaratory judgment action against individual defendants Chazrick Alves, Jahaspha Johnson, and Neville Duffus (along with various medical providers) over no-fault reimbursement claims arising out of a motor vehicle accident that occurred on September 28, 2021. By Decision and Order dated October 11, 2023, the Court granted plaintiff's motion for a default judgment against each of the individual defendants, including Duffus. In said Decision, the Court found that the individual defendants had breached a condition precedent to coverage under New York's No-Fault regulations and the subject insurance policy. (NYSCEF doc. no. 75, underlying Decision.) In this motion sequence 003, Duffus seeks to vacate the default judgment entered against him pursuant to CPLR 5015 and 317. For the following reasons, his motion is denied.

Vacatur under CPLR 5015

"A defendant seeking to vacate a default under [CPLR 5015 (a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action." (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986] [citations omitted].) "The court may grant a motion to vacate a default on grounds of excusable default and a showing of a meritorious defense, if the motion is made within one year after service of the order entered on default, with written notice of its entry." (*Marston v Cole*, 147 AD3d 678, 678 [1st Dept 2017] [citations omitted].) What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court. (*See Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 [1st Dept 2011].)

Here, Duffus contends that the Court must vacate the default judgment entered against him because plaintiff failed to properly serve him and, thus, the Court never obtained personal jurisdiction over him. This argument is unpersuasive. In plaintiff's affidavit of service, the process server avers that he attempted to personally serve Duffus at his residence on October 13 and October 18, 2022. (NYSCEF doc. no. 37, affidavit of service.) Having failed to do so, he instead left a copy of the summons and complaint at Duffus' address and mailed copies of both pursuant to CPLR 308 (4). (*Id*.) Nonetheless, Duffus contends that he "did not see a Summons and compliant attached to the door of my apartment or anywhere near the door." (*See* NYSCEF doc. no. 104, Duffus affidavit in support.) In support of vacatur, he relies upon *Commissioners of State Ins. Fund v Khondoker* (55 AD3d 525, 525 [2d Dept 2008]). But this case is inapposite: the Second Department determined that the default judgment should have been vacated and the action dismissed where the defendant submitted evidence demonstrating that the place where the summons was affixed was not his.

By contrast, critically, Duffus does not dispute the fact that the address at which the process server attempted personal service and subsequently mailed the summons and complaint was, in fact, his address (NYSCEF doc. no. 104), the same one listed on his driver's license, the Report of Motor Vehicles Accident he signed, and provided at his EUO. Accordingly, plaintiff's affidavit of service constitutes prima facie evidence of proper service (*see Bank of Am., N.A. v Budhan*, 171 AD3d 622, 622 [1st Dept 2019]) and Duffus' affidavit constitutes a "mere denial of receipt of the summons and complaint" that is insufficient to create an issue of fact that requires a traverse hearing (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *see also Rudd Mech. Assoc., Inc. v ZDG, LLC*, 192 AD3d 440, 441 [1st Dept 2021] [finding that the defendants failed to demonstrate a reasonable excuse for their default under CPLR 5015 as their mere denial was insufficient to rebut the presumption of proper service]).

Vacatur under CPLR 317

CPLR 317 provides:

> "[A] person served with a summons other than by personal delivery to him or his agent…who does not appear may be allowed to defend the action within one year after he obtains knowledge of the entry of

> the judgment…upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." (CPLR 317.)

The rule's language makes clear that, unlike with CPLR 5015, to vacate a default judgment under CPLR 317, a defendant need not demonstrate a reasonable excuse for its delay in answering the complaint. (*Eugene Di Lorenzo Inc.*, 67 NY2d at 141.) As such, Duffus' failure to demonstrate a reasonable excuse *supra* does not preclude the Court from vacating the default under CPLR 317. However, assuming *arguendo* that Duffus' conclusory denial of receipt of the summons and complaint establishes that he did not personally receive notice of the action, Duffus has not advanced a meritorious defense to the action. Duffus contends that "the failure to attach the insurance policy to the pleadings renders the complaint defective." (NYSCEF doc. no. 100 at ¶23, counsel's affidavit in support.) He then quotes a 1953 New York Supreme Court case—*Manhattan Fire & Marine Ins. Co v Paul Tishman Co.* (203 Misc. 452, 453 [NY County 1953])—for the proposition that "the mere reference to a written contract in a pleading, without more, does not make the contract part of the pleading." Even overlooking the evident lack of binding or persuasive authority, the Court fails to appreciate the significance of this case to the matter at hand as Duffus has not, and cannot, cite any CPLR provision that requires a plaintiff to attach a contract to the pleadings for it to be sufficiently pled.

Further, Duffus does not dispute the factual underpinnings of plaintiff's complaint: that (1) Duffus and the individual defendants claimed significant bodily injuries—over $220,000 in No-Fault claims—in an accident with no police report, (2) the Report of Motor Vehicle Accident that Duffus submitted to plaintiff did not state whether he or the other defendants had requested or received medical attention at the scene and did not list any injuries they sustained, and (3) they began receiving treatment from medical facilities that plaintiff had investigated for fraudulent billing practices. (NYSCEF doc. no. 54 at 5, affirmation in support of default.) Nor does Duffus dispute the inconsistent testimony he, Alves, and Johnson gave during their respective EUOs, at which none could agree on (1) whether police officers showed up on the scene of the accident, (2) how the accident occurred, and (3) whether they collectively or individually went to the hospital the next day. (*Id*. at 7-8.) [1] Lastly, Duffus does not dispute the fact that plaintiff sent his counsel's office a copy of his EUO transcript and that he failed to subscribe and return it (*see* NYSCEF doc. no. 66, plaintiff counsel email dated 11/24/21; *id*, plaintiff counsel's follow-up email dated 12/ 28/21), which constitutes a separate and no less fatal grounds under which his motion must be denied. (*See* 11 NYCRR § 65-2.4 ["Upon request by the self-insurer, the eligible injured person…shall… (2) …submit to examinations under oath by any person named by the self-insurer and subscribe same"]; *Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 618 [1st Dept 2018] [finding that a failure to subscribe an EUO transcript violates a condition precedent to coverage].)

Accordingly, for the foregoing reasons, it is hereby

[1] In reply, Duffus contends that "plaintiff has not once made a claim that the testimony in the transcript provided is not meritorious and not a covered event." Yet that is precisely what plaintiff asserts in its complaint and is the basis for having demonstrated the merits of its default judgment motion.

ORDERED that defendant Neville Duffus' motion to vacate the Court's Decision and Order dated September 28, 2021, which granted plaintiff Unitrin Safeguard Insurance Company's default judgment motion, is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, on all parties within 10 (ten) days of entry.

This constitutes the Decision and Order of the Court.

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12/30/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

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