

**DTG Operations, Inc. v Advanced Med. Diagnostics  
of Queens, P.C.**

2011 NY Slip Op 32452(U)

September 9, 2011

Sup Ct, NY County

Docket Number: 109791/10

Judge: Louis B. York

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

PRESENT: \_\_\_\_\_

PART 2

Index Number : 109791/2010

DTG OPERATIONS, INC.

INDEX NO. \_\_\_\_\_

vs

ADVANCED MEDICAL DIAGNOSTICS

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

DEFAULT JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION** *and*  
*Judgment.*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/9/11

*Lry* J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

----- x  
DTG OPERATIONS, INC. d/b/a DOLLAR RENT A CAR,

Index No. 109791/10

Plaintiff,

-against-

ADVANCED MEDICAL DIAGNOSTICS OF QUEENS, P.C.,  
JAMAICA HEALTHY MEDICAL, P.C., FEEL A PLUS  
ACCUPUNCTURE, P.C., BONNE SANTO, INC., CHIROTOME,  
P.C., V & T MEDICAL, P.C., PERFECT DRUGS, INC., SK  
PRIME MEDICAL SUPPLY, INC., ERNEST AUGUSTIN,  
DESTA BATSON and ENOCH PARKER,

Defendant.  
----- x

LOUIS B. YORK, J.:

This decision addresses plaintiff DTG Operations, Inc's (hereafter Dollar) motion for default judgment against all defendants and the cross-motion by defendants Jamaica Healthy Medical, P.C. (hereafter Jamaica Healthy) and Perfect Drugs Inc. (hereafter Perfect Drugs) requesting an extension of time to serve an answer or in the alternative requesting plaintiff be compelled to accept their pleadings which had been untimely served. For the reasons stated <sup>infra</sup> ~~infra~~, plaintiff's motion for default judgment is granted as to all defendants except Jamaica Healthy and Perfect Drugs is granted and the cross-motion by Jamaica Healthy and Perfect Drugs is granted.

**FACTS**

Dollar is a self-insured company engaged in the business of renting motor vehicles in New York. In the underlying action, Dollar seeks a declaration that it has no obligation to pay no-fault benefits to the defendants arising out of an alleged vehicular collision that occurred on April 11, 2010. On that date, defendants Ernest Augustin, Desta Batson, and Enoch Parker

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[\*B]

(hereafter collectively the "claimants") were allegedly involved in a vehicular collision while driving an 2010 Nissan owned by Dollar. The police report from the accident indicated that none of the claimants reported injuries at the time. Following the accident, Dollar received numerous claims from defendants Advanced Medical Diagnostics of Queens, P.C., Jamaica Healthy Medical, P.C., Feel A Plus Acupuncture, P.C., Bonne Santo, Inc., Chirotime, P.C., V & T Medical, P.C., Perfect Drugs, Inc. and SK Prime Medical Supply, Inc. as assignees of the claimants. Due to the high number of claims and various discrepancies regarding the accident, Dollar sought to verify the claims by conducting examinations under oath (EUO). All three claimants failed to appear at EUOs scheduled for June 15, 2010 and July 8, 2010.

Dollar then commenced the present action seeking a declaration that it has no obligation to pay no-fault benefits to the defendants arising out of the alleged vehicular collision. Dollar has presented proof of service for all of the defendants including evidence that defendants Perfect Drugs, Inc. (hereafter Perfect Drugs) and Jamaica Health Medical, P.C. (hereafter Jamaica Healthy) were served on August 9, 2010 by service on the New York Secretary of State pursuant to BCL § 306. Perfect Drugs served an answer on September 30, 2010 and Jamaica Healthy served an answer on October 19, 2010 however both answers were rejected by Dollar as being untimely. The present motion and cross-motion followed.

### **DISCUSSION**

For a plaintiff to succeed on motion for default judgment, she must show that proper service was made upon the defendant, that the plaintiff has a meritorious cause of action and that the motion was made within one year (*see e.g. Brokaw v Cohen*, 117 Misc.2d 31, 32 [NY Sup 1982]). Here, Dollar has established that it is entitled to default judgment. In addition to establishing the other elements, it has fully established a meritorious cause of action. The affirmation of attorney

[\*4]

Joseph R. Federici clearly establishes that the claimants failed to appear for EUO requested by Dollar. Compliance with a request for an EUO is a condition precedent for any action to lie against a no-fault insurance provider (11 NYCRR § 65-1.1).<sup>1</sup> As the First Department recently stated in *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, "[a] denial premised on a breach of a condition precedent to coverage voids the policy ab initio" (82 AD3d 559, 560 [1st Dept 2011]). Furthermore, because such a breach represents an exception to the preclusion policy, "plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued" (*id.*). As such, Dollar has presented sufficient evidence to establish its entitlement to a default declaratory judgment.

As to defendants Perfect Drugs and Jamaica Healthy, under CPLR § 3012(d), 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." Keeping in mind "New York's strong public policy in favor of litigating matters on the merits" (*Silverio v City of New York*, 266 AD2d 129, 129 [1st Dept 1999]), generally the Court will excuse a relatively short delay in service of an answer when it is attributable to law office failure (*see e.g. Nason v Fisher*, 309 AD2d 526 [1st Dept 2003]). Furthermore, despite Dollar's contention to the contrary, the absence of an affidavit of merit by the defendants is not fatal but "[r]ather, the presence (or absence) of an affidavit of merit is one factor to consider in determining whether a defendant is entitled to relief under CPLR 3012(d)" (*Guzetti v City of New York*, 32 AD3d 234, 240 [1st Dept 2006]). Therefore, because the relatively short delay in serving the answers was based on law office failure and because Dollar has not demonstrated

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<sup>1</sup> Dollar did not and is not required to produce its insurance policy to establish the mandatory no fault endorsement because "even assuming, arguendo, that the policy did not contain an EUO provision, the policy would be construed as though it did" (*Dover Acupuncture, P.C. v State Farm Mut. Auto Ins. Co.*, 28 Misc3d 140(A) [App Term 1st Dept 2010]).

5] any prejudice accruing from this delay, the cross-motion to compel Dollar to accept the late answers of Perfect Drugs and Jamaica Healthy is granted.

Therefore, for the reasons stated *infra*, Dollar's motion for default judgment is granted as to all defendants except Jamaica Healthy and Perfect Drugs is granted and the cross-motion by Jamaica Healthy and Perfect Drugs is granted such that Dollar is compelled to accept their respective answers as timely.

Based on the foregoing, it is

**ORDERED** that plaintiff DTG Operations, Inc. is hereby compelled to accept the answers of defendants Jamaica Healthy Medical, P.C. and Perfect Drugs Inc. as timely; and it is further

**ORDERED** that DTG Operations, Inc.'s motion for default judgment is granted as to all defendants except Jamaica Healthy Medical, P.C. and Perfect Drugs Inc.; and it is further


**ORDERED** that the action is severed as to defendants Advanced Medical Diagnostics of Queens, P.C., Feel A Plus Accupuncture, P.C., Bonne Santo, Inc., Chirotime, P.C., V & T Medical, P.C., SK Prime Medical Supply, Inc., Ernest Augustin, Desta Batson and Enoch Parker Jamaica Healthy Medical, P.C. and Perfect Drugs Inc., and is continued as to the remaining defendants; and it is further

**ADJUDGED and DECLARED** that DTG Operations Inc. owes no duty to defendants Advanced Medical Diagnostics of Queens, P.C., Feel A Plus Accupuncture, P.C., Bonne Santo, Inc., Chirotime, P.C., V & T Medical, P.C., SK Prime Medical Supply, Inc., Ernest Augustin, Desta Batson and Enoch Parker to pay No-Fault claims to those defendants with respect to the

April 11, 2010 collision reference in the complaint and permanently staying any and all pending No-Fault suits or arbitration by those defendants relating to this matter.

Dated: 9/9/2011

ENTER:

  
\_\_\_\_\_  
Louis B. York, J.S.C.

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