

**State Farm Mut. Ins. Co. v Anikeyeva**

2013 NY Slip Op 33939(U)

September 30, 2013

Supreme Court, Nassau County

Docket Number: 4399-10

Judge: Steven M. Jaeger

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,  
Acting Supreme Court Justice

-----  
STATE FARM MUTUAL INSURANCE COMPANY,

TRIAL/IAS, PART 41  
NASSAU COUNTY  
INDEX NO.: 4399-10

Plaintiff,

MOTION SUBMISSION  
DATE: 8-1-13

-against-

MOTION SEQUENCE  
NO. 009

VALENTINA ANIKEYEVA, ANDREWY  
ANIKEYEV a/k/a ANDRE ANIKEYEV a/k/a  
ANDREI ANIKEYEV, AVA ACUPUNCTURE,  
P.C., CROSSBAY ACUPUNCTURE, P.C.,  
DITMAS ACUPUNCTURE, P.C.,  
DOWNTOWN ACUPUNCTURE, P.C.,  
EAST ACUPUNCTURE, P.C., EMPIRE  
ACUPUNCTURE P.C., FIRST HELP  
ACUPUNCTURE, P.C., GREAT WALL  
ACUPUNCTURE, P.C., LEXINGTON  
ACUPUNCTURE, P.C., MADISON  
ACUPUNCTURE, P.C., MIDBOROUGH  
ACUPUNCTURE, P.C., NEW ERA  
ACUPUNCTURE, P.C., N.Y. FIRST  
ACUPUNCTURE, P.C., NORTH  
ACUPUNCTURE, P.C. and V.A. ACUTHERAPY  
ACUPUNCTURE, P.C.,

Defendants.

-----  
The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition	X
Affirmation in Reply	X

Motion by defendants, for an Order, pursuant to CPLR §2221 granting leave to reargue the Order of this Court dated April 29, 2013, and upon reargument, granting its motion dated February 28, 2013 and the Order to Show Cause, dated July 25, 2013, seeking the staying of the enforcement and compliance with the subpoenas; quashing these subpoenas pursuant to CPLR §2304; granting the providers a Protective Order pursuant to CPLR §3103; and imposing costs and sanctions pursuant to 22NCYRR §130-1.1 and that all court proceedings be stayed pending the hearing and determination of this motion, and denying plaintiff's motion for a default judgment, pursuant to CPLR §3215, on plaintiff's first and second causes of action against all defendants: Valentina Anikeyeva ("Anikeyeva"), Andrey Anikeyev a/k/a Andre Anikeyev a/k/a Andrei Anikeyev ("Andrey"), Ava Acupuncture, P.C., Crossbay Acupuncture, P.C., Ditmas Acupuncture, P.C., Downtown Acupuncture, P.C., East Acupuncture, P.C., Empire Acupuncture, P.C., First Help Acupuncture, P.C., Great Wall Acupuncture, P.C., Lexington Acupuncture, P.C., Madison Acupuncture, P.C., Midborough Acupuncture, P.C., Midwood Acupuncture, P.C., New Era Acupuncture, P.C., N.Y. First Acupuncture, P.C., North Acupuncture, P.C., and VA Acupuncture, P.C.

[\* 3]

## PROCEDURE

The instant motion arises out the Court's April 29, 2013 Order denying the defendants' motion before this Court. For the sake of judicial economy, the Court will forgo the underlying facts and refer to the procedural history.

The plaintiff, in its complaint filed in this Court in March, 2010, alleged, inter alia, that the defendant entities were not owned and controlled by licensed acupuncturists, as required by the statutes, rules and regulations of New York State, and that the actual services were performed by independent contractors, also in violation of the State regulations.

The plaintiff's first cause of action alleged that the defendants were not entitled to collect no-fault benefits, and plaintiff was not obligated to tender payment for any medical and/or health services rendered, while the second cause of action alleged that the moving defendants were not entitled to reimbursement for services provided by independent contractors or other non-employees of the P.C. defendants.

The defendants responded to the complaint by first serving a pre-answer motion to dismiss plaintiff's complaint under CPLR §3211 and the parties exchanged discovery demands in December, 2013. The defendants' motion was denied by this Court in August, 2010. The defendants then served a 981-page amended answer and counterclaims and the Court, upon plaintiff's motion and in

[\* 4]

its Order dated August 10, 2011, compelled the defendants to serve a second amended answer and counterclaim in compliance with the statutory pleading requirements. In March, 2012, the Court, after receiving the second amended answer and counterclaims, granted the plaintiff's motion.

The parties voluntarily stipulated that they would comply with outstanding discovery demands in July, 2012. Because defendants had not complied with the terms of the stipulation, which was so-ordered by this Court, the plaintiff made a good faith attempt to resolve the issue in August and in September, 2012. After further non compliance by the defendants, the plaintiff moved this Court in October, 2012, to compel such discovery. In the interim, the plaintiff sought the requested information from third party insurance companies by issuing a subpoena upon them and defendants moved for a protective order and to quash the subpoenas and stay their enforcement.

In November, 2012, the parties executed a voluntary agreement which stipulated that the plaintiff's motion to compel would be granted and that the defendants' answer would be *conditionally stricken* unless defendants fully comply with discovery by January, 2013. In February 2013, upon defendants' continued non compliance, the plaintiff moved for a default judgment on the complaint's first and second causes of action. The Court granted the plaintiff's

motion in its entirety and denied the defendants' motion to the extent that it was rendered moot.

## ARGUMENTS

The defendants argue that the Court overlooked or misapprehended the matters of fact or law set forth in their affidavits and supporting papers.

Specifically, they argue: that the Court undermined and downplayed the impact of Hurricane Sandy upon their ability to comply with discovery; the Court abused its discretion by not considering their meritorious excuse of law office failure; the Court incorrectly determined that defendants were willful and contumacious in their failure to comply with discovery demands; that the causes of action were based on statutory violations and the statute of limitations for fraud do not apply; and that the issuing of the subpoenas was improper.

The defendants also include additional arguments in their instant motion: the plaintiff failed to submit an affidavit from someone with actual knowledge to its default motion and/or someone with actual knowledge failed to verify the complaint in its motion to dismiss under CPLR §3215; the plaintiff "limited [the] universe of witnesses" to the defendants; because plaintiffs failed to timely deny "each bill" it received, plaintiff is precluded from setting forth a claim under the independent contractor argument; and that there is no evidence to prove a fraudulent or unlawful corporation.

[\* 6]

Plaintiff argues that the defendants are merely repeating the same arguments while trying to present arguments that were not set forth in their prior motion or supporting opposition papers.

## DISCUSSION

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. *It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided. (Gellert & Rodner v. Gem Community Mgt., Inc., 20 AD3d 388 [2nd Dept.2005]) nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (Amato v. Lord & Taylor, Inc. 10 AD3d 374, 375 [2nd Dept. 2004]).*

As previously stated, a result of the failure of the defendants to timely comply with the conditional order, is that the conditional order became absolute. To avoid the adverse impact, the defendants were required to demonstrate a reasonable excuse for their default in complying with the terms of the conditional order and a meritorious defense to the complaint ( see *Pugliese v. Mondello*, 67 AD3d 880 [2nd Dept 2009]). It also well settled that the decision to relieve a party from its default rests in the sound discretion of the motion court. To vacate a

[\* 7]

default judgment, a moving defendant must demonstrate the existence of a reasonable excuse and a meritorious defense ( see *Holt Const. Corp. v. J & R Music World, Inc.*, 294 AD2d 540 [2nd Dept 2002]).

The Court maintains, as per the defendants' own admission, that the November, 2012 stipulation setting forth a January, 2013 deadline, was executed *after* the Sandy disaster. The Court is quite aware of the impact of the storm and needs no recitation of Governor Cuomo's edict regarding its severity or a pronounced "State of Emergency". To even couch its argument in that way, wreaks of sarcasm and serves to antagonize. Defendants had the option of seeking more time and if their lives were so disrupted, they should have been aware of the extent of their devastation in November, 2012, and at least January, 2013. They did not seek more time and did not refer to these issues when *they* agreed to that date. This is the first time they mentioned any damage to any party's house and even if that were the case, they failed to set forth how it impacted their ability to comply with their self imposed deadline.

As to defendants' contention of law office failure, while a court may accept law office failure that is not willful or deliberate as a reasonable excuse, conclusory and unsubstantiated assertions of law office failure are insufficient. Such claim office failure should be supported by a detailed and credible

explanation of the default ( see *Byers v. Winthrop Univ. Hosp.*, 100 AD3d 817 [4<sup>th</sup> Dept 2012]).

The defendants claim that they installed some type of “tracking system” in August, 2012 which was fraught with errors and ultimately causing delays in document production and tracking court dates. There was no documentary evidence as to the specific type of system that was referenced in defendants’ Affirmation of Opposition, nor was any affidavit of an individual with knowledge of the technological issues complained of, attached. It strains credulity, that an office that handles matters before a court of law, would knowingly be subject to such a system without appropriate backup for several months.

Further, the defendants offer an array of excuses for the delay: first they switched counsel; they were disrupted by the storm; and then a faulty “tracking system” in their counsel’s office that failed to record the due date. In light of the foregoing, the Court has the discretion to accept or reject law office failure as a justifiable excuse, and it is hereby rejecting this argument ( see *Byers v. Winthrop University Hospital*, supra).

Regarding the Court’s determination that defendants’ conduct was willful and contumacious, the Court now notes new arguments where they focus on

[\* 9]

plaintiff's discovery responses. Their remedy, which they chose not to exercise, was to make the appropriate application before this Court as did the plaintiff. The plaintiff's responses are not at issue and they are irrelevant to the issue of the defendants' conduct.

In the case at bar, the record is clear that defendants' overall pattern of noncompliance gives rise to an inference of willful and contumacious conduct on their part. An overall examination of the record reflects that the defendants have frustrated the discovery process by failing to produce evidence that has been repeatedly requested since December, 2010. Defendants' conduct in failing to meaningfully produce material and necessary evidence has caused the plaintiff to move this Court to compel production and the parties to enter into at least two stipulations. The defendants voluminous pleadings, which even caused the Court to order re submission at one point, indicates a willful and deliberate conduct. The instant motion further evinces dilatory conduct on their part, which may be subject to sanctions ( see *L & L Auto Distributors and Suppliers Inc. v. Auto Collection, Inc.*, 85 AD3d 734 [2<sup>nd</sup> Dept 2011]).

The defendants again argue the issue of statute of limitations and they do not vary from their initial faulty reasoning. In *St. Paul Travelers Ins. Co. v. Nandi*, 15 Misc3d 1145(A) (NY Sup 2007) , the court considered the very statute of

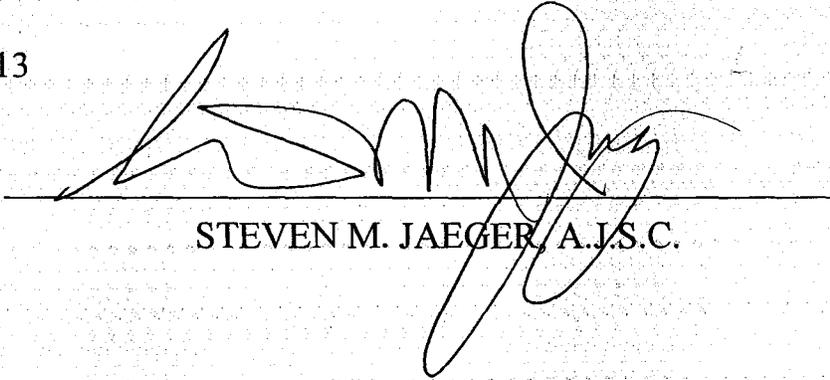
limitations argument set forth in the case at bar. There, the insurance company sought a declaration that the defendant medical entities were not entitled to collect no-fault benefits for any unpaid charges for acupuncture services that they have submitted and to recover the sums it paid to the defendants as no-fault benefits. That court held that the causes of action sounded in fraud and were subject to a six-year statute of limitations (see CPLR §213[8]). Here, the causes of action are identical, and that statute of limitations applies to the instant matter.

As to the remaining arguments, as already stated herein, the facts underlying the defendants' arguments are being presented in this motion for the first time, and they will not be considered by this Court under CPLR §2221(d). The offering of new matters of fact makes the motion one to renew under CPLR §2221(e), not one to reargue under CPLR 2221(d). Furthermore, a motion for re argument is not available where the movant seeks only to argue a new theory of law not previously advanced (*see Frisenda v. X Large Enters.*, 280 A.D.2d 514 [2d Dept 2001]).

This Court has considered the defendant's remaining arguments, and has determined that they are without merit.

Accordingly, the defendants' motion is denied in its entirety. The parties are directed to appear in this part for a Conference on October 30, 2013 at 9:30 a.m.

Dated: September 30, 2013



A handwritten signature in black ink, appearing to read 'S. M. Jaeger', is written over a horizontal line.

STEVEN M. JAEGER, A.J.S.C.

**ENTERED**

OCT 04 2013

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**