

<b>21st Century Ins. Co. v Blackman</b>
2017 NY Slip Op 32478(U)
November 20, 2017
Supreme Court, New York County
Docket Number: 151988/2017
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

21ST CENTURY INSURANCE COMPANY, 21ST CENTURY CASUALTY COMPANY, 21ST CENTURY PACIFIC INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST, 21ST CENTURY ADVANTAGE INSURANCE COMPANY f/k/a AIG ADVANTAGE INSURANCE COMPANY, 21ST CENTURY ADVANTAGE COMPANY f/k/a AMERICAN INTERNATIONAL INSURANCE COMPANY OF DELAWARE, 21ST CENTURY AUTO INSURANCE COMPANY OF NEW JERSEY f/k/a AIG AUTO INSURANCE COMPANY OF NEW JERSEY, 21ST CENTURY CENTENNIAL INSURANCE COMPANY f/k/a AIG CENTURY CENTENNIAL INSURANCE COMPANY, 21ST CENTURY INDEMNITY INSURANCE COMPANY f/k/a AIG INDEMNITY INSURANCE COMPANY, 21ST CENTURY NATIONAL INSURANCE COMPANY f/k/a AIG NATIONAL INSURANCE COMPANY, 21ST CENTURY NORTH AMERICAN INSURANCE COMPANY f/k/a AMERICAN INTERNATIONAL NORTH AMERICAN INSURANCE COMPANY, 21ST CENTURY PINNACLE INSURANCE COMPANY f/k/a AIG INTERNATIONAL INSURANCE COMPANY OF NEW JERSEY, 21ST CENTURY PREFERRED INSURANCE COMPANY f/k/a AIG PREFERRED INSURANCE COMPANY, 21ST CENTURY PREMIER INSURANCE COMPANY f/k/a AIG PREMIER INSURANCE COMPANY, 21ST CENTURY SECURITY INSURANCE COMPANY f/k/a NEW HAMPSHIRE INDEMNITY COMPANY, INC., FARMERS INSURANCE COMPANY OF ARIZONA, FARMERS NEW CENTURY INSURANCE COMPANY, FARMERS NEW CENTURY INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN, FOREMOST PROPERTY & CASUALTY INSURANCE COMPANY, FOREMOST SIGNATURE INSURANCE COMPANY, BRISTOL WEST CASUALTY INSURANCE COMPANY, BRISTOL WEST INSURANCE COMPANY, and any and all of their subsidiaries, affiliates and/or parent companies,

Index No: 151988/2017  
**DECISION/ORDER**  
Motion Sequence 002

Plaintiffs,

-against-

NOEL E. BLACKMAN, BNE CLINTON MEDICAL, P.C.,  
NOEL BLACKMAN PHYSICIAN P.C. a/k/a NOEL  
BLACKMAN P.C., NEB BRONX MEDICAL, P.C. a/k/a NEB  
MEDICAL, P.C., BLANO MEDICAL, P.C., BLACKMAN  
MEDICAL P.C., BLACKMAN PELHAM MEDICAL, P.C.  
a/k/a NOEL BLACKMAN PELHAM MEDICAL P.C., WAVE  
MEDICAL SERVICES, P.C., NOEL E. BLACKMAN, M.D.,  
P.C., ABC CORP. 1-10, JOHN DOE 1-10,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' Noel E. Blackman, Blano Medical P.C., and Wave Medical Services, P.C., pre-answer motion to dismiss under CPLR (a) (7) and plaintiffs' cross-motion for a default judgment under CPLR 3215.

**Papers**

**NYSCEF Documents Numbered**

Defendants' Notice of Motion .....	15
Defendants' Affirmation in Support .....	16
Plaintiffs' Notice of Cross-Motion .....	31
Plaintiffs' Affirmation in Support .....	32
Defendants' Affirmation in Opposition .....	45

*Rubin, Fiorella & Friedman LLP, New York (Harlan R. Schreiber of counsel), for plaintiffs.  
The Rybak Firm, New York (Oleg Rybak of counsel), for defendants Noel E. Blackman, Blano  
Medical P.C., and Wave Medical Services, P.C.*

Gerald Lebovits, J.

Plaintiffs commenced this action on March 1, 2017, alleging five causes of action — fraudulent incorporation, false claims submissions, improper billing, improper use of independent contractors, violation of fee-splitting rules, and unjust enrichment — against defendants for submitting fraudulent claims for no-fault benefits. Plaintiffs write automobile insurance policies for New York State drivers. (Defendants' Affirmation in Support, Exhibit A.) Defendants provide medical services to no-fault claimants by “submitting claims, and attempting to collect such claims from automobile insurers.” (*Id.*) Plaintiffs allege that defendant Noel E. Blackman formed a fraudulent company, Blackman P.C., under his name and medical license, to collect no-fault benefits. (*Id.*)

In a stipulation dated July 6, 2017, plaintiffs discontinued this action against defendants BNE Clinton Medical, P.C, NEB Bronx Medical, and Blackman Pelham Medical, P.C.

On June 5, 2017, defendants Noel E. Blackman, Blano Medical, P.C., and Wave Medical Services, P.C. (“the moving defendants”), moved to dismiss the complaint under CPLR 3211 (a) (7). (Plaintiff’s Affirmation in Support of Cross-Motion, Exhibit J.)

On August 16, 2017, plaintiffs cross-moved for a default judgment under CPLR 3215 against the moving defendants and against defendants Noel Blackman Physician, P.C., Blackman Medical P.C., Noel E. Blackman, M.D. P.C., ABC Companies 1-10 and John Does 1-10, who failed to appear in this action (collectively, “the defaulting defendants”).

### **I. The Moving Defendants’ Motion to Dismiss under CPLR 3211(a) (7)**

Defendants’ motion to dismiss under CPLR 3211 (a) (7) is denied. Under a CPLR 3211 (a) (7) motion, a court determines if the facts alleged by the plaintiff fit within any cognizable legal theory. (*See Nonnon v City of New York*, 9 NY3d 825, 827 [2007].) A court must accept alleged facts as true and construe any inferences in a light most favorable to the plaintiffs. (*See Leon v Martinez*, 84 NY2d 83, 88 [1994]; *accord Miglino v Bally Total Fitness of Greater N.Y. Inc.*, 20 NY3d 342, 351 [2013] [finding plaintiffs cannot be penalized for failing to provide evidentiary showing in a facially sufficient complaint].)

Accordingly, a court may consider affidavits submitted by the plaintiffs to remedy any defects in a complaint. (*See Rovello v Orofino Realty Co.*, 50 NY2d 633, 636 [1976] [finding that plaintiff’s affidavits do not warrant dismissal unless they conclusively establish that plaintiff has no cause of action]; *accord Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010].)

The facts, as plaintiffs allege them, state cognizable legal theories. Plaintiffs provide an affidavit from James Egner, a general special investigator, raising factual issues for each claim. (Plaintiffs’ Notice of Cross-Motion, Egner Affidavit.) Plaintiffs allege that Blackman personally submitted several no-fault claims but neither practiced nor managed the clinics issuing treatment. (*Id.*, at ¶¶ 16-24.) Plaintiffs allege that Dr. Simeon and Dr. Orenstein conducted all testing for no-fault claims although neither was affiliated with Blackman PC. (*Id.*, at ¶¶ 27-23.) The documents defendants submitted for reimbursement showed that a large patient sample had identical testing results and were also billed on pre-printed forms under the same code. (*Id.*, at ¶¶ 34-39.)

Plaintiffs interviewed the no-fault claimants who indicated that they did not receive treatments for the items that defendant providers had billed. (*Id.*, at ¶ 40.) These facts are sufficient to give rise to an action for fraudulent incorporation, false claims submissions, improper billing, improper use of independent contractors, violation of fee-splitting rules, and unjust enrichment. Therefore, the complaint survives a motion to dismiss under CPLR 3211 (a) (7).

**II. Plaintiffs' Cross-Motion for a Default Judgment under CPLR 3215**

Plaintiffs' CPLR 3215 cross-motion for a default judgment is granted. Under CPLR 3215 (a), plaintiffs may seek a default judgment against defendants that fail to appear, plead, or proceed to trial in an action. (CPLR 3011; CPLR 3215; *accord 7th Ave. Tax & Accounting v Walf*, 2017 NY Slip Op 31331 [U], \*1, 2017 WL 2652883, at \*2 [Sup Ct, NY Cty 2017].)

As movants, plaintiffs must demonstrate that defendants defaulted by showing an obligation and failure to respond to the movant's pleading. (CPLR 3215 [f].) Movants must submit proof of service of the summons and complaint, defendant's default, and facts constituting the claim using a party affidavit. (CPLR 3215 [f]; *accord U.S. Bank, Nat'l Ass'n v Razon*, 981 NY2d 571, 572 [2014].) Defaulting parties may oppose a motion for a default judgment based on a failure to appear or timely serve an answer by providing a reasonable excuse for their delay and a potentially meritorious defense. (CPLR 5015 [a] [1]; *accord Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2d Dept 2012].)

Here, plaintiffs submitted an affidavit of service and proof of the summons and complaint. (Plaintiffs' Notice of Cross-Motion, Exhibits A-B.) Plaintiffs served defaulting defendants via regular mail on August 17, 2017.

Defendant Noel E. Blackman was served with the summons and complaint via personal delivery on March 21, 2017; defendant had until April 10, 2017 to answer. (CPLR 3012 [a].)

Defendants Noel E. Blackman, M.D., P.C., Noel Blackman Physician, P.C., Blano Medical, P.C., Blackman Medical P.C., Wave Medical Services, P.C., were served with the summons and complaint via Secretary of State on March 28, 2017, and had until April 27, 2017, to answer. (CPLR 3012 [b]; BCL § 306 [noting that service on a domestic corporation that is authorized to do business is completed when the Secretary of State is served].)

The moving defendants provided an untimely answer on May 26, 2017. (Stipulation Adjourning Motion #001). The remaining defendants, Noel Blackman Physician, P.C., Blackman Medical P.C., Noel E. Blackman, M.D. P.C., ABC Companies 1-10 and John Does 1-10, never answered.

The moving defendants do not provide an explanation for their delay or a meritorious defense. (Defendants' Affirmation in Opposition.) They allege only that plaintiffs did not satisfy their burden of making a prima facie case using non-hearsay facts for obtaining a default judgment. (*Id.* at ¶¶ 7-16.) Further, they allege that plaintiffs failed to demonstrate the merits of the asserted causes of actions and their alleged facts lack specificity. But, as discussed above, plaintiffs allege sufficient facts to give rise to their causes of action. (CPLR 3211 [a] [7].)

Plaintiffs satisfied their requirements under CPLR 3215 and are entitled to a default judgment on liability against defendants Noel E. Blackman, Blano Medical, P.C., and Wave Medical Services, P.C.

That aspect of plaintiffs' cross-motion for a default judgment against defendants Noel Blackman Physician, P.C., Blackman Medical P.C., Noel E. Blackman, M.D. P.C., is granted. Plaintiffs show proof of defendants' default through an affidavit and evidence of alleged facts. (CPLR Plaintiffs' Notice of Cross-Motion, Egner Affidavit; Plaintiffs' Affirmation in Support of Cross-Motion, Schreiber Affirmation.)

As to defendants ABC Companies 1-10 and John Does 1-10, that aspect of plaintiffs' cross-motion is denied.

Accordingly, it is

ORDERED that defendants' Noel E. Blackman, Blano Medical, P.C., and Wave Medical Services, P.C., motion to dismiss the complaint under CPLR 3211 (a) (7) is denied; and it is further

ORDERED that plaintiffs' motion for a default judgment under CPLR 3215 is granted in part and denied in part: plaintiff is entitled to a default judgment on liability as to defendants Noel E. Blackman, Blano Medical, P.C., and Wave Medical Services, P.C., Noel Blackman Physician, P.C., Blackman Medical P.C., Noel E. Blackman, M.D. P.C., but denied as to defendants ABC Companies 1-10 and John Does 1-10, and plaintiffs shall settle order.

Dated: November 20, 2017



J.S.C.

**HON. GERALD LBOVITS**  
J.S.C.