SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 152551/2017

HERTZ VEHICLES, LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ADVANCED ORTHOPAEDICS, P.L.L.C.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for DEFAULT JUDGMENT.

Upon the foregoing documents, it is ordered that the motion and cross-motion are decided as follows.

In this declaratory judgment action, plaintiff Hertz Vehicles, LLC ("Hertz") moves, pursuant to CPLR 3215, for a default judgment against defendant Advanced Orthopaedics, P.L.L.C. ("Advanced"). Advanced cross-moves to dismiss the action and for attorneys' fees or, in the alternative, to vacate its default in timely answering the complaint, to change the place of venue, and for any other relief this Court deems just and proper. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion and cross-motion are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On August 20, 2014, Nasr Ismail ("Ismail"), Lakeisha Hinton ("Hinton"), and Keyion Cheairs were allegedly involved in a motor vehicle accident in Queens while in a vehicle owned

and insured by plaintiff Hertz.[1] (Docs. 7 at 2, 29 at 4.) Although the police report indicated that there was no visible damage to the vehicle (Doc. 10 at 2), defendant Advanced evaluated and treated Ismail and Hinton for injuries allegedly resulting from the incident (Doc. 29 at 4). Hertz assigned claim number 02201421994 to all no-fault claims arising out of the occurrence. (Doc. 11 at 2, 5.) Thereafter, Hertz received medical bills from Advanced for shoulder surgeries performed on Ismail and Hinton. (Docs. 29 at 4, 47 at 8.) Specifically, on November 6, 2014, Hertz received a claim from Advanced for Ismail's treatments in the amount of $7,829.72. (Doc. 30 at 20.) Hertz received a bill for Hinton's surgery in the amount of $6,863.17 on November 7, 2014. (Docs. 29 at 5, 30 at 19.) On April 10, 2015, Hertz received another bill from Advanced for Hinton's treatment in the amount of $64.07. (Doc. 30 at 2.)

On November 12, 2014, Hertz requested that Ismail and Hinton appear for an Examination Under Oath ("EUO") to verify their claims as well as the circumstances surrounding the accident.[2] Both Ismail and Hinton attended their scheduled EUOs on December 19, 2014. (Docs. 7 at 3–5, 13 at 2, 14 at 2, 47 at 8.) Although Ismail testified at his EUO that the impact of the collision was hard and that the Hertz vehicle was pushed into the street intersection (Doc. 14 at 12), he also stated that the only damage he saw on the vehicle was a dented bumper (*id.* at 13). At her EUO, Hinton represented that she and Ismail declined treatment when police officers at the accident scene asked whether they needed medical attention. (Doc. 13 at 12.)

On January 7, 2015, Hertz requested that Advanced attend an EUO to be held on January 27, 2015 to explore whether the surgeries performed on Ismail and Hinton were necessary. (Doc. 15 at 2.) However, Advanced failed to appear for the EUO on that date. (Docs. 7 at 5, 15 at 5.)

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[1] Unless otherwise indicated, all references are to the documents filed with NYSCEF in this matter.
[2] Proof of the EUO request letters can be found in Document 40, pages 2 and 10, filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015), a separate, prior action involving plaintiff and defendant regarding the same alleged accident.

On February 6, 2015, Hertz rescheduled the EUO for February 20, 2015 and warned Advanced that its failure to appear on the newly scheduled date would constitute a breach of the insurance policy. (Doc. 15 at 5.) Again, Advanced failed to appear. (Doc. 7 at 5.) On March 10, 2015, Hertz denied the medical claims on the basis that Advanced's nonattendance at the EUOs constituted a breach of contract. (Docs. 29 at 6, 47 at 8.) According to Hertz, attending the requested EUOs, as required by 11 NYCRR §§ 65-3.5(b) and 65-3.5(p), was a condition precedent to coverage with which Advanced did not comply. (Doc. 7 at 5–6.)

Pursuant to New York Insurance Law § 5106(b), Advanced commenced arbitration proceedings against Hertz before the American Arbitration Association seeking reimbursement for the medical bills which it submitted on behalf of Ismail and Hinton. With respect to the bill for Ismail's treatment, Arbitrator Richard Martino ("Martino") awarded Advanced the full amount of the bill, as well as attorneys' fees, and determined that Hertz could not deny payment because Hertz's EUO scheduling letters were untimely under 11 NYCRR § 65-3.5(b). (Doc. 17 at 5–13.) While Martino's decision was vacated by a Master Arbitrator (*id.* at 14–17), Advanced was again awarded the amount in dispute by Arbitrator Martin Schulman ("Schulman") on remand (*id.* at 18–23). Master Arbitrator Robyn Weisman affirmed Schulman's decision. (*Id.* at 24–28.)

With respect to Hinton's medical bill, Martino found that, under 11 NYCRR § 65-3.5(b), Hertz had 15 days after receipt of the bill to schedule an EUO with Advanced. He therefore concluded that, as with Ismail's arbitration proceedings, Hertz could not raise Advanced's failure to attend the EUOs as a reason for not paying the claims. (Doc. 18 at 5–13.) Master Arbitrator Frank Godson confirmed Martino's decision in its entirety. (*Id.* at 14–18.)

Simultaneously with the arbitration proceedings, in an action captioned *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.*, Supreme Court, New York County Index Number 154077/2015 ("the 2015 action"), Hertz sought declaratory relief against not only Advanced but also all the medical providers (collectively the "Medical Provider Defendants") from whom Ismail and Hinton allegedly received treatment. (Doc. 29 at 9–10.) Hertz moved for a default judgment against the Medical Provider Defendants in the 2015 action but, by order dated May 16, 2016, this Court denied Hertz's motion with leave to renew upon proper papers (Docs. 29 at 10, 32 at 1–3), reasoning that Hertz failed to submit sufficient proof of the facts constituting its claim (Doc. 32 at 3).

Although Advanced had drafted a pre-answer motion for dismissal and vacatur of its default in answering the complaint in the 2015 action, Hertz and Advanced came to an agreement: the two parties stipulated that Advanced would not move forward with its cross-motion and, in exchange, Hertz would vacate Advanced's purported default and accept its answer. (Docs. 29 at 10, 33 at 2.) Upon the renewal of Hertz's default motion, this Court, by order dated November 13, 2017, granted Hertz a default judgment against some of the Medical Provider Defendants, but denied the default motion as against Advanced.[3]

On February 10, 2017, Advanced moved to dismiss Hertz's claims in the 2015 action pursuant to CPLR 3211(a)(1) and (5), as well as Insurance Law § 5106(b).[4] On August 29, 2017, Hertz moved for summary judgment in the 2015 action.[5] Advanced argued that dismissal was warranted because it had elected to arbitrate the matter and had prevailed in the arbitrations, and

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[3] The order can be found in Document 107 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).
[4] The notice of motion can be found in Document 67 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).
[5] The notice of motion can be found in Document 86 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).

because the findings in the arbitration proceedings were binding on the 2015 action. (Doc. 29 at 11.) In opposition, Hertz argued that its EUO letters were timely and that Advanced breached a condition precedent to coverage by failing to appear for the two scheduled EUOs.[6]

By order dated December 6, 2017, this Court denied dismissal and granted summary judgment in Hertz's favor in the 2015 action.[7] In so holding, this Court reasoned that Hertz's requests for EUOs with Advanced were timely under 11 NYCRR § 65-3.5 because Hertz requested the EUOs in January and February of 2015 and because Hertz subsequently received a bill from Advanced in April of 2015.[8] This Court stated that, under *Mapfre Ins. Co. of New York v Manoo* (140 AD3d 468 [1st Dept 2016]), if a claim is received by an insurer after EUO request letters are sent out, then the EUO letters are not subject to the time requirements in 11 NYCRR § 65-3.5.[9] Advanced has filed an appeal from the December 6, 2017 order.[10]

On March 17, 2017, Hertz commenced the captioned action seeking a trial *de novo* against Advanced pursuant to Insurance Law § 5106, which allows an insurer or claimant to demand such a trial if an arbitration award exceeds the sum of $5,000.[11] (Doc. 7 at 8.) Process was properly served on Advanced on March 31, 2017 via the Secretary of State. (Doc. 9 at 2–3.) Hertz now moves, pursuant to CPLR 3215, for a default judgment against Advanced. (Doc. 7 at 8.) In response, Advanced has filed a pre-answer cross-motion seeking to dismiss the action and

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[6] Hertz's arguments for summary judgment can be found in Document 87 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).
[7] The order can be found in Document 108 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).
[8] *See* Document 108, pages 4 and 5, filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).
[9] *Id.*
[10] The notice of appeal can be found in Document 115 filed with NYSEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).
[11] Although Hertz's complaint only sought a trial *de novo* regarding Advanced's claims over Ismail's treatments, an amended complaint added Advanced's claims with regard to Hinton's treatments when the arbitration proceedings concluded. (Doc. 7 at 8.)

for attorneys' fees or, in the alternative, to vacate its default in timely answering the complaint, to change venue, and for such other relief as this Court deems proper. (Doc. 29.)

POSITIONS OF THE PARTIES:

Hertz claims that a default judgment should be granted against Advanced because it breached a condition precedent to coverage by failing to attend the scheduled EUOs. Hertz argues that it has submitted sufficient proof of the facts constituting its claim. Specifically, Hertz has proffered two attorney affirmations and an employee affidavit which, according to Hertz, establish that its EUO letters were timely because they were mailed before a bill was received from Advanced on April 10, 2015. (*Id.* at 8–12.) Therefore, Hertz claims, the EUO letters were not subject to the stringent time requirements of 11 NYCRR § 65-3.5, which mandates that an EUO must be requested within 15 days after receipt of a claim. (*Id.*)

In opposition to Hertz's motion, Advanced maintains that a trial *de novo* action is improper under 11 NYCRR § 65-4.10(h)(2), which requires that "all amounts set forth in the master arbitration award which will not be the subject of judicial action or review shall be made prior to the commencement of such action." Because Hertz has not paid the attorneys' fees set forth in the arbitration awards, and because those fees are not subject to *de novo* relief, Advanced contends that the action seeking a trial *de novo* should be dismissed. (Doc. 29 at 14–16.)

In the alternative, Advanced also seeks an extension of time to answer Hertz's complaint, for a change in venue from New York County to Queens County, and for such other relief as this Court deems just and proper. (*Id.* at 1–2.) Advanced's attorney submits an affidavit of Katherine Raskin ("Raskin"), Advanced's billing manager, who states that Advanced's failure to answer the complaint occurred because Advanced only learned of the present action when it received

notice of Hertz's default judgment motion. (*Id.* at 17, Doc. 38 at 3.) According to Advanced, this law office failure constitutes a reasonable excuse for the delay in answering pursuant to CPLR 2004, 2005, and 3012(d). (Doc. 29 at 17.) In further support of extending its time to answer, Advanced alleges that it has a meritorious defense to this action. (*Id.* at 16–23.) With respect to its motion to change venue, Advanced asserts that Hertz neither resides nor has a place of business in New York County, that the accident occurred in Queens County, that Advanced resides in Queens County, and that neither Ismail nor Hinton resides in New York County. (*Id.* at 26.) Under these facts, Advanced argues, venue must be changed, pursuant to CPLR 503(a), to Queens County. (*Id.*) Last, Advanced claims that it should recover reasonable attorneys' fees for defending the previous arbitration proceedings and this action. (*Id.* at 27–33.)

In response, Hertz argues that there is no condition precedent to filing a trial *de novo* action under 11 NYCRR § 65-4.10(h)(1)(ii); that Advanced is not entitled to attorneys' fees because Hertz may prevail in the present action; that the law office failure in this case does not amount to a reasonable excuse in failing to answer because the failure was that of Advanced's billing manager, not its attorney; and that New York County is a proper venue because Hertz's certificate of registration filed with the New York Secretary of State lists its address as 111 Eighth Avenue, New York, New York. (Doc. 41.)

In a second cross-motion, Advanced moves to recuse this Court from the instant action and have it transferred to a different judge. Advanced claims that, based on this Court's order dated December 6, 2017,[12] the undersigned is predisposed to rule against it. (Doc. 47 at 3.)

[12] The order can be found in Document 108 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." However, a defendant who has failed to answer the complaint in a timely fashion can still seek permission to appear in the case upon a showing of reasonable excuse for the delay. For example, pursuant to CPLR 3012(d), "[u]pon the application of a party, a 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." And, under CPLR 2005, a "court shall not, as a matter of law, be precluded from excusing its discretion in the interests of justice to excuse delay or default resulting from law office failure." In construing CPLR 2005, courts have held that a law office failure may qualify as "good cause" under CPLR 2004 for an extension of any time limit fixed by statute. (*See Tewari v Tsoutsouras*, 75 NY2d 1, 12–13 [1989].)

A "[l]aw office failure may constitute a reasonable excuse, particularly where there has not been a pattern of dilatory behavior, or where the failures were caused by former counsel and substitute counsel has been obtained." (*Pryce v Montefiore Med. Ctr.*, 114 AD3d 594, 594 [1st Dept 2014]) (internal citations omitted). Nevertheless, a law office failure will not be automatically accepted as an excuse for a delay in every case. (*See Martinez v Belanger*, 186 AD2d 40, 40 [1st Dept 1992]) (rejecting law office failure as an excuse where the plaintiff did not maintain adequate communication with his own counsel). In particular, "claims of law office failure which are conclusory and unsubstantiated cannot excuse default." (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]) (internal quotations omitted).

This Court determines that Advanced is entitled to an extension of time to answer Hertz's complaint. Although Hertz has submitted proof that it served the summons and verified complaint on Advanced via the Secretary of State (Doc. 9), Advanced has submitted the affidavit of its billing manager, Raskin, who explains Advanced's reason for the delay in answering (Doc. 38). That affidavit establishes that Advanced first learned of the captioned action when it received notice of Hertz's motion for a default judgment. (*Id.* at 3.) Raskin further represents that Advanced's electronic records give no indication that the office received the summons and verified complaint. (*Id.*) This Court finds that there is no evidence of dilatory behavior on the part of Advanced's counsel. Given Advanced's active participation in the 2015 action, which involved essentially the same issues between the two parties, Hertz's counsel knew or should have known that Advanced was not likely to default had it been aware of the present action.

Advanced also argues that an extension of time to answer is warranted because it has a meritorious defense to Hertz's action. (Doc. 29 at 16–23.) Advanced's defense is premised on its theory that Hertz's EUO letters were untimely. (*Id.*) However, this Court need not consider that argument. (*Nason v Fisher*, 309 AD2d 526, 526 [1st Dept 2003] (affidavits of merit in support of relief sought not essential where no default judgment has been obtained by plaintiff); *DeMarco v. Wyndham Intern., Inc.*, 299 AD2d 209, 209 [1st Dept 2002] (same).) Therefore, given its reasonable excuse for the delay in answering, this Court finds, in its discretion, that Advanced is entitled to an extension of 30 days to answer from the service of this order with notice of entry. (*See* CPLR 3012[d]; *see generally Antonious v Muhammed*, 188 AD2d 399, 399 [1st Dept 1992].)

Because Advanced's cross-motion seeking an extension of time to answer Hertz's complaint is granted, Hertz's motion for a default judgment is denied. Likewise, Advanced's

cross-motion seeking dismissal of the action with prejudice pursuant to CPLR 3211(a)(1), (2), (3), and (5) is denied. Pursuant to CPLR 3211(e), a motion to dismiss the action must be made before the responsive pleading is required.[13] Should it be so advised, Advanced may submit a motion for dismissal pursuant to CPLR 3211 prior to serving its answer.

This Court further denies Advanced's cross-motion seeking to transfer venue from New York County to Queens County. Advanced argues that Queens County is the proper venue because the accident occurred in Queens County, Advanced resides in Queens County, neither Ismail nor Hinton resides in New York County, and because Hertz neither resides nor has a place of business in New York County. (Doc. 29 at 23–27.) With respect to Hertz's corporate residence, Advanced refers to the summons, which lists Hertz's address as 225 Brae Boulevard in Park Ridge, New Jersey. (Doc. 1 at 1.) CPLR 503(c) governs a corporation's state residence for venue purposes. (*See* CPLR 503[c].) In analyzing whether the location of a corporation's principal office renders the corporation a "resident" of a certain county, courts have held that a "corporation's designation of the location of its office in its statement filed with the Secretary of State constitutes a designation of its residence for venue purposes under CPLR 503(c)." (*Johanson v J.B. Hunt Transp., Inc.*, 15 AD3d 268, 269 [1st Dept 2005].)

Hertz submits an attorney affirmation which represents that Hertz's address, as filed with the New York Secretary of State, is listed as 111 Eighth Avenue, New York, New York, 10011.[14] (Doc. 41 at 6.) Therefore, Hertz properly chose New York County as a place of venue

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[13] This rule does not apply to a motion to dismiss pursuant to CPLR 3211(a)(2), which is premised on subject matter jurisdiction and therefore may be made at any time. (*See* CPLR 3211[e].)

[14] An online search of the New York State Department of State's website confirms this address. *See* https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_token=53FC66CED21F48103B68278CF32D6342722BDD6F8E23544DEB27926B7D61C8B5B2DD01506596542D1A51D1B8CC6D25AF&p_nameid=E4DD0BFFE86AB268&p_corpid=4F81B16AFC31AEFE&p_captcha=19495&p_captcha_check=53FC66CED21F48103B68278CF32D6342722BDD6F8E23544DEB27926B7D61C8B5EAFAA0BB9D8CC8F00007B91FFB387EEF&p_entity_name=hertz%20vehicles&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0 (last visited Aug. 23, 2018).

for this action. (*See* CPLR 503[a] (general rule is that plaintiff may commence the action in any county in which any one of the parties resides).)

Last, Advanced's cross-motion seeking to have the undersigned recused from the instant action and have it transferred to a different judge is denied. "[The] court is the sole arbiter [of its] recusal, and its decision is a matter of discretion and personal conscience." (*See US Bank, N.A. v Morrison*, 160 AD3d 680, 681 [2d Dept 2018].) A party must set forth proof of the court's bias or prejudice warranting recusal. (*See id.*)

Advanced has not provided this Court sufficient evidence of bias or prejudice warranting the undersigned's recusal from the action. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." (*People v Moreno*, 70 NY2d 403, 407 [1987]) (internal citations omitted). Advanced's reasons for recusal fall short of that. Indeed, Advanced's argument for recusal is merely that this Court is predisposed to rule against it in this case because the undersigned granted summary judgment to Hertz in the 2015 action.

Hertz's notice of motion for a default judgment was filed on May 18, 2017. (Doc. 6.) Since Advanced claims that it only learned of the captioned action when Hertz filed the default motion (Docs. 29 at 17, 38 at 3), it waited eight months, until January 25, 2018, to raise the issue of recusal (Doc. 47 at 24). This Court granted summary judgment to Hertz in the 2015 action on December 16, 2017.[15] Where, as here, "a party inexplicably withholds an allegation of bias until after the court adversely rules against it, denial of the recusal motion is generally warranted and the court['s] discretion in so ruling will not be disturbed." (*Glatzer v Bear, Stearns & Co., Inc.*, 95 AD3d 707, 707 [1st Dept 2012].) Advanced's cross-motion for recusal is therefore denied.

[15] The order can be found in Document 108 filed with NYSCEF in *Hertz Vehs., LLC v Jagga Alluri, M.D. et al.* (154077/2015).

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff Hertz Vehicles, LLC's motion for a default judgment against defendant Advanced Orthopaedics, P.L.L.C. is denied; and it is further

ORDERED that, within 30 days after this order is filed with NYCSEF, Advanced is to serve a copy of this order with notice of entry on Hertz's attorney and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that Advanced's cross-motion to vacate its default is granted on condition that it serve and file an answer to the complaint herein, or otherwise respond thereto or appear in this action, within 30 days after it is served with of a copy of this order with notice of entry; and it is further

ORDERED that Advanced's cross-motion is otherwise denied; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on January 15, 2019, at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of this Court.

9/17/2018
DATE

KATHRYN E. FREED, J.S.C.

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