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| <b>Liberty Mut. Ins. Co. v Cooper</b>  |
| 2020 NY Slip Op 31847(U)   |
| June 11, 2020  |
| Supreme Court, New York County   |
| Docket Number: 656004/2019   |
| Judge: Louis L. Nock   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

*Justice*

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LIBERTY MUTUAL INSURANCE COMPANY and LM  
GENERAL INSURANCE COMPANY,

Plaintiff,

- v -

PRECIOUS COOPER, ALEMAN CHIROPRACTIC  
SERVICES, PLLC, ALFORD A. SMITH MD, PC, ATLAS PT,  
PC, CENTER FOR NEURORESTORATIVE MEDICINE,  
COSMOPOLITAN PHYSICAL THERAPY, HARBOR  
MEDICAL GROUP, HEAL RITE PT, PC, HMP  
ORTHOPAEDICS, INSTAR MEDICAL PC, JAMAICA  
HOSPITAL MEDICAL CENTER, JHMC HOSP CO BETZ  
MITCHELL, THE JAMAICA HOSPITAL MEDICAL CENTER,  
LONGEVITY MEDICAL SUPPLY INC., NEW SENSE  
ACUPUNCTURE PC, NYRX PHARMACY INC., and VAN  
SICLEN CHIROPRACTIC PC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 51, 52, 53, 54, 55, and 56

were read on this motion to/for JUDGMENT - DEFAULT.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion of plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company (“Plaintiffs”) for entry of a default judgment against defendants Precious Cooper (“Cooper”), Aleman Chiropractic Services, PLLC, Alford A. Smith MD, PC, Atlas PT, PC, Center for Neurorestorative Medicine, Cosmopolitan Physical Therapy, Heal Rite PT, PC, HMP Orthopedics, New Sense Acupuncture, PC, Van Siclen Chiropractic PC, Harbor Medical Group (“Harbor”), Jamaica Hospital Medical Center, JHMC Hospital CO Betz Mitchell, Longevity Medical Supply Inc. (“Longevity Med”), The Jamaica

|                                       |             |
|---------------------------------------|-------------|
| INDEX NO.                             | 656004/2019 |
| MOTION DATE                           | 01/16/2020  |
| MOTION SEQ. NO.                       | 001         |
| <b>DECISION + ORDER ON<br/>MOTION</b> |             |

Hospital Medical Center, and NYRX Pharmacy Inc. (“NYRX”) is granted in part, and the cross-motions of NYRX and Longevity Med to compel acceptance of their respective answers are granted, in accord with the following memorandum decision.

### **Background**

Plaintiffs are the issuers of an insurance policy under policy number AOS22806161270, under which Cooper made claims for No-Fault benefits in connection with a motor vehicle collision that occurred on December 4, 2018 (the “Collision”). The remaining defendants are medical providers who have made claims to Plaintiffs as assignees of Cooper. By virtue of this action, Plaintiff seeks an injunction barring the defendants from seeking reimbursement for the claims submitted by Cooper in connection with the Collision, a stay of all related pending litigation or arbitrations, an injunction prohibiting defendants from submitting additional bills for reimbursement of Cooper’s claims, and a declaration that the denials of all claims in connection with the Collision were proper. All defendants were served with process. But defendants Cooper, Aleman Chiropractic Services, PLLC, Alford A. Smith MD, PC, Atlas PT, PC, Center for Neurorestorative Medicine, Cosmopolitan Physical Therapy, Heal Rite PT, PC, HMP Orthopedics, New Sense Acupuncture, PC, and Van Siclen Chiropractic PC (the “Non-Appearing Defendants”) have failed to appear in this action.

Defendants Jamaica Hospital Medical Center, JHMC Hospital CO Betz Mitchell, and the Jamaica Hospital Medical Center, (the “Jamaica Defendants”) appeared in the action on November 25, 2019 by filing an answer asserting fifty-six affirmative defenses and one counterclaim; NYRX appeared on December 9, 2019 by filing an answer asserting twenty affirmative defenses and one counterclaim; Harbor appeared on December 27, 2019 by filing an answer asserting twelve affirmative defenses; and Longevity Med appeared on December 27,

2019 by filing an answer asserting forty affirmative defenses and one counterclaim. On January 3, 2002, Plaintiff filed replies to each of the counterclaims of the Jamaica Defendants, Longevity Med, and NYRX.<sup>1</sup> Two weeks later, on January 16, 2020, Plaintiff filed the instant motion for default, seeking entry of a default judgment against the Non-Appearing Defendants and against Harbor, the Jamaica Defendants, Longevity Med, and NYRX. NYRX and Longevity Med each filed, on January 24, 2020 and March 17, 2020, respectively, opposition to the motion and cross-motions for an order compelling Plaintiff to accept Defendant's answer pursuant to CPLR 3012 (d).

### Discussion

CPLR 3215 (a) provides, in relevant part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” On a motion for default judgment under CPLR 3215, a plaintiff demonstrates entitlement to a default judgment by submitting proof of service of the summons and complaint, proof of facts constituting its claim, and proof of the defendant's default in answering or appearing (CPLR 3215 [f]). Notwithstanding a party's default, the court may, in its discretion, refuse to enter a default judgment (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]). “Under CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading ‘upon such terms as may be just,’ provided that there is a showing of a reasonable excuse for the delay (*id.*). The First Department has outlined five factors that “must . . . be considered and balanced” when considering a motion under CPLR 3012 (d) for an extension of time to appear or plead, including (1) length of the delay, (2) the excuse offered, (3) the extent to which the delay was willful, (4) the possibility of prejudice to adverse parties,

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<sup>1</sup> The action was discontinued as against Instart Medical PC by a stipulation between the parties filed on December 9, 2019.

and (5) the potential merits of any defense (*id.* at 472-473). A showing of a potential meritorious defense is not an “essential component” of a motion to serve a late answer (CPLR 3012 [d]) where no default order or judgment has been entered (*Pichardo v. 969 Amsterdam Holdings, LLC*, 176 AD3d 571, 572 [1st Dept 2019]; *Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]).

Plaintiff’s motion seeks entry of a default judgment against the Non-Appearing Defendants on the basis of their failure to answer or otherwise appear in the action, and against Harbor, the Jamaica Defendants, Longevity Med, and NYRX on the basis of its assertion that these defendants failed to timely appear in the action. In support of its motion, Plaintiff has demonstrated that all defendants were served with copies of the summons and complaint (Bynum Aff. Ex. B) and has submitted affidavits and supporting documents demonstrating proof of facts constituting its claim (Stojanov, Smith, and Marrangoni Affs.). Plaintiff has also demonstrated that it served the additional notices required by CPLR 3215 (g) on all defendants (Bynum Aff. Ex. C). Plaintiff has also submitted proof that the Non-Appearing defendants have defaulted by failing to appear in this action. Plaintiff is, therefore, entitled to entry of a default judgment against the Non-Appearing Defendants.

As set forth in the affidavit of service filed in support to Plaintiff’s motion, the Jamaica Defendants were served on October 30, 2019 by service upon the Secretary of State pursuant to Business Corporations Law § 306 (Bynum Aff. Ex. B). Pursuant to CPLR Rule 320 (a), “[a]n appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf . . . the appearance shall be made within thirty days after service is complete. Whereas the Jamaica Defendants filed their answer on November 25, 2019, twenty-six

days after service of the summons and complaint on the Secretary of State, their answer was timely and Plaintiff is not entitled to a default judgment against them.

NYRX and Longevity Med concede that their answers were untimely filed ten and twenty-eight days late, respectively, but cross-move for an order compelling Plaintiff's to accept service of their respective answers. New York courts have a "strong public policy in favor of resolving cases on the merits," which the Appellate Division, First Department, has "held normally weighs in favor of granting such motions" (*Emigrant Bank*, 156 AD3d at 478; *Artcorp*, 140 AD3d at 418). In consideration of this public policy and the pertinent facts, NYRX and Longevity Med are entitled to the relief sought. As an initial matter, Plaintiff waived its objections to the untimeliness of the defendant's answers by not rejecting the late answer and instead retaining it for two weeks and serving a reply to the counterclaims (*Rossini Excavating Corp. v Shelter Rock Bldrs., LLC*, 89 AD3d 467, 467 [1st Dept 2011] ["Plaintiff waived its objections to the untimeliness of defendants' answer by serving a reply to the counterclaims after rejecting the late answer and moving for a default judgment."]). The length of the delay for each answer was brief (*see Hertz Vehicles, LLC v Mollo*, 171 AD3d 651, 651 [1st Dept 2019] [excusing a three month delay occasioned by law office failure]; *Nedeltcheva v MTE Transportation Corp.*, 157 AD3d 423, 423 [1st Dept 2018] [excusing a one-month delay in service of an answer]). The defendants have offered acceptable excuses of law office failure (Chin 1/20/2020 Aff., Betancourt 3/11/2020 Aff.). Plaintiff has made no showing of willfulness on the part of NYRX or Longevity Med, and Plaintiff suffered no prejudice as a result of the brief delay. A showing of a potential meritorious defenses is not essential to the relief sought because no default order or judgment has been entered (*Naber Electric v. Triton Structural*

*Concrete, Inc.*, 160 AD3d 507, 507 [1st Dept 2018]). In light of these factors and in the interest of justice, the cross-motions are granted.<sup>2</sup>

Accordingly, it is

ORDERED that Plaintiff's motion for a entry of a default judgment is granted in part and the Clerk is directed to enter judgment for plaintiff against defendants Precious Cooper, Aleman Chiropractic Services, PLLC, Alford A. Smith MD, PC, Atlas PT, PC, Center for Neurorestorative Medicine, Cosmopolitan Physical Therapy, Heal Rite PT, PC, HMP Orthopedics, New Sense Acupuncture, PC, and Van Siclen Chiropractic PC; and it is, accordingly,

ADJUDGED and DECLARED that each and every part of any arbitration or court hearing commenced by Precious Cooper, Aleman Chiropractic Services, PLLC, Alford A. Smith MD, PC, Atlas PT, PC, Center for Neurorestorative Medicine, Cosmopolitan Physical Therapy, Heal Rite PT, PC, HMP Orthopedics, New Sense Acupuncture, PC, and Van Siclen Chiropractic PC for No-Fault benefits stemming from the alleged vehicle collision of December 4, 2018 is hereby permanently stayed; and it is further

ADJUDGED and DECLARED that each of Precious Cooper, Aleman Chiropractic Services, PLLC, Alford A. Smith MD, PC, Atlas PT, PC, Center for Neurorestorative Medicine,

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<sup>2</sup> As for defendant Harbor: although it appears that it has not filed papers in opposition to plaintiff's motion for a default judgment; it *has*, as indicated above, filed a late answer, just as its answering co-defendants did. This court does not see the justification of encumbering Harbor with a default judgment merely because of its lack of formal opposition filing, in light of the reality that the policy reasons set forth above relating to Harbor's late-answering co-defendants apply, with perfect harmony, to Harbor. To deny Harbor the benefit of those policies and reasonings, which benefit similarly situated co-defendants, merely on account of the lack of any formal opposition by Harbor, would, in this court's opinion, constitute an unsound exercise of adjudication. This is especially so, given the lack of any real prejudice to plaintiff, whose motion has been denied as to Harbor's similarly situated co-defendants. No counterclaims are asserted by Harbor, so there is no need for plaintiff to reply. In sum, Harbor's answer is recognized, and no entry of default will be ordered as to Harbor for the reasons set forth above in connection with the late-answering defendants who formally opposed plaintiff's motion and who formally cross-moved for acceptance of answer.

Cosmopolitan Physical Therapy, Heal Rite PT, PC, HMP Orthopedics, New Sense Acupuncture, PC, and Van Siclen Chiropractic PC is hereby permanently enjoined from commencing or participating in any arbitration or court hearing for No-Fault benefits stemming from the alleged vehicle collision of December 4, 2018; and it is further

ADJUDGED and DECLARED that the Plaintiffs' denials of all claims for No-Fault benefits made by Precious Cooper, Aleman Chiropractic Services, PLLC, Alford A. Smith MD, PC, Atlas PT, PC, Center for Neurorestorative Medicine, Cosmopolitan Physical Therapy, Heal Rite PT, PC, HMP Orthopedics, New Sense Acupuncture, PC, and Van Siclen Chiropractic PC stemming from the alleged vehicle collision of December 4, 2018 are deemed valid; and it is further

ORDERED that the remainder of Plaintiff's motion is denied; and it is further

ORDERED that the cross-motion of NYRX Pharmacy Inc. to compel Plaintiff to accept its Answer is granted; and it is further

ORDERED that the cross-motion of Longevity Medical Supply Inc. to compel Plaintiff to accept its Answer is granted; and it is further

ORDERED that the Answer of Harbor Medical Group is deemed timely filed; and it is further

ORDERED that the parties are directed to contact the chambers of this court at [lfurdyna@nycourts.gov](mailto:lfurdyna@nycourts.gov) within ten (10) days of entry of this order to schedule a preliminary conference to be held telephonically within thirty (30) days of entry of this order.

This shall constitute the decision and order of the court.

ENTER:

*Louis L. Nock*

|                       |                          |                            |                                     |                       |
|-----------------------|--------------------------|----------------------------|-------------------------------------|-----------------------|
| <u>6/11/2019</u>      |                          |                            | <u>LOUIS L. NOCK, J.S.C.</u>        |                       |
| DATE                  |                          |                            |                                     |                       |
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
|                       | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | DENIED                |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER               | <input checked="" type="checkbox"/> | GRANTED IN PART       |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | SUBMIT ORDER          |
|                       |                          |                            | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                       |                          |                            | <input type="checkbox"/>            | OTHER                 |
|                       |                          |                            | <input type="checkbox"/>            | REFERENCE             |