

Liberty Mut. Ins. Co. v Castillo
2020 NY Slip Op 34358(U)
December 30, 2020
Supreme Court, New York County
Docket Number: 650552/2020
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650552/2020

MOTION DATE 11/19/2020

MOTION SEQ. NO. 001

- v -

JOSE CASTILLO, ALFORD A. SMITH PC, ATLAS PT PC,
BURKE PHYSICAL THERAPY PC, CHANG HEALTH
PHYSICAL THERAPY, DAVID ISRAEL, MD, HEAL-RITE PT
PC, MEDAID RADIOLOGY LLC, MONTEFIORE MED
CENTER OUT, KIM CHIROPRACTIC PC, NU AGE MED
SOLUTIONS INC., RIDGEWOOD DIAGNOSTIC
LABORATORY, RIVERSIDE MEDICAL SERVICES PC,
SANFORD CHIROPRACTIC PC, SPINE PRO CHIRO PC,
SUPPORTIVE PRODUCTS CORP., SYOSSET
ACUPUNCTURE PC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 40, 41, 42, 43, 44

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

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave to enter a default judgment against the individual defendant Jose Castillo, as well as the non-answering health-care defendants Alford A Smith MD PC, Atlas PT PC, Burke Physical Therapy PC, Chang Health Physical Therapy, David Israel MD, Heal-Rite PT PC, Medaid Radiology LLC, Montefiore Med Center Out, Kim Chiropractic PC, Nu Age Med Solutions Inc., Sanford Chiropractic PC, Spine Pro Chiro PC, Supportive Products Corp., and Syosset Acupuncture PC. The plaintiffs seek a declaration that they are not obligated to pay no-fault benefits to Castillo under policy number AOS22114803470, claim number, 0396536910005, in connection with injuries that he allegedly sustained in a March 28, 2019 motor vehicle accident, or to reimburse the non-answering health-care defendants for treatment they rendered or equipment and supplies they provided to him for those injuries. The plaintiffs move for this relief on the grounds that Castillo made a material misrepresentation on his insurance policy application by failing to disclose that he was, or intended to, operate the vehicle for livery/business purposes.

Defendants Alford A Smith MD PC, Burke Physical Therapy PC, Medaid Radiology LLC, Montefiore Med Center Out, Sanford Chiropractic PC, and Spine Pro Chiro PC (the cross-moving defendants) oppose the motion and cross-move pursuant 3012(d) to compel the

acceptance of their late answer. Defendants Chang Health Physical Therapy and Syosset Acupuncture PC (Chang and Syosset) oppose the motion and purport to cross-move, without Notice of Cross-Motion, to compel the acceptance of their late answer.

The motion is denied, and the cross-motion and purported cross-motion to compel the plaintiffs' acceptance of the late answers are granted.

A. Plaintiffs' Motion for Leave to Enter Default Judgment

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept. 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st Dept. 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]).

CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. See Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see also Martinez v Reiner, 104 AD3d 477 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

Here, in support of their motion, the plaintiffs submit, *inter alia*, Castillo's EUO transcript wherein he testified that he was a self-employed driver for Uber and Lyft since 2014, that he used the insured vehicle for these business purposes, and that he had picked up a woman, Aristina Alvarez, prior to the accident. The plaintiffs further submit Alvarez' EUO transcript wherein she testified that following a dental appointment she attempted to hail a cab and that Castillo picked her up and was attempting to bring her to her destination when the accident occurred. The plaintiffs also submit an affidavit from Brian McCamley, an investigator in the Special Investigation Unit for defendant Liberty Mutual Insurance Company, averring that based on Castillo using his vehicle for livery/business purposes he was violating his personal-line insurance policy.

These submissions are insufficient to demonstrate the plaintiffs' *prima facie* entitlement to relief. In order to establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented. See Zilkha v Mut. Life Ins. Co. of New York, 287 AD2d 713 (2nd Dept. 2001); see also AA Acupuncture Serv., P.C. v Safeco Ins. Co. of Am., 25 Misc. 3d 30 (1st Dept. 2009); Ins. Co. of N. Am. v Kaplun, 274 AD2d 293 (2nd Dept. 2000); Insurance Law § 3105(b). The plaintiffs fail to submit the policy at issue, or any terms within the policy that would suggest Castillo's usage of

his vehicle for livery/business purposes were beyond the terms of the policy. Moreover, the plaintiffs fail to submit any proof that they would not have provided Castillo his policy had they been aware that he intended to use his vehicle for such purposes. Thus, the plaintiffs' motion is denied. As these defects may be cured, the plaintiffs' motion is denied without prejudice to renew on proper papers, except as against the non-answering defendants permitted to interpose a late answer as discussed further herein.

B. Cross-Motion and Purported Cross-Motion to Compel Acceptance of Late Answers

In determining a motion pursuant to CPLR 3012(d), the court takes into account the excuse offered for the defendant's delay in answering, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001).

Here, the default in answering by defendants Alford A Smith MD PC, Burke Physical Therapy PC, Medaid Radiology LLC, Montefiore Med Center Out, Sanford Chiropractic PC, and Spine Pro Chiro PC occurred on April 9, 2020, at the start of the COVID-19 health crisis and during the consequent temporary courthouse closures and e-filing limitations, providing some justification for their delay. To the extent that the cross-moving defendants further delayed in answering, there is no indication of willfulness or bad faith. While taking on an unmanageable caseload is not a valid excuse (see Picardo-Garcia v Josephine's Spa Corp., 91 AD3d 413 [1st Dept. 2012]), the defendants have asserted through an affidavit of counsel's paralegal that the delay in answering is due in part to a delay in receiving the summons and complaint from the Secretary of State. Therefore, the court is inclined to find such a failure to be a reasonable excuse. See Imperato v Mount Sinai Med. Ctr., 82 AD3d 414 (1st Dept. 2011); Chelli v Kelly Group, P.C., 63 AD3d 632 (1st Dept. 2009). Nor is there any discernible prejudice to the plaintiff in accepting the late answer. While the defenses asserted in the proposed answer are not certain to succeed, at least one is potentially meritorious. Further, the court is mindful of the strong public policy favoring resolution of disputes on the merits. See Wimbledon Financing Master Fund, Ltd. v Weston Capital Mgmt. LLC, 150 AD3d 427 (1st Dept. 2017); Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 (1st Dept. 2016); Jones v 414 Equities LLC, *supra*.

As with the other moving defendants, defendants Chang and Syosset's default in answering also occurred on April 9, 2020, providing some justification for their delay, and there is no indication that willfulness or bad faith contributed to the additional delay. Counsel for these defendants submitted an affirmation averring that they did not receive notice of this action until the notice of the motion for default judgment was mailed to them, and that a recent surge in the volume of declaratory judgment actions and a recent office merger and relocation has caused a delay in counsel's ability to timely answer in this action. Under the circumstances presented, the court likewise finds this to be reasonable excuse. See Imperato v Mount Sinai Med. Ctr., *supra*; Chelli v Kelly Group, P.C., *supra*.

Moreover, the absence of a Notice of Cross-Motion is not fatal to the cross-motion. CPLR 2001 provides that "at any stage of the action ... the court may permit a mistake,

omission, defect or irregularity ... to be corrected, upon such terms as may be just or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded (emphasis added).” The court finds that no substantial right of the plaintiff is prejudiced by the procedural defect in the cross-motion. See Marx v Marx, 258 AD2d 366 (1st Dept. 1999); Plateis v Flax, 54 AD2d 813 (3rd Dept. 1976).

Accordingly, it is hereby,


ORDERED that the plaintiffs’ motion for leave to enter a default judgment is denied without prejudice to renew upon proper papers as against the remaining non-answering defendants Jose Castillo, Atlas PT PC, David Israel MD, Heal-Rite PT PC, Kim Chiropractic PC, Nu Age Med Solutions Inc., and Supportive Products Corp., and the cross-motion of defendants Alford A Smith MD PC, Burke Physical Therapy PC, Medaid Radiology LLC, Montefiore Med Center Out, Sanford Chiropractic PC, and Spine Pro Chiro PC, and it is further

ORDERED that the cross-motion of defendants Chang Health Physical Therapy and Syosset Acupuncture PC are granted, and those defendants’ respective answers attached to their motion papers are deemed to have been timely served and the plaintiff shall accept the same pursuant to CPLR 3012(d); and it is further,

ORDERED that the Clerk shall mark the file accordingly; and it is further,

ORDERED that the parties shall proceed with discovery and jointly contact chambers on or before February 5, 2021, to schedule a preliminary/settlement conference.

This constitutes the Decision and Order of this Court.

<u>12/30/2020</u> DATE	 _____ NANCY M. BANNON, J.S.C. HON. NANCY M. BANNON				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE