Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **JANICE A. TAYLOR** IAS PART 15
Justice

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| STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff | Index No: 716259/2018 |
| -against- | Motion Date: 02/25/20 |
| ALEXANDRO SANCHEZ ACEVEDO, et. al., Defendants | Motion Seq. No: 2 |



The following numbered 1-20 papers read on this motion by plaintiff for an order granting a default judgment; a cross-motion by defendant Big Apple Medical Supply Company for an order compelling plaintiff to accept its answer; and a cross-motion by defendants Barakat PT, P.C., Brook Chiropractic of NY P.C., Columbus Imaging Center, LLC, First Alternative PLM Acupuncture P.C., First Spine Chiropractic of NY P.C., Maz Chiropractic, P.C., Metro Pain Specialists Professional Corporation and Primavera Physical Therapy, P.C.

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Upon the foregoing papers, it is ordered that the above referenced motion and two (2) cross-motions are considered together and decided as follows:

This is an action seeking a judgment declaring that a July 14, 2017 motor vehicle collision "was not an 'accident,' but rather a staged, intentional act for which there is no insurance coverage." Plaintiff State Farm Fire and Casualty Company insured the 2001 GMC van driven by defendant Alexandro Sanchez Acevado (a/k/a Alexandro Sanchez Acevedo), which contained defendants Jose Velez Perez, Jordan Minope and Keiny Colon

Guerrero as passengers. The other vehicle, a 2016 Hyundai sedan was driven by defendant Marcus Martinez and contained defendants Jose Santiago and Shamika Ceballos as passengers.

Plaintiff now moves for an order (1) pursuant to CPLR §3215, granting judgment by default against defendants Alexandro Sanchez Acevado a/k/a Alexandro Sanchez Acevedo, GWB Caribbean Express Inc., Jose F. Velez Perez, Marcus A. Martinez, A.M. Patel Physical Therapy PLLC, Arden M. Kaisman, M.D., Barakat PT, P.C., Big Apple Medical Supply Inc, Brook Chiropractic of NY P.C., Classic Medical Diagnostic Rehab P.C., Columbus Imaging Center, LLC, First Alternative PLM Acupuncture P.C., First Spine Chiropractic of NY P.C., Maz Chiropractic, P.C., Metro Pain Specialists Professional Corporation, Primavera Physical Therapy, P.C., Seniorcare Emergency Medical Services Inc., Sutter Pharmacy Inc, Universal Supply Distribution Corp, and Vitruvian Rehab, P.T., P.C., (2) pursuant to CPLR §306-b, extending plaintiff's time to serve defendants Jordan A. Minope Vivanco, Keiny Colon Guerrero, Jose Santiago and Shamika Ceballos, and (3) permitting defendants Keiny Colon Guerrero and Shamika Ceballos to be served via service upon the attorneys representing them for the alleged bodily injuries.

Defendants Big Apple Medical Supply, Inc. ("Big Apple") and Universal Supply Distribution Corp. ("Universal Supply") oppose.[1] Big Apple also cross-moves ("Cross-Motion #1"), pursuant to CPLR §3012(d), for an order compelling acceptance of its answer, or alternately, permitting service of a late answer.

CPLR 3012(d), entitled Extension of Time to Appear or Plead, provides:

> Upon the application of a party, the 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.

Here, the record indicates that Big Apple was served via service on the New York State Secretary of State on October 31, 2018; the statutory period for timely answering the complaint, or moving for and extension pursuant to CPLR 3012(d) thus ran through November 30, 2018. Neither Big Apple nor Universal Supply did so. A Notice of Default was served sixty (60) days hence, on January 30, 2019.

In support of its claimed entitlement to an extension of its

[1] That part of the motion seeking a default judgment as against defendant Universal Supply was withdrawn as Plaintiff was directed to accept the answer filed on behalf of said defendant by memorandum decision dated December 12, 2019.

time to appear, Big Apple asserts merely that it "did not receive the Summons and Complaint" (and was thus unaware of this declaratory judgment action) and that its conduct was not "willful or contumacious." Big Apple submits the affidavit of its principle, Alexander Nevsky, wherein Mr. Nevsky states that he opens all company mail and that upon "a review of the business records maintained by BIG APPLE, the company never received the Summons and Complaint in this action." This claim is made despite the admission by Big Apple that its current address as being the same as that on file with the Secretary of State. Without more, the Court finds that defendant Big Apple has provided no reasonable excuse demonstrating a basis for relief from its default. See, Hamilton Pub. Relations v. Scientivity, LLC, 129 AD3d 1025, 12 NYS3d 234 (2d Dept. 2015), citing, Trini Realty Corp. v Fulton Ctr. LLC, 53 AD3d 479, 861 NYS2d 743 (2d Dept. 2008).

Where no reasonable excuse has been shown, the Court "need not address whether [the defendant] has a potentially meritorious defense to the action." Bank of N.Y. Mellon v. Van Roten, 181 AD3d 549, 121 NYS3d 80 (2d Dept. 2020) (citation omitted). Even so, nothing presented in Mr. Nevsky's affidavit rises to the level of factual allegations that sufficiently raise questions that viable causes of action exist on behalf of this defendant, as "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them." Vanderbilt Mortg. & Fin., Inc. v. Ammon, 179 AD3d 1138, 118 NYS3d 125 (2d Dept. 2020) quoting Woodson v. Mendon Leasing Corp., 100 NY2d 62, 760 NYS2d 727 (2003).

In light of the foregoing, that part of the motion seeking default judgment as against defendant Big Apple is granted. Consistent therewith, the cross-motion (cross-motion #1) to compel acceptance of Big Apple's previously asserted answer pursuant to CPLR §3012(d) or alternately granting leave to serve a late answer is denied.

In Cross-Motion #2, defendants Barakat PT, P.C., Brook Chiropractic of NY P.C., Columbus Imaging Center, LLC, First Alternative PLM Acupuncture P.C., First Spine Chiropractic of NY P.C., Maz Chiropractic, P.C., Metro Pain Specialists Professional Corporation and Primavera Physical Therapy, P.C. oppose the motion for a default judgment and similarly cross-move, pursuant to CPLR §5015(a)(1), for an order vacating their default and deeming the May 31, 2019 Answer served and filed on their behalf to be timely served nunc pro tunc, pursuant to CPLR §3012(d).[2]

[2] Defendants Barakat PT, P.C., Brook Chiropractic of NY P.C., Columbus Imaging Center, LLC, First Alternative PLM Acupuncture P.C., First Spine Chiropractic of NY P.C., Maz

It is well settled that "[A] defendant seeking to vacate a default in answering or appearing upon the ground of excusable default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action." Singh v. Sukhu, 180 AD3d 837, 119 NYS3d 214, 217 (2d Dept., 2020) citing Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141 501 NYS2d 8 (1986).

In this application, the cross-moving defendants allege that law office failure due to an "inadvertent clerical error" was the cause of the default, claiming that the file was mistakenly marked as the Answer having been served and filed.

While "a claim of law office failure may be accepted as a reasonable excuse where the claim is supported by a 'detailed and credible' explanation of the default or defaults at issue ... {c]onclusory and unsubstantiated claims of law office failure are insufficient." State Farm Mut. Auto. Ins. Co. v. Preferred Trucking Serv. Corp., 42 Misc 3d 88, 90, 981 NYS2d 889 (App. Term, 2d Dept. 2013), citing, Henry v. Kuveke, 9 AD3d 476, 781 NYS2d 114 (2d Dept. 2004), see also, Lugauer v. Forest City Ratner Co., 44 AD3d 829, 830, 843 NYS2d 456 (2d Dept. 2007); Wechsler v. First Unum Life Ins. Co., 295 AD2d 340, 742 NYS2d 668 (2d Dept. 2002).

Here, counsel for the cross-movants claims that the error in failing to serve and file an Answer was discovered when the opposition to plaintiff's earlier motion was prepared that the answer had already been prepared but was merely not served or filed. The affirmation provided in support attempts, but fails, to present information with sufficient detail to satisfy the specificity necessary as articulated by the above noted case law, as follows: no mention is made of when counsel was retained; no date of when the Answer was actually drafted is provided; no detail of when the Answer was uploaded to the firms internal computerized database; no detail of who allegedly mislabeled the file as having had its Answer served and filed; no detail of what kind(s) of internal record keeping the firm utilizes to track cases; no detail of what other activity occurred on the file in the ensuing six (6) month period from the lapse of the time to serve and file a timely answer (on November 30, 2018) to May 31, 2019, when the answer was actually filed and served.

Most significantly, no detail is provided explaining the lapse of another nearly six (6) month period of delay between June 10, 2019, when Plaintiff rejected cross-movants' late Answer

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Chiropractic, P.C., Metro Pain Specialists Professional Corporation and Primavera Physical Therapy, P.C. served their answer on or about May 31, 2019, which was rejected as untimely pursuant to CPLR 320.

and the filing of the instant cross-motion on December 5, 2019 in answer to Plaintiff's motion for declaratory judgment.

In light of the foregoing, that part of Plaintiff's motion seeking a default judgment as against defendants Barakat PT, P.C., Brook Chiropractic of NY P.C., Columbus Imaging Center, LLC, First Alternative PLM Acupuncture P.C., First Spine Chiropractic of NY P.C., Maz Chiropractic, P.C., Metro Pain Specialists Professional Corporation and Primavera Physical Therapy, P.C. is granted. The cross-motion (cross-motion #2) to vacate these defendants' default and compel acceptance of their Answer is denied.

Dated: June 3, 2020

***JANICE A. TAYLOR, J.S.C.***

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**FILED**

**6/4/2020**
**10:34 AM**

**COUNTY CLERK**
**QUEENS COUNTY**