SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM GENERAL INSURANCE COMPANY,

Plaintiffs,

- v -

FERNANDO MENDEZ, ADVANCED PHARMACY ONE INC.,AFFINITY RX INC.,CENTRAL SUPPLIES OF NY CORP., DOS MANOS CHIROPRACTIC PC,GARA MEDICAL CARE PC,HERSCHEL KOTKES MD PC,HILLSIDE FAMILY CHIRORACTIC, PC,MEDSOURCE SOLUTIONS INC.,MOVE BETTER PHYSICAL THERAPY PLLC,PMK ACUPUNCTURE PC,PSYCHOLOGY HELP PC,QUEENS DIAGNOSTIC RADIOLOGY PC,RF CHIROPRACTIC IMAGING PC,RIVERSIDE PHYSICAL MEDICINE PC,SABAS NY SERVICES, INC.,SANFORD CHIROPRACTIC PC,WELLNESS PHYSICAL THERAPY REHABILITATION PLLC

Defendants.

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INDEX NO. 657492/2019

MOTION DATE 11/20/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39

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, Fernando Mendez (Mendez), as well as non-answering provider defendants Central Supplies of NY Corp., Dos Manos Chiropractic PC, Gara Medical Care PC, Hillside Family Chiropractic PC, Move Better Physical Therapy PLLC, PMK Acupuncture PC, Psychology Help PC, Queens Diagnostic Radiology PC, RF Chiropractic Imaging PC, Riverside Physical Medicine PC, Sabas NY Services Inc., Sanford Chiropractic PC, and Wellness Psychical Therapy Rehabilitation PLLC (the non-answering health-care defendants), declaring that they are not obligated to pay no-fault benefits to Mendez in connection with injuries he sustained in a 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.

Defendants Central Supplies of NY Corp., Riverside Physical Medicine PC and Sanford Chiropractic PC (the cross-moving defendants) oppose the motion and cross-move pursuant to CPLR 3012(d) to compel the acceptance of their late answer. Defendants Sabas NY Services Inc. and Dos Manos Chiropractic PC (Sabas and Dos Manos) oppose the motion and move, without Notice of Cross-Motion, to compel the acceptance of their late answer. The motion is granted to the extent discussed herein, and the cross-motion and purported cross-motion are granted.

A. Cross-Motion and Purported Cross-Motion to Compel Acceptance of Late Answer

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 cross-moving defendants' default in answering occurred on March 12, 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, the cross-moving 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.

Sabas and Dos Manos' also demonstrate a reasonable excuse inasmuch as they submit an attorney affirmation averring that their delay in answering the complaint was due in part to ongoing settlement discussions with the plaintiffs seeking to settle the relatively small amount at issue between them in this matter, totaling approximately $3,000, without having to file answer.

Under these circumstances, an attempt to settle constitutes a reasonable excuse for delay in answering. See Vazquez v Beharry, 82 AD3d 649 (1st Dept. 2011); Polanco v Scott, 41 AD3d 182 (1st Dept. 2007); Finkelstein v E. 65th St. Laundromat, 215 AD2d 178 (1st Dept. 1995). These defendants have also shown the absence of willfulness in their delay and the potential merits to their defenses.

Further, 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).

Therefore, Central Supplies of NY Corp., Riverside Physical Medicine PC and Sanford Chiropractic PC's cross-motion and Sabas NY Services Inc. and Dos Manos Chiropractic PC's purported cross-motion seeking to compel the acceptance of their respective late answers are granted, and the instant motion for leave to enter a default judgment against those defendants is denied.

B. Plaintiffs' Motion for Leave to Enter a Default Judgment

As to the remaining portion of the plaintiffs' motion for leave to enter a default judgment against the non-answering defendants, the plaintiffs establish their entitlement to relief. Mendez claimed that he was injured in a motor vehicle accident on March 16, 2019, and thereafter obtained medical treatment or medical supplies from the non-answering medical defendants, among others. The non-answering medical defendants sought payment, as Mendez' assignees, for no-fault benefits under insurance policy number AOS22811823170, under claim number 397556490001. The policy was issued by the plaintiffs to non-parties Joselyn Luna, the mother of Mendez' children, and Maria Mendez, Mendez' mother, (the policyholders). See Insurance Law 5106(a); 11 NYCRR 65-1.1. Mendez appeared for and submitted to an examination under oath (EUO) on July 31, 2019. The policyholders did not appear for their EUOs. The plaintiffs then timely denied the defendants' claims for benefits, beginning on or about August 23, 2019 (see 11 NYCRR 65-3.8[a][1]). The denials concluded that, based on Mendez' testimony at the EUO and the plaintiffs' own investigation, the policyholders made material misrepresentations in

their initial application for the subject insurance policy with respect to where the insured vehicle was usually garaged and maintained in order to lower the cost of obtaining the policy, vitiating coverage.

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]). The plaintiffs submit the affidavits of service referable to service of the summons and complaint upon Mendez and the non-answering health-care defendants, and an attorney's affirmation. As proof of the facts constituting its claims, the plaintiffs submit the affidavits of Special Investigations Unit investigator, Denise Stojanov, and their Claims Department Team Manager, Dawn Smith, along with the transcript of Mendez' EUO testimony, and the denials of claim issued by the plaintiffs. The affidavits of service establish that Mendez and the non-answering health-care defendants were served with process, and the attorney's affirmation establishes that these defendants did not answer or appear prior to this motion.

Where an insured makes material misrepresentations on his or her application for insurance as to where he or she regularly garages a vehicle sought to be insured, coverage is defeated. See Remedial Med. Care, P.C. v Infinity Prop. & Cas. Co., 2017 NY Slip Op 50391(U), 55 Misc. 3d 130(A) (App. Term, 2nd, 11th & 13th Jud. Dists., Mar. 31, 2017); Jamaica Dedicated Med. Care, P.C. v Praetorian Ins. Co., 2015 NY Slip Op 50756(U), 47 Misc. 3d 147(A) (App. Term, 2nd, 11th & 13th Jud. Dists., May 6, 2015). The plaintiffs' proof establishes, *prima facie*, the facts underpinning their contentions, namely, that when the policyholders first applied for insurance coverage, they represented that they resided at 116 Angel Rd., Mount Vision, NY 13810-1136 and that the insured vehicle was regularly garaged there. However, according to Mendez's EUO, the car was regularly used and garaged by him, and he and the policyholders had never resided at that address and that Mendez instead lived at 2545 Linden Boulevard #5D, Brooklyn, NY 11208, where premium rates are significantly higher. The denial-of-claim statements show that the relevant denials of coverage were expressly based on the ground that the policyholders made material misrepresentations in connection with their application for insurance with respect to the where the vehicle was regularly garaged in order to reduce insurance premium rates.

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Woodson v Mendon Leasing Corp., 259 AD2d 304 (1st Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003); Holt v Holt, 262 AD2d 530 (2nd Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3rd Dept. 1978). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., supra; Frolish v Ryder Truck Rental, supra.

Accordingly, it is hereby,

ORDERED that the plaintiffs' motion for leave to enter a default judgment against the non-answering defendants is granted as against Fernando Mendez, Gara Medical Care PC, Hillside Family Chiropractic PC, Move Better Physical Therapy PLLC, PMK Acupuncture PC, Psychology Help PC, Queens Diagnostic Radiology PC, RF Chiropractic Imaging PC, and Wellness Psychical Therapy Rehabilitation PLLC, and is otherwise denied, and the cross-motion of Central Supplies of NY Corp., Riverside Physical Medicine PC and Sanford Chiropractic PC pursuant to CPLR 3012(d) and purported cross-motion of defendants Sabas NY Services Inc. and Dos Manos Chiropractic 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; and it is further,

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the to the defendant Fernando Mendez under policy number AOS22811823170, claim number 397556490001, in connection with injuries that he sustained in a motor vehicle accident on March 16, 2019, or to reimburse defendants Gara Medical Care PC, Hillside Family Chiropractic PC, Move Better Physical Therapy PLLC, PMK Acupuncture PC, Psychology Help PC, Queens Diagnostic Radiology PC, RF Chiropractic Imaging PC, and Wellness Psychical Therapy Rehabilitation PLLC, for treatment they rendered or equipment and supplies they provided to her for those injuries; and it is further;

ORDERED that this action is severed and continued against the remaining defendants Central Supplies of NY Corp., Riverside Physical Medicine PC and Sanford Chiropractic PC, Sabas NY Services Inc., Dos Manos Chiropractic PC, Advanced Pharmacy One, Inc. and Affinity Rx, Inc.; and it is further,

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

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

This constitutes the Decision and Order of this Court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/7/2021
DATE

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