

<b>Liberty Mut. Ins. Co. v Powell</b>
2021 NY Slip Op 31662(U)
May 17, 2021
Supreme Court, New York County
Docket Number: Index No. 650160/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

*Justice*

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LIBERTY MUTUAL INSURANCE COMPANY, LM  
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650160/2020

MOTION DATE 03/17/2021

MOTION SEQ. NO. 001

- v -

WILLIAM POWELL, AVERY FORNTER, KELLY  
MCDONALD, ADVANTAGE RADIOLOGY PC, AGYAL  
PHYSICAL THERAPY PLLC, ALFORD A. SMITH MD  
PC, ARTE MEDICAL PRIMARY CARE  
PC, COMPREHENSIVE PSYCHOLOGICAL PC, COUNTY  
LINE PHARMACY, DIANA BEYNIN DC, GOLDEN  
ACUPUNCTURE PC, HEALTHPLUS SURGERY CENTER  
LLC, ICONIC WELLNESS SURGICAL SERVICES  
LLC, INTERMED MEDICAL NY PC, LPM PHARMACY  
INC., LR MEDICAL PLLC, M&M SUPPLIES GROUP  
INC., MANILA CHIROPRACTIC PC, METRO PAIN  
SPECIALISTS PC, MICHAEL GEORGE ALLEYNE MD  
PC, MIISUPPLY LLC, MYRTLE AVENUE TRADING  
LLC, NEW AGE MEDICAL PC, PREMIER ANESTHESIA  
ASSOCIATES, QIXIA ACUPUNCTURE PC, RF  
CHIROPRACTIC IMAGING PC, SPEEDY RECOVERY  
EQUIPMENT AND SUPPLIES INC., SPRUCE MEDICAL &  
DIAGNOSTIC PC, THERACARE & WELLNESS PT  
PC, UNION DME CORP., WELLNESS PHYSICAL  
THERAPY REHABILITATION PLLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 50, 51, 52, 53, 54, 56, 57, 58

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

Upon the foregoing documents and for the reasons stated hereinbelow, (1) the instant motion by plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, pursuant to CPLR 3215, for a default judgment as against certain defendants, is granted in part, on the merits and on default, and denied in part, solely as moot; (2) the instant joint cross-motion by medical provider defendants Agyal Physical Therapy PLLC; Alford A. Smith MD, P.C.; County Line Pharmacy; LR Medical, PLLC; and Metro Pain Specialists, P.C., essentially to deem their answer as timely, nunc pro tunc, is granted; and (3) the instant joint cross-motion by medical

provider defendants Manila Chiropractic PC and Union DME Corp, essentially to deem their answer as timely, nunc pro tunc, is denied solely as moot.

### Background

Plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, issued an insurance policy (number AOS22114595875) that was in effect from February 10, 2019 through February 10, 2020. On March 6, 2019, the claimant-defendants, William Powell (“Powell”); Avery Fornter (“Fornter”); and Kelly McDonald (“McDonald”), were allegedly injured in a motor vehicle accident that occurred at the intersection of East New York Avenue and Dean Street, Brooklyn, New York. The claimant-defendants allegedly sought medical treatment for the subject alleged injures from the medical provider defendants, namely, Advantage Radiology PC; Agyal Physical Therapy PLLC; Alford A Smith MD PC; Arte Medical Primary Care PC; Comprehensive Psychological PC; County Line Pharmacy; Diana Beynin DC; Golden Acupuncture PC; Healthplus Surgery Center LLC; Iconic Wellness Surgical Services LLC; Intermed Medical NY PC; LPM Pharmacy Inc; LR Medical PLLC; M & M Supplies Group Inc; Manila Chiropractic PC; Metro Pain Specialists PC; Michael George Alleyne MD PC; MII Supply LLC; Myrtle Avenue Trading LLC; New Age Medical PC; Premier Anesthesia Associates; Qixia Acupuncture PC; RF Chiropractic Imaging PC; Speedy Recovery Equipment and Supplies Inc; Spruce Medical & Diagnostic PC; Theracare & Wellness PT PC; Union DME Corp; and Wellness Physical Therapy Rehabilitation PLLC. The medical provider defendants, in their capacities as the claimant-defendants’ assignees under the subject insurance policy, then submitted bills totaling \$15,884.05 to plaintiffs for No-Fault reimbursement. (NYSCEF Doc. 1.)

On April 30, May 16, and June 6, 2019, Fornter failed to appear for a scheduled and twice rescheduled Examination Under Oath (“EUO”) (NYSCEF Doc. 1, at 15-16).

On May 16, 2019, Powell appeared for his scheduled EUO and testified, inter alia, that (1) he was Fornter’s acquaintance; (2) he was a passenger in the front seat, and McDonald was a passenger in the rear seat of Fornter’s vehicle at the time of the subject alleged accident; (3) he and McDonald were at “Curtis’s” house, and Fornter offered them a ride home; and (4) he and McDonald left the scene of the subject accident together. By correspondence dated June 18 and July 23, 2019, plaintiffs requested the full name, phone number, and address of “Curtis”; Powell failed to respond to said correspondence. (NYSCEF Doc. 1, at 16.)

On May 16, 2019, McDonald appeared for her scheduled EUO and testified, inter alia, that (1) she and Powell took a bus to “Curtis’s house”; (2) she was unaware of Curtis’s phone number and/or address; (3) she knew Fornter only through Powell; and (4) Fornter offered McDonald and Powell a ride home, but McDonald and Powell took a cab home after the subject alleged accident. By correspondence dated June 18 and July 23, 2019, plaintiffs requested the full name, phone number, and address of “Curtis”; McDonald failed to respond to said correspondence. (NYSCEF Doc. 1, at 16.)

Plaintiff disclaimed all coverage on the grounds that (1) Fornter failed to appear for her scheduled and twice rescheduled EUO; and (2) McDonald and Powell failed to respond to

plaintiffs' post-EUO requests for information about "Curtis," about whom said claimant-defendants testified at their subject EUOs (NYSCEF Doc. 1, at 16).

On December 29, 2019, plaintiffs commenced the instant action against defendants, seeking a judgment (1) declaring that plaintiffs have no duty to provide coverage and/or pay claims for No-Fault benefits that the claimant-defendant and/or the medical provider defendants, in their respective capacities as the claimant-defendants' assignees under the subject insurance policy, submit; (2) declaring that plaintiffs are entitled to a permanent injunction barring any and all current and/or future suits between the parties; (3) declaring that plaintiffs are entitled to a stay and ultimate dismissal of all pending litigation and arbitration arising out of the subject No-Fault billing; (4) barring the medical provider defendants, in their respective capacities as the claimant-defendants' assignees under the subject insurance policy, from submitting new bills to plaintiffs and from commencing any new litigation or arbitration for any bills that they previously submitted that plaintiffs denied; (5) declaring that plaintiffs properly issued the denials of the subject bills for all three claimant-defendants; and (6) awarding costs and disbursements to plaintiffs (NYSCEF Doc. 1, at 20). Between January 27 and October 28, 2020, plaintiffs served the subject pleadings and the CPLR 3215(g) additional notice upon defendants (NYSCEF Documents 18-19).

Pursuant to a February 7, 2020 stipulation, plaintiffs discontinued, with prejudice, the instant action as against medical provider defendant Iconic Wellness Surgical Services LLC, only (NYSCEF Doc. 2).

On February 24, 2020, medical provider defendants Healthplus Surgery Center LLC; MII Supply LLC; and Premier Anesthesia Associates jointly answered the instant complaint with various admissions, denials, and nine Affirmative Defenses (NYSCEF Doc. 3).

On March 5, 2020, medical provider defendants Golden Acupuncture, P.C. and M & M Supplies Group, Inc. jointly answered the instant complaint with various admissions, denials, forty Affirmative Defenses, and a counter-claim (NYSCEF Doc. 6). On March 12, 2020, plaintiffs responded to said counterclaim (NYSCEF Doc. 8).

Pursuant to a stipulation dated March 16, 2020, plaintiffs discontinued the instant action, with prejudice, as against medical provider defendant Comprehensive Psychological Services PC, only (NYSCEF Doc. 9).

On May 27, 2020, medical provider defendants Agyal Physical Therapy PLLC; Alford A. Smith, MD, P.C.; County Lin Pharmacy; LR Medical, PLLC; M & M Supplies Group, Inc.; and Metro Pain Specialists, P.C. jointly answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 11).

On June 3, 2020, plaintiffs rejected the May 27, 2020 answer from medical provider defendant M & M Supplies Group, Inc. as duplicative of that medical provider defendant's Mach 5, 2020 Answer (NYSCEF Doc. 12).

Plaintiffs now move, pursuant to CPLR 3215, for a default judgment against the claimant-defendants and medical provider defendants Advantage Radiology PC; Arte Medical Primary Care PC; Diana Beynin DC; Intermed Medical NY PC; LPM Pharmacy Inc; Manila Chiropractic PC; Michael George Alleyne MD PC; Myrtle Avenue Trading LLC; New Age Medical PC; Qixia Acupuncture PC; RF Chiropractic Imaging PC; Speedy Recovery Equipment and Supplies Inc; Spruce Medical & Wellness PT PC; Theracare & Wellness PT PC; Union DME Corp; Wellness Physical Therapy Rehabilitation PLLC,; Agyal Physical Therapy PLLC; Alford A Smith MD PC; County Line Pharmacy; LR Medical PLLC; and Metro Pain Specialists PC, (1) permanently staying each and every part of any arbitration or court hearing that the aforementioned defendants submit and/or will submit arising out of the subject alleged accident; (2) permanently enjoining any arbitration or court hearing that the aforementioned defendants submit and/or will submit arising out of the subject alleged accident; and (3) declaring that plaintiffs' subject denials of claims for No-Fault reimbursement were valid (NYSCEF Doc. 14).

On February 18, 2020, medical provider defendants Agyal Physical Therapy PLLC ("Agyal"); Alford A. Smith MD, P.C. ("Smith"); County Line Pharmacy ("County Line"); LR Medical, PLLC ("LR Medical"); and Metro Pain Specialists, P.C. ("Metro Pain") (collectively, "the cross-moving defendants") jointly cross-moved, pursuant to CPLR 5015(a)(1) and 3012(d), (1) to vacate their subject default in the instant matter; (2), upon said vacatur, to extend the cross-moving defendants' time to appear and plead in the instant matter; and (3) to compel plaintiffs to accept the cross-moving defendants' joint answer (NYSCEF Doc. 35). The cross-moving defendants assert, inter alia, the following: (1) plaintiffs served Agyal, Smith, LR Medical, and Metro Pain pursuant to BCL § 306, via the New York Secretary of State, who had a backlog of pleadings to serve upon defendants and thus was delayed in serving Agyal, Smith, and LR Medical; and (2) the cross-moving defendants' law firm experienced limited resources, which the COVID-19 pandemic exacerbated (NYSCEF Doc. 36).

Plaintiffs oppose that cross-motion, asserting, inter alia, the following: (1) on January 17, 2020, pursuant to CPLR 3215(g)(4), plaintiff served additional notice upon the cross-moving defendants at the addresses that the cross-moving defendants themselves provided; (2) the cross-moving defendants have failed to request additional time to submit their subject answer prior to plaintiffs' moving for a default judgment against them; (3) the affidavit of Carmella Londono, a paralegal with the law firm representing the cross-moving defendants, contains insufficient detail; and (4) it would prejudice plaintiffs if the Court compelled them to accept the cross-moving defendants' late answer (NYSCEF Doc. 49).

Pursuant to a February 22, 2021 stipulation, plaintiffs discontinued, with prejudice, the instant action as against medical provider defendant Myrtle Avenue Trading LLC, only (NYSCEF Doc. 45).

Pursuant to a February 23, 2021 stipulation, plaintiffs discontinued, with prejudice, the instant action as against medical provider defendant Advantage Radiology PC, only (NYSCEF Doc. 46).

On February 25, 2021, medical provider defendants Manila Chiropractic PC ("Manila") and Union DME ("Union") jointly answered the instant complaint with various admissions, denials,

and twenty-four Affirmative Defenses (NYSCEF Doc. 47). On March 8, 2021, plaintiffs rejected, as untimely, that answer (NYSCEF Doc. 48).

On March 4, 2021, Manila and Union jointly cross-moved, pursuant to CPLR 3012(d), 2004, and 2005, (1) to compel plaintiffs to accept their joint late answer or to extend the time, retroactively, in which Manila and Union could answer the instant complaint; and (2) to request that this Court deny plaintiffs' motion for a default judgment as against Manila and Union (NYSCEF Doc. 55).

Pursuant to a March 19, 2021 stipulation, (1) plaintiffs accepted the March 1, 2021 joint answer of Manila and Union; (2) Manila and Union waived all jurisdictional defenses; (3) Manila and Union withdrew their March 16, 2021 joint-cross motion; and (4) plaintiff withdrew its motion for a default judgment as against Manila and Union (NYSCEF Doc. 58).

On May 17, 2021, claimant-defendants William Powell and Kelly McDonald jointly answered the instant complaint with various admissions, denials, and twenty-six Affirmative Defenses (NYSCEF Doc. 59).

### Discussion

#### The Instant Joint Cross-Motion by Medical Provider Defendants Agyal, Smith, County Line, LR Medical, and Metro Pain

The First Department has explained that “a strong public policy exists in this State for resolving disputes on their merits ... a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that the parties may have their day in court.” Mate Picnic v Seatrain Lines, Inc., 117 AD2d 504, 508 (1<sup>st</sup> Dept. 1986).

Medical provider defendants Agyal, Smith, County Line, LR Medical, and Metro Pain have established a reasonable excuse and meritorious defense for their delay in appearing in the instant matter. Apparently, the Secretary of State experienced a backlog of pleadings that postponed Agyal, Smith, LR Medical, and Metro Pain's receipt of the subject pleadings. The affidavits of Carmella Londono and Karina Brandon, paralegals in the law firm that represents the cross-moving defendants, demonstrate that the Secretary of State's subject backlog and the law firm's large volume of No-Fault-related cases delayed the cross-moving defendants from receiving the subject pleadings and, thus, from appearing in the instant matter (NYSCEF Documents 41-42).

This Court has considered plaintiffs' other arguments on these issues and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will (1) grant the cross-moving defendants' instant joint cross motion; (2) vacate the cross-moving defendants' defaults in the instant matter; (3) deem the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 38 as timely served and filed; and (4) compel plaintiffs to accept, as timely, nunc pro tunc, the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 38.

#### The Instant Joint Cross-Motion by Medical Provider Defendants Manila and Union

This Court will deny the instant joint cross-motion by Manila and Union, solely as moot pursuant to the aforementioned March 19, 2021 stipulation withdrawing said cross-motion (NYSCEF Doc. 58).

The Instant Motion by Plaintiffs for a Default Judgment

Plaintiffs are not entitled to a default judgment as against medical provider defendants Agyal; Smith; County Line; LR Medical; and Metro Pain, as this Court will grant said cross-moving defendants' aforementioned cross-motion.

Plaintiffs are also not entitled to a default judgment as against medical provider defendants Manila and Union, pursuant to plaintiffs' aforementioned March 19, 2021 stipulation withdrawing plaintiffs' motion for a default judgment as against those medical provider defendants (NYSCEF Doc. 58).

Additionally, plaintiffs are not entitled to a default judgment as against medical provider defendants Iconic Wellness Surgical Services LLC; Advantage Radiology PC; and Myrtle Avenue Trading LLC, pursuant to the aforementioned stipulations of discontinuance as against said medical provider defendants (NYSCEF Documents 2, 45, and 46)

Plaintiffs have made out a prima facie case that they are entitled to the relief that they seek in the instant complaint and to a default judgment as against the claimant-defendants and medical provider defendants Arte Medical Primary Care PC; Diana Beynin DC; Intermed Medical NY PC; LPM Pharmacy Inc; Michael George Alleyne MD PC; New Age Medical PC; Qixia Acupuncture PC; RF Chiropractic Imaging PC; Speedy Recovery Equipment and Supplies Inc; Spruce Medical & Wellness PT PC; Theracare & Wellness PT PC; and Wellness Physical Therapy Rehabilitation PLLC ("the defaulting defendants") by complying with CPLR 3215(f) and (g) by submitting the following, among other documents: copies of the subject summons and verified complaint (NYSCEF Doc. 17); copies of the affidavits of service and the CPLR 3215(g) additional notice (NYSCEF Documents 18-19); and the affidavit of David J. De George, an investigator in plaintiff Liberty Mutual Insurance Company's Special Investigations Unit (NYSCEF Doc. 23). To date, the defaulting defendants have failed to answer the instant complaint timely and/or oppose or otherwise respond to the instant motion, and their time to do so has expired.

Therefore, this Court will (1) grant plaintiffs' motion for a default judgment as against the claimant-defendants and medical provider defendants Arte Medical Primary Care PC; Diana Beynin DC; Intermed Medical NY PC; LPM Pharmacy Inc; Michael George Alleyne MD PC; New Age Medical PC; Qixia Acupuncture PC; RF Chiropractic Imaging PC; Speedy Recovery Equipment and Supplies Inc; Spruce Medical & Wellness PT PC; Theracare & Wellness PT PC; and Wellness Physical Therapy Rehabilitation PLLC, only, and (2) deny plaintiffs' motion for a default judgment as against medical provider defendants Agyal Physical Therapy PLLC; Alford A Smith MD PC; County Line Pharmacy; LR Medical PLLC; Metro Pain Specialists PC; Manila Chiropractic PC; Union DME Corp; Iconic Wellness Surgical Services LLC; Advantage Radiology PC; and Myrtle Avenue Trading LLC.



### Conclusion

Thus, for the reasons stated hereinabove, this Court holds the following.

The instant motion (NYSCEF Doc. 14) by plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, pursuant to CPLR 3215, for a default judgment is hereby (1) granted, on the merits and on default, as against the claimant-defendants, William Powell, Avery Fornter, and Kelly McDonald, and medical provider defendants Arte Medical Primary Care PC; Diana Beynin DC; Intermed Medical NY PC; LPM Pharmacy Inc; Michael George Alleyne MD PC; New Age Medical PC; Qixia Acupuncture PC; RF Chiropractic Imaging PC; Speedy Recovery Equipment and Supplies Inc; Spruce Medical & Wellness PT PC; Theracare & Wellness PT PC; and Wellness Physical Therapy Rehabilitation PLLC, only, and (2) denied, solely as moot, pursuant to the aforementioned stipulations of discontinuance and withdrawal, as against medical provider defendants Agyal Physical Therapy PLLC; Alford A Smith MD PC; County Line Pharmacy; LR Medical PLLC; Metro Pain Specialists PC; Manila Chiropractic PC; Union DME Corp; Iconic Wellness Surgical Services LLC; Advantage Radiology PC; and Myrtle Avenue Trading LLC.

The instant joint cross-motion (NYSCEF Doc. 35) by medical provider defendants Agyal Physical Therapy PLLC; Alford A. Smith MD, P.C.; County Line Pharmacy; LR Medical, PLLC; and Metro Pain Specialists, P.C. (“the cross-moving defendants”) is hereby granted. Accordingly, this Court hereby (1) vacates the cross-moving defendants’ defaults in the instant matter; (2) deems the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 38 as timely served and filed, nunc pro tunc; and (3) compels plaintiffs to accept, as timely, the answer that the cross-moving defendants jointly e-filed as NYSCEF Doc. 38.

The instant joint cross-motion (NYSCEF Doc. 55) by medical provider defendants Manila Chiropractic PC and Union DME Corp is hereby denied solely as moot pursuant to the aforementioned March 19, 2021 stipulation withdrawing said cross-motion (NYSCEF Doc. 58).

Accordingly, the Clerk is hereby directed to enter judgment (1) declaring that plaintiffs have no duty to provide coverage and/or pay claims for No-Fault benefits that the claimant-defendants and/or the defaulting medical provider defendants, in their respective capacities as the claimant-defendants’ assignees under the subject insurance policy (number AOS22114595875), submit; (2) permanently staying and/or enjoining any and all current and/or future suits between plaintiffs and the defaulting defendants arising out of the alleged March 6, 2019 motor vehicle accident; (3) declaring that plaintiffs are entitled to a stay and ultimate dismissal of all pending litigation and arbitration with the defaulting defendants arising out of the subject No-Fault billing; (4) barring the defaulting medical provider defendants, in their respective capacities as the claimant-defendants’ assignees under the subject insurance policy, from submitting new bills to plaintiffs and/or from commencing any new litigation or arbitration for any bills that they previously submitted that plaintiffs denied; (5) declaring that plaintiffs properly issued the denials of the subject bills for all three claimant-defendants and that said denials were valid; and (6) awarding costs and disbursements to plaintiffs.

The Court requests that, if appropriate, plaintiffs and medical provider defendants Golden Acupuncture PC; Healthplus Surgery Center LLC; M & M Supplies Group Inc; MII Supply



LLC; Premier Anesthesia Associates; Agyal Physical Therapy, PLLC; Alford A. Smith MD, P.C.; County Line Pharmacy; LR Medical, PLLC; and Metro Pain Specialists, P.C. (who answered the instant complaint) contact our Part Clerk, Margie Ramos-Ciancio, via email at [mciancio@nycourts.gov](mailto:mciancio@nycourts.gov), to schedule a preliminary conference, remembering to copy all parties.

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5/17/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE