At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of ~~October~~ June, ~~2020~~ 2021

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

- against - Index No. 507730/18

Individual Defendants
DOMINIQUE PETTAWAY,

Healthcare Defendants
NEW SENSE ACUPUNCTURE P.C., ASPEN MEDICAL CARE, P.C., SCARBOROUGH CHIROPRACTIC P.C., CLASSIC MEDICAL DIAGNOSTIC REHAB P.C., STARK MEDICAL SUPPLY INC., MORNING STAR PHYSICAL THERAPY P.C., ORTHOCARE SURGICAL, MODERN AMERICAN ACUPUNCTURE P.C., COLUMBUS IMAGING CENTER LLC, A.M. PATEL PHYSICAL THERAPY PLLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, VITRUVIAN REHAB, P.T.P.C., NILE REHAB PHYSICAL THERAPY, P.C. and EDWIN RASKIN, L.AC.,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	50-57
Opposing Affidavits (Affirmations)	59-65

Upon the foregoing papers in this action for a declaratory judgment regarding no-fault insurance coverage, defendants Columbus Imaging Center LLC (Columbus) and

Metro Pain Specialists Professional Corporation (Metro) move (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 2005, 3012 (d) and 5015 (a) (1), vacating the November 14, 2019 default judgment issued against them and, upon vacatur, compelling plaintiff State Farm Fire and Casualty Company (State Farm) to accept defendants' answer to the complaint.

On April 17, 2018, State Farm commenced this action against Columbus, Metro and others by filing a summons and verified complaint seeking a judgment declaring that State Farm is not obligated to provide insurance coverage under the insurance policy in effect on July 20, 2017, the date of the underlying motor vehicle accident. According to the Provider Defendants' counsel:

> "This action putatively arose out of plaintiff's intentional and willful breach of contract in its failure to timely and properly pay the first party beneficiary claims of DEFENDANTS' after plaintiff had received DEFENDANTS' timely and properly submitted claims for No-Fault reimbursements. Those claims sought payment for medically necessary services provided by DEFENDANTS to persons entitled to receive benefits under the New York Insurance Law and the No-Fault Implementing Regulations ('Regulations') promulgated thereunder."
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> "In the case at bar, plaintiff has erroneously and misleadingly asserted causes of action seeking an advisory declaratory judgment declaring that it has no obligation to reimburse DEFENDANTS under the subject insurance policy, on the basis that the Assignor allegedly engaged in material misrepresentation in both procuring the policy and presenting the claim in connection with the July 20, 2017 accident."

On or about December 5, 2018, State Farm moved for a default judgment against the nonappearing parties, including Columbus and Metro. In a November 14, 2019 order, this court granted State Farm a default judgment against Columbus and Metro. Columbus and Metro now move to vacate the November 14, 2019 judgment and restore the action to the calendar because they have both a reasonable excuse for their default due to law office failure and a meritorious defense to this action.

Counsel for Columbus and Metro affirms that their "delay in appearing in this action was caused by law office failure . . ." and "was not willful or intended to prejudice the Plaintiff, but rather [was] inadvertent." Defense counsel explains that Metro did not receive the summons and complaint in a timely manner because it was served through the New York Secretary of State and "the Secretary of State has a backlog of Summons and Complaints upon which to serve Defendants." Defendants submit an affidavit from Carmello Londono, a former paralegal in defense counsel's office, who attests that she contacted the office of the Secretary of State and was informed that it was experiencing a backlog of pleadings causing a delay in service.

Defense counsel explains that Columbus and Metro, upon receiving the summons and complaint, promptly sent it to their counsel. Upon receipt of the pleadings, defense counsel drafted and filed an answer on behalf of Columbus and Metro within the 30-day timeframe set forth in CPLR 320 (a). However, defense counsel explains that he "did not learn that Plaintiff had filed a Summons and Complaint against Defendants until after the

Court had rendered a default judgment against Defendants on November 14, 2019." Defense counsel further affirms that "any additional delay in the drafting and/or filing of Defendants' Answer that occurred was caused by the limited resources of said law firm." Defense counsel asserts that Columbus and Metro "always intended to defend this matter until a final decision was reached on the merits, and [their] failure to timely appear was not the result of any attempt to delay the resolution of this case or otherwise avoid service."

Defense counsel asserts that Columbus and Metro have a meritorious defense to this action under New York's Insurance Department Regulations, including 11 NYCRR § 65-3.8, which require an insurer to pay a claim or issue a denial within thirty (30) days of receipt of the proof of claim. Defense counsel explains that "[a]n insurer that fails to comply with the statutory 30-day period is precluded from asserting a defense against payment of the claim." Defense counsel argues that State Farm failed to comply with the timeframes set forth in the foregoing Regulations and, consequently, State Farm is precluded from denying defendants' claims. Defense counsel further contends that State Farm's rationale for denying defendants' claims based on an alleged fraud in the procurement of the insurance policy are meritless and based on pure speculation.

State Farm, in opposition, asserts that it timely served Metro with the summons and complaint through the New York Secretary of State and that it served Columbus through an authorized agent. In addition to those methods of service, State Farm asserts

that defendants "were both served with a Notice of Service pursuant to CPLR § 3215 (g) (4) (i)." State Farm's counsel notes that defendants are "silent as to the fact that they were each served with the Motion for Default Judgment in this matter, which gave them notice of this action." State Farm also argues that in the absence of an affidavit from defendants their motion to vacate the default judgment should be rejected.

State Farm further argues that defendants' motion to vacate their default should be denied because they have failed to demonstrate that they have a potentially meritorious defense to this action. State Farm contends that it submitted admissible evidence in its motion for a default judgment proving that its insured, Dominique Pettaway, made material misrepresentations at the time she procured the insurance policy.

"A party seeking to vacate a default in appearing or answering pursuant to CPLR 5015 (a) (1), and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*92-18 149th Street Realty Corp. v Stolzberg*, 152 AD3d 560, 562 [2017] [internal quotations omitted]). Furthermore, where a default in appearing results from law office failure, the court may "exercise its discretion in the interest of justice to excuse delay or default . . ." pursuant to CPLR 2005 (*see JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048, 1049 [2014]).

Here, defendants Columbus and Metro have demonstrated a reasonable excuse for their default based on a delay in receiving the summons and complaint from the New York Secretary of State and their counsel's law office failure. In addition, defendants

have established a potentially meritorious defense to this action based on the New York Insurance Regulations. In the court's discretion, the defendants' motion to vacate their default is granted since it was not willful and it was due to excusable law office failure. Accordingly, it is

ORDERED that the defendants' motion (in mot. seq. two) is granted, this court's November 14, 2019 order and judgment is hereby vacated, and State Farm is compelled to accept the defendants' answer to the complaint.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE