Liberty Mut. Ins. Co. v Johnson
2021 NY Slip Op 32841(U)
December 15, 2021
Supreme Court, New York County
Docket Number: Index No. 656565/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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INDEX NO. 656565/2020

MOTION DATE 10/29/2021

MOTION SEQ. NO. 001

LIBERTY MUTUAL INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY,

Plaintiffs,

- v -

MICHAEL JOHNSON, ADVANTAGE RADIOLOGY PC, ARS MEDICAL EQUIPMENT CORP, ASG RX CORP, BYOUNG IM LEE NP, COMPREHENSIVE PSYCHOLOGICAL EVALUATION PC, AKA COMPREHENSIVE PSYCHOLOGICAL PC,DI PHARMACY CORP, DIANA BEYNIN DC, ENGLEWOOD ORTHOPEDICS GROUP PC,GO FLEX REHAB PHYSICAL THERAPY PC,HAMZA PHYSICAL THERAPY PLLC,JASMINE RX INC, JEVA PHYSICAL THERAPY PC,LIANA BINNS NP, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MINNIE CHOI NP, RALPH MEDICAL DIAGNOSTICS PC,SOUTH SHORE CHIROPRACTIC WELLNESS PC,TMVQS CORP AKA TRINITY PHARMACY, TOPLAB AKA ADVANCED COMPREHENSIVE LABORATORY, LLC,WFN ACUPUNCTURE PC

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35

were read on this motion to/for DEFAULT JUDGMENT.

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave to enter a default judgment against Michael Johnson (the individual defendant), Advantage Radiology PC, ASG Rx Corp, Byoung Im Lee NP, Comprehensive Physiological Evaluation PC aka Comprehensive Psychological PC, DI Pharmacy Corp, Diana Beynin DC, Englewood Orthopedics Group PC, Go Flex Rehab Physical Therapy PC, Hamza Physical Therapy PLLC, Liana Binns NP, Minnie Choi NP, Ralph Medical Diagnostics PC, South Shore Chiropractic Wellness PC, TMVQS Corp aka trinity Pharmacy, Toplab aka Advanced Comprehensive laboratory, LLC, and WFN Acupuncture PC (collectively, the medical provider defendants). The plaintiffs seek a declaration that they are not obligated to pay no-fault benefits under policy number AOJ23150045740, claim number 0428303190005, in connection with injuries that the individual defendant allegedly sustained in an June 6, 2020 motor vehicle accident, or to

reimburse the medical provider defendants for treatment they rendered or equipment and supplies they provided to the individual defendant for his alleged injuries on the ground that the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). The plaintiffs also move to permanently stay any arbitrations or court hearings brought by the defendants for no-fault benefits stemming from the alleged June 6, 2020 accident involving the individual defendant. Defendants Advantage Radiology PC, ASG Rx Corp, Liana Binns NP, and South Shore Chiropractic Wellness PC oppose the motion and cross-move pursuant to CPLR 3012(d) to compel the acceptance of their late answers. The motion and cross-motion are denied.

As an initial matter, the court notes that the plaintiffs discontinued the action as against Jeva Physical Therapy PC by stipulation filed March 1, 2021.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2nd Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). "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, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22–3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see 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., supra. While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006).

In support of their motion, the plaintiffs submit, *inter alia*, the pleadings, an attorney's affirmation, the first EUO notice dated August 26, 2020 scheduling an EUO for September 10, 2020 at 11:00am, a subsequent EUO notice dated September 10, 2020 scheduling an EUO for October 1, 2020 at 12:00pm, as well as statements on the record made on the dates and times the individual defendant was scheduled to appear, which indicate that the individual defendant failed to appear. The plaintiffs additionally submit NF-10 denial forms, which indicate that the claims were denied due to the violation of policy conditions. More specifically, they state that the claims were denied because the individual defendant failed to appear for EUOs on the abovementioned dates and that the failure to do so, *i.e.*, comply with conditions of the policy, prevented the plaintiffs from obtaining proper proof of the claim.

The plaintiffs' motion must be denied as they failed to submit proof establishing that they complied with the timeliness requirements of 11 NYCRR 65-3.5. The plaintiffs do not establish that the initial notices for EUOs were timely mailed to the individual defendants within 15 days of the receipt of relevant claim forms, such as NF-2 or NF-3 forms, as required by 11 NYCRR 65-3.5(b) and (d). Hertz Vehicles, LLC v Best Touch PT, P.C., 162 AD3d 617 (1st Dept. 2018); Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); Am. Transit Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1st Dept. 2015) (citing Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 [1st Dept. 2011]).

Although the plaintiffs do establish that the EUO notices were generated and that the individual defendant did not appear on either date, the plaintiffs fail to demonstrate that the scheduling of the EUOs complied with 11 NYCRR 65-3.5(b) and (d) and thus the plaintiffs do not establish a *prima facie* case. Kemper Independence Ins. Co., supra; Am. Transit Ins. Co.; supra; Unitrin Advantage Ins. Co., supra. Thus, even assuming the plaintiffs submitted proof of service of the summons and complaint and proof of the defendants' default, they failed to submit sufficient proof of the facts constituting the claim. See CPLR 3215(f).

The court turns to the cross-motion of defendants Advantage Radiology PC, ASG Rx Corp, Liana Binns NP, and South Shore Chiropractic Wellness PC (the cross-movants) pursuant to CPLR 3012(d). In making a determination under CPLR 3012(d), the court must take into account the excuse offered for the delay in responding to the summons, the extent of the delay, 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).

As the excuses for their delay, the cross-movants contend that (i) their counsel's firm only opened this matter upon receipt of the summons and complaint "recently," in January 2021 and a clerical error precluded the attorney assigned to the case from filing a (proposed) answer until July 26, 2021, (ii) there is a large volume of declaratory judgment actions received by the firm, and a significant backlog of such cases are being processed by the firm, (iii) there is an overall increase of filings of declaratory judgments by the insurance companies, and (iv) service was made upon the Secretary of State, even though the addresses of the defendant are well known to the plaintiff.

The court does not find these excuses to be reasonable. See Pichardo-Garcia v. Josephine's Spa Corp., 91 AD3d 413, 414 (1st Dept. 2012); Perez v New York City Hous. Auth., 47 AD3d 505 (1st Dept. 2008) ("conclusory and perfunctory claim of law office failure," including "inability to keep track . . . does not constitute a reasonable excuse"); Rosenzweig v. Gubner, 194 AD3d 1086 (2nd Dept. 2021) ("conclusory denial of receipt of the summons and complaint failed to rebut the presumption of proper service created by the executed affidavit of service

upon the Secretary of State"). Moreover, court notes that service upon the Secretary of State constitutes valid service. See, e.g., Union Indem. Ins. Co. of New York v 10-01 50th Ave. Realty Corp., 102 AD2d 727, 728 (1st Dept. 1984) (citing BCL 306[b]; CPLR 311[1]; Colonial Sand & Stone Co. v Enrico & Sons Contractors, Inc., 66 AD2d 705 [1st Dept. 1978]). While the court is mindful of the public policy that favors resolving cases on the merits, it need not carry the day where the excuses proffered for the delay are, as here, unreasonable. Thus, the cross-movant's application pursuant to CPLR 3012(d) is denied.

The appearing parties are encouraged to explore settlement.

Accordingly, it is

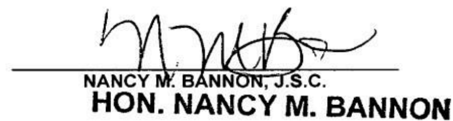
ORDERED that the action is discontinued and the complaint is dismissed, with prejudice and without costs, as against defendant Jeva Physical Therapy PC pursuant to the parties' stipulation of discontinuance filed March 1, 2021; and it is further

ORDERED that the plaintiffs' motion pursuant to CPLR 3215 for leave to enter a default judgment is denied; and it is further

ORDERED that the cross-motion of defendants Advantage Radiology PC, ASG Rx Corp, Liana Binns NP, and South Shore Chiropractic Wellness PC pursuant to CPLR 3012(d) to compel the late acceptance of their answers is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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

12/15/2021
DATE

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
SEQ 001		**GRANTED**	X	**DENIED**		**GRANTED IN PART**	**OTHER**
SEQ 001 X-MOT		**GRANTED**	X	**DENIED**		**GRANTED IN PART**	**OTHER**