SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

INFINITY INSURANCE COMPANY,
INFINITY AUTO INSURANCE COMPANY,
INFINITY CASUALTY INSURANCE COMPANY,
INFINITY INDEMNITY INSURANCE COMPANY,
INFINITY NATIONAL INSURANCE COMPANY,
INFINITY SELECT INSURANCE COMPANY,
INFINITY STANDARD INSURANCE COMPANY,

Plaintiffs,

-against-

MUTIAT YUSUF, NURYDEEN OLATUNJI,
FIRE DEPARTMENT NEW YORK,
IMMEDIATE IMAGING, P.C.M,
PRECISION MEDICAL DIAGNOSTICS OF NY, P.C.,
CHAROITE CHIROPRACTIC, P.C.,
ST LOCHER MEDICAL, P.C.,
SILVER ACUPUNCTURE, P.C.,
METRO HEALTH PRODUCTS INC.,

Defendants.

INDEX NO. 151432/13
MOTION DATE 10-02-2013
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to/for a Default Judgment and cross-motion to dismiss alternatively to vacate default:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____cross motion _____	5 - 7
Replying Affidavits _____	8 , 9

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion pursuant to CPLR §3215, for a default judgment against all of the defendants in this declaratory judgment action, is denied with leave to renew as to the non-appearing defendants. CHAROITE CHIROPRACTIC, P.C., ST LOCHER MEDICAL, P.C., and SILVER ACUPUNCTURE, P.C.'s cross-motion to dismiss pursuant to CPLR §3211[a][4],[7], alternatively, pursuant to CPLR §5015 [a], to vacate their default is granted only to the extent that their default is vacated. The remainder of the cross-motion is denied.

Plaintiffs seek an Order pursuant pursuant to CPLR §3215, granting a default judgment in this declaratory judgment action against all of the defendants.

Charoite Chiropractic, P.C., St Locher Medical, P.C., and Silver Acupuncture, P.C.'s, (hereinafter referred to as "the appearing defendants") oppose plaintiffs motion and cross-move pursuant to CPLR 3211 [a][4],][7], to dismiss this declaratory judgment action on the grounds that there are pending actions relating to the same nucleus of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

operating facts and for failure to state causes of action. Alternatively, pursuant to CPLR §5015[a], the appearing defendants seek to vacate their default and compel plaintiffs to accept the late answer.

Plaintiff brought this declaratory judgment action contending that the defendants are not eligible for no-fault benefits stemming from an April 2, 2011 motor vehicle accident based on failure to comply with a condition precedent to their insurance policy and No-Fault Insurance Regulations (Mot. Exh. A). Plaintiffs provide affidavits of service for all of the defendants and contend that none of them timely appeared and answered, therefore a default judgment should be granted (Mot. Exhs. B - I). Charoite Chiropractic, P.C. and St Locher Medical, P.C. , were served with the summons and complaint through service on the Secretary of State on February 28, 2013 (Mot. Exhs. F & G). Silver Acupuncture, P.C. was served with the summons and complaint through service on the Secretary of State on April 3, 2013 (Mot. Exh. H).

Plaintiffs claim that Mutiat Yusuf and Nurydeen Olatunji (hereinafter referred to as the "assignors") each failed to appear for two duly scheduled Examinations Under Oath ("EUO"), a condition precedent to coverage. Plaintiffs rely on the affidavits of Melissa Deak, office manager at Freiberg, Peck & Kang and the affirmations of David E. Peck to establish EUOs were scheduled and the assignors failed to appear. Melissa Deak states that letters dated June 8, 2011 and June 24, 2011, were mailed to each of the assignors requesting that each submit to an EUO and the manner in which they were prepared and mailed. The letters were not returned as undeliverable. Copies of the letters sent to the assignors scheduling the EUOs are annexed to the motion papers (Mot. Exhs. K - N). David E. Peck states that at the EUO scheduled dates and time he waited approximately thirty minutes at Veritext Reporting Service, 1250 Broadway, Suite 2400, New York, New York for the assignors and they did not appear. Plaintiffs also rely on the verified complaint which states that a timely and proper denial or claims was made based on the assignors failure to appear at the EUOs (Mot. Exh. A).

The appearing defendants cross-move pursuant to CPLR §5015[a], to vacate their default in appearing in this action. They served an answer to the summons and complaint on May 20, 2013 (Cross-Mot. Exh. B) and it was rejected as untimely. They claim that they have a reasonable excuse for the default in appearance, specifically that plaintiffs served the summons and complaint directly on the appearing defendants instead of their attorney. The appearing defendants did not understand the limited time frame for appearance and failed to forward the summons and complaint to their attorney in a timely fashion. The delay in answering should be treated as law office failure.

The appearing defendants claim that they have a meritorious defense to this action, specifically, the affidavit of Melissa Deak is based on hearsay and does not establish proper mailing to the assignors. The notices alleged to have been sent to Nurudeen Olatunji were mailed to the Law Offices of Felix Kozak, P.C., no proof is annexed to the motion papers establishing that plaintiffs provided the information concerning representation. They also claim that they have complied with the requirements for submitting notice of claims as set forth by 11 N.Y.C.R.R. §65-3.11[b][1] and 11 N.Y.C.R.R. §65-3.8[a][1]. Statuory billing forms were mailed and received by the insurer and the payment of no-fault benefits are overdue. The appearing defendants contend that discovery is needed to establish whether the mailing and denial of their claims was proper. Plaintiff has failed to demonstrate it properly scheduled EUOs, or that the addresses on the letters were correct.

The appearing defendants pursuant to CPLR 3211 [a],[4],[7], seek to dismiss this action. They claim that the complaint fails to state a cause of action because it is vague as to the condition precedent to policy coverage.

To obtain a judgment pursuant to CPLR §3215, a plaintiff is required to provide proof of service of the summons and complaint, proof of the facts constituting the claims and proof of the party's default in appearing (Integon Nat. Ins. Co. v. Norterile, 88 A.D. 3d 654, 930 N.Y.S. 2d 260 [N.Y.A.D. 2nd Dept., 2011]). An insurer's entitlement to a default judgment pursuant to CPLR §3215, in a declaratory judgment action is not granted on pleadings alone, the plaintiff must establish a right to a declaration against the defendant (Levy v. Blue Cross and Blue Shield of Greater New York, 124 A.D. 2d 900, 508 N.Y.S. 2d 660 [N.Y.A.D. 3rd Dept., 1986]).

In order to vacate a default pursuant to CPLR §5015[a], a party must demonstrate both a reasonable excuse for the default as well as a meritorious cause of action Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 N.Y. 2d 138, 492 N.E. 2d 116, 501 N.Y.S. 2d 8 [1986]). A determination of what is a reasonable excuse for the default is within the discretion of the Court (38 Holding Corp. v. City of New York, 179 A.D. 2d 486, 578 N.Y.S. 2d 174 [N.Y.A.D. 1st Dept., 1992]).

Claims for no-fault coverage are void ab initio, unless there has been full compliance with the terms of coverage required as a condition precedent under the policy, including Examinations Under Oath (Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 A.D. 3d 720, 827 N.Y.S. 2d 217 [N.Y.A.D. 2nd Dept., 2006] and Unitrin Advantage Insurance Company v. Bayshore Physical Therapy, PLLC, 82 A.D. 2d 559, 918 N.Y.S. 2d 473 [N.Y.A.D. 1st Dept., 2011]). An insurer satisfies its prima facie burden for purposes of obtaining summary judgment by establishing that notices for an examination were properly mailed to the assignor and the assignor failed to appear. A provider may raise an issue of fact based on the mailing, reasonableness of the notice, or the assignor's failure to appear for the examination (Seacoast Medical, P.C. v. Praetorian Ins. Co., 38 Misc. 3d 127(A), 967 N.Y.S. 2d 870 [App. Term, 1st Dept.,2012], Bath Ortho Supply , Inc. v. New Yok Cent. Mut. Fire Ins. Co., 38 Misc. 3d 145(A), 951 N.Y.S. 2d 84 [App. Term, 1st Dept., 2012 citing to Unitrin Advantage Insurance Company v. Bayshore Physical Therapy, PLLC, 82 A.D. 2d 559, supra).

Dismissal pursuant to CPLR §3211[a][7], for failure to state a cause of action, requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. Allegations are generally deemed true (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pursuant to CPLR §3211[a][4], an action may be dismissed when there is another action or proceeding pending between the same parties, "as justice requires." The Court has broad discretion in determining the motion. The nature of the relief sought must be for the same cause of action with the nature of the relief being the same (Walsh v. Goldman Sachs & Co., 185 A.D. 2d 748, 586 N.Y.S. 2d 608 [N.Y.A.D. 1st Dept., 1992]). It is an improvident exercise of discretion to dismiss a declaratory judgment action in favor of a party that had defaulted in the action, based on pending Civil Court actions (American Transit Ins. Co. v. Solorzano, 108 A.D. 3d 449, 968 N.Y.S. 2d 372 [N.Y.A.D. 1st Dept.,2013]).

This Court finds that plaintiffs have not established a basis to obtain a default judgment. They have failed to annex sufficient documentation to substantiate their

claims to a right to a declaration. The verified summons and complaint annexed in lieu of an affidavit, makes only generalized referrals to the notice of denial of claims. The letters and receipts for certified mailing for the scheduling of EUOs annexed to the motion papers do not confirm actual mailing, there is no authentication or stamp from the post-office. Plaintiffs are granted leave to renew the application for a default judgment as to the non-appearing defendants.

The appearing defendants served a late answer to the complaint on May 20, 2013, they have stated a reasonable excuse for the default and a potential defense. The appearing defendants have failed to establish a basis for dismissal pursuant to CPLR §3211[a][4]. Having defaulted in this action, they have not stated a basis to dismiss based on pending actions where they are plaintiffs. The relief sought in the Civil Kings actions is not the same as that sought in this declaratory judgment action. The appearing defendants have also failed to state a basis for dismissal pursuant to CPLR §3211[a][7], a valid claim for declaratory judgment has been stated and plaintiffs are not required to completely prove their claim on a motion to dismiss.

Accordingly, it is ORDERED that plaintiffs' motion pursuant to CPLR §3215, for a default judgment against all of the defendants in this declaratory judgment action, is denied with leave to renew as to the non-appearing defendants, and it is further,

ORDERED, that CHAROITE CHIROPRACTIC, P.C., ST LOCHER MEDICAL, P.C., and SILVER ACUPUNCTURE, P.C.'s cross-motion to dismiss pursuant to CPLR §3211[a][4],[7], alternatively, pursuant to CPLR §5015 [a] to vacate their default is granted only to the extent that their default is vacated; and it is further,

ORDERED, that CHAROITE CHIROPRACTIC, P.C., ST LOCHER MEDICAL, P.C., and SILVER ACUPUNCTURE, P.C.'s Answer in the form annexed to the cross-motion is deemed served, upon service on the plaintiffs of a copy of this Order with Notice of Entry, and the Clerk of the Court, and it is further,

ORDERED, that plaintiff shall serve a Reply to the Counterclaims asserted in CHAROITE CHIROPRACTIC, P.C., ST LOCHER MEDICAL, P.C., and SILVER ACUPUNCTURE, P.C.'s Answer within thirty (30) days of service of a copy of this Order with notice of entry, and it is further

ORDERED, that the remainder of the relief sought in the cross-motion is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: October 7, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE