| **Hereford Ins. Co. v Interdependent Acupuncture PLLC** |
| --- |
| 2024 NY Slip Op 31269(U) |
| April 10, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 152296/2019 |
| Judge: David B. Cohen |
|  |
|  |

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

**PRESENT:** **HON. DAVID B. COHEN** **PART** **58**

***Justice***

----------X

HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

INTERDEPENDENT ACUPUNCTURE PLLC, *et al.*,

Defendants.

----------X

**INDEX NO.** 152296/2019

**MOTION DATE** N/A

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this no-fault insurance declaratory judgment action, defendants Shelly Sarben-Sarpong and Corey Hargrove (movants) move pursuant to CPLR 5015(a)(1) for an order vacating the default judgments entered against them. Plaintiff opposes.

In this action, commenced in 2019, plaintiff sought a judgment declaring that it did not have a duty to pay any no-fault insurance claims related to the accident at issue, involving the three defendants-claimants, Sarben-Sarpong, Hargrove, and Timothy Sterling.

As pertinent here, according to plaintiff's affidavit of service, it served Sarben-Sarpong with the summons and complaint on March 23, 2019, by delivering it to her residence to a woman named Victoria "Doe" and subsequently mailing it to her (NYSCEF 33). After Sarben-Sarpong failed to answer or appear timely, on May 2, 2019, plaintiff filed a motion seeking a default judgment against her and other defaulting defendants, which was granted on July 8, 2019 (NYSCEF 74). A copy of the motion was served on Sarben-Sarpong by mail on May 7, 2019 (NYSCEF 62), and notice of entry of the decision was mailed and filed on NYSCEF on August 20, 2019 (NYSCEF 98).

On July 10, 2019, plaintiff efiled proof that on March 9, 2019, it served Hargrove with the pleadings by handing them to him at his place of residence (NYSCEF 75). After he failed to answer or appear timely, plaintiff moved for a default judgment against him, which was granted on October 18, 2019 (NYSCEF 118). Plaintiff filed and mailed notice of entry of the decision on October 28, 2019 (NYSCEF 119).

Movants' counsel sets forth the following pertinent background:

(1) the no-fault claims in this action arose out of an automobile accident on June 13, 2018, when a motor vehicle owned and operated by Melinda Angela Marshall collided with a vehicle owned by Saif M. Ripon, plaintiff's insured, in which movants were passengers;

(2) Movants' counsel commenced an action on movants' behalf against Marshall in Kings County, and in October 2021, summary judgment was granted on behalf of other defendants in that action;

(3) Defendant Marshall defaulted in that action, and her insurance company denied coverage as her insurance coverage was not in effect on the accident date;

(4) Movants' counsel then filed a Demand for Uninsured Motorist Arbitration on movants' behalf; and

(5) In March 2023, plaintiff filed a petition for a permanent stay of the Arbitration, based on the default judgments granted in this action, which was granted in May 2023.

Counsel also contends that her firm represented Sarpong at her examination under oath in September 2018, and represented both movants at their examinations before trial in the personal injury action in 2019 (NYSCEF 149). Despite the fact that plaintiff knew that counsel was representing movants, she alleges that plaintiff failed to serve her with the default orders and

judgment, and that the first time she learned of this action was when plaintiff filed its petition for a stay of the Arbitration (*id.*).

Movants also argue that the default judgments are nullities as plaintiff breached its duty pursuant to Insurance Law 3420(d) to provide notice of disclaimer. Moreover, the evidence submitted by plaintiff in seeking default judgments against them, they argue, was inadmissible, and they urge the court to vacate the judgments in its discretion and in the interest of justice. They also claim that they have a meritorious defense as they sustained serious injuries in the accident, and observe that the courts favor determination on the merits rather than on default (NYSCEF 149).

Plaintiff notes that movants' motion is not supported by an affidavit from someone with personal knowledge of the facts, such as movants, and that they fail to offer a reasonable excuse for failing to appear or answer or to oppose the motions for default judgments against them. It contends that there is no requirement that it serve pleadings or other court-filed documents on a party's counsel in a different action. It also denies that movants have a meritorious defense, and maintains that it issued disclaimers timely in November 2018 (NYSCEF 160).

This court does not consider movants' reply as counsel did not seek permission to file one and there is no right to reply to an order to show cause (22 NYRR 202.8-d ["absent advance permission for the court, reply papers shall not be submitted on orders to show cause"]).

Absent from movants' submission is an affidavit from them or any other statement denying that they were served with the pleadings in 2019, copies of the motions for default judgment against them, or notices of entry of the decisions granting the default judgments against them. Thus, while movants' counsel claims she did not receive notice of the instant action or motion practice until after the default judgments were granted, movants themselves fail

to show a lack of notice. Counsel also fails to cite any requirement that plaintiff serve her with court filings in this action simply because she represented claimants in the personal injury action. Thus, movants fail to show a reasonable excuse for their defaults (*Moreno v Ramos*, 174 AD3d 716 [2d Dept 2019] [as party did not submit affidavit based on personal knowledge in support of motion to vacate default, he did not show reasonable excuse for default], *lv dismissed* 34 NY3d 1140 [2020]).

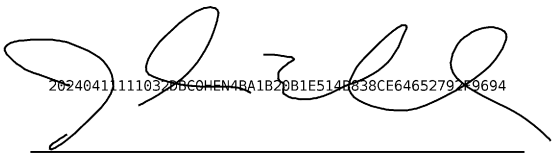
In light of this result, there is no need to consider whether movants have a meritorious defense. But even if considered, there is no merit to their claim that plaintiff failed to issue a timely disclaimer, as plaintiff not only did so, but even if it did not, it was not precluded from later raising a defense of lack of coverage (*see Nationwide Affinity Ins. Co. of Am. v Jamaica Wellness Med., P.C.*, 167 AD3d 192 [4th Dept 2018] [insurer which fails to issue timely disclaimer is not prohibited from raising lack of coverage defense]).

Counsel's unexplained eight-month delay in moving to vacate the default judgments is another factor against granting the motion to vacate (*Delucia v Mar Lumber Co., Inc.*, 210 AD3d 636 [2d Dept 2022] [plaintiff failed to provide excuse for delay in moving to vacate default, as motion was not filed for approximately nine months after notice of entry of order at issue]).

For all of these reasons, the court also declines to vacate the default judgments in the interest of justice (*see Go Sweat, LLC v GRA Legal Title Trust 2013-1, U.S. Bank, Ntl. Assn.*, __ AD3d __, 2024 NY Slip Op 01507 [1st Dept 2024] [no basis to vacate default judgment in interest of justice, as movant did not show judgment was procured through fraud, mistake, inadvertence, or excusable neglect]).

Accordingly, it is hereby

ORDERED, that the motion by defendants Shelly Sarben-Sarpong and Corey Hargrove for an order vacating the default judgments entered against them is denied.




4/10/2024
DATE

DAVID B. COHEN, J.S.C.

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