SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

ALLSTATE INSURANCE COMPANY,
ALLSTATE INDEMNITY COMPANY,
DEERBROOK INSURANCE COMPANY,

Plaintiffs,

-against-

PLAINVIEW PROFESSIONAL MEDICAL, P.C.,
BRUCE BROMBERG, D.C., RAFAEL GARCIA,
M.D.,

Defendants.

INDEX No. 11427/06

MOTION DATE: Feb. 6, 2008
Motion Sequence # 004

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by plaintiffs, for an order pursuant to CPLR 2221(e) to renew the Order of Hon. Stephen A. Bucaria dated December 4, 2007; and for any such other and further relief as this Court deems just and proper, is **granted**, and upon renewal, is determined as hereinafter set forth.

Factually, Dr. Garcia was the principal in Plainview Professional Medical, P.C. ("Plainview"). The pivotal allegation is that Dr. Garcia was a figurehead in the sham professional corporation which enabled the defendants to collect no-fault benefits from

the plaintiffs, contrary to New York State law. Procedurally, a default was obtained against Plainview and Dr. Garcia, and they moved for vacatur. This Court granted that motion on the basis that they had demonstrated a reasonable excuse (Dr. Garcia's poor health); and that a meritorious defense that Dr. Garcia was the actual owner of Plainview was established.

The plaintiffs herein argue that Dr. Garcia's "reasonable excuse", that of his varied medical ailments that prevented him from maintaining contact with his attorney; and that his "meritorious defense" of actual ownership, are refuted by his deposition testimony. Specifically, counsel asserts that Dr. Garcia did not suffer from all of the possible diagnoses that were listed by his physician as a reason for his inability to keep proper contact with his attorney, i.e., he only avers that he was hypotensive, and that such statement was false. With respect to the meritorious defense, counsel asserts that Dr. Garcia's testimony described his position as being more like an employee than a principal or an owner; that he was receiving $500 per week plus a car lease for a corporation that made $918,000 in 2002 and that the defendant Bromberg later reported to him that business was "very slow and he was about to close" (Garcia deposition, p.36, lines 17-18); and that Dr. Garcia was not the real owner of Plainview and Plainview was merely a shell; the defendant Bromberg, a chiropractor, was the real owner.

In opposition, the defendants' attorney argues that the plaintiffs' attorney is attempting to argue the merits and is procedurally improper. Counsel asserts that this information was already available to the movants' attorney, and the fact that Dr. Garcia was the real owner was noted in the prior Court Order. He asserts that Dr. Garcia's status as a "paper owner" is an issue that should be taken up on trial. He further asserts that plaintiffs' counsel is attempting to distort Dr. Garcia's testimony about his health, because the genesis of Dr. Garcia's hospitalization was an accident for which he was confined for a number of months.

In reply, plaintiffs' counsel reiterates, with some detail, the arguments that Dr. Garcia's contradiction of his medical diagnoses warrants reinstatement of his default and that of Plainview. Also reiterated are his assertions that Plainview was making hundreds of thousands of dollars, while Dr. Garcia shows W-2s for 2002 through 2004 with income totaling $6,386.31, a clear showing that Plainview was a sham corporation; and Dr. Garcia's testimony that he was paid $500 per week plus his car lease payments demonstrate a contradiction. Counsel avers that Dr. Garcia's testimony incompletely

accounts for the timing of his hospitalization and disability, and seeks a hearing as to Dr. Garcia's failure to answer the complaint between September 2006 and the time of his accident.

DECISION

> "A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not known to the party seeking renewal, and, therefore, were not made known to the court (see, **Matter of Shapiro v New York**, 259 AD2d 753). Although leave to renew may be granted in the trial court's discretion even where the additional facts were known to the party seeking renewal at the time of the original motion (see, **Daniel Perla Assocs. v Ginsburg**, 256 AD2d 303; **Oremland v Miller Minutemen Constr. Corp.**, 133 AD2d 816), "[l]eave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application (**Matter of Shapiro v New York, supra**, at 754)"".

(**Cole-Hatchard v Grand Union**, 270 AD2d 447, 705 NYS2d 605, 2nd Dept., 2000; see, **Gomez v Needham Capital Group, Inc.**, 7 AD3d 568, 775 NYS2d 903, 2nd Dept., 2004).

In the case at bar, the Court is satisfied that the actual, fact-based testimony of Dr. Garcia was unavailable to the plaintiffs since Dr. Garcia was ostensibly incapacitated

from testifying due to his adverse medical condition, and renewal is warranted.

It is beyond cavil that

> "A strong public policy exists which favors the disposition of matters on their merits (see **Bunch v Dollar Budget**, 12 AD3d 391). A party seeking to vacate an order entered upon his or her default is required to demonstrate both a reasonable excuse for the default and the existence of a meritorious cause of action or defense (see CPLR 5015(a)[1]; **Hageman v Home Depot U.S.A.**, 25 AD3d 760; **Zrake v New YorkCity Dept. of Educ.**, 17 AD3d 603). The determination of whether or not to vacate a default in answering is generally left to the sound discretion of the court (see **Hegarty v Ballee**, 18 AD3d 760)".

(**Ahmad v Aniolowski**, 28 AD3d 692, 814 NYS2d 666, 2nd Dept., 2006).

With respect to the defendants' assertion of a reasonable excuse for the default, while Dr. Garcia's testimony (that some of the ailment listed by his physician were diagnoses that were never proven) casts some doubt on the completeness of his physician's letter which formed a basis for vacatur of his default. Such testimony is not conclusive of Dr. Garcia's disability, nor his inability to participate in the proceedings, nor his inability to keep in regular contact with counsel.

Turning now to the co-requirement of a meritorious defense, the issue central to the defense and, conversely, the issue central to the cause of action brought by the

plaintiffs, is whether Dr. Garcia was an actual owner of Plainview under the theory outlined in **State Farm Insurance Co. v Mallela** (4 NY3d 313, 2005). To make that determination on this motion to renew, i.e., whether Dr. Garcia has, in fact, established that defense, is to make a determination of the facts that is equivalent to a summary judgment motion. This Court perceives this determination is inappropriate at this time. For the purposes of this application on a default, the defendants have met that burden. Additionally, there is no prejudice that has impacted on the plaintiffs, nor have the plaintiffs demonstrated wilfulness by these defendants.

"Accordingly, in light of the strong public policy that actions be resolved on their merits, the brief delay involved, the defendant's lack of willfulness, and the absence of prejudice to the plaintiffs (see **New York Univ. Hosp. Tisch Inst. v Merchants Mut. Ins. Co.**, 15 AD3d 554, 555; **Orwell Bldg. Corp. v Bessaha**, 5 AD3d 573, 574" (**New York & Presbyterian Hospital v American Home Assurance Company**, 28 AD3d 442, 813 NYS2d 186, 2nd Dept., 2006), the **vacatur** is undisturbed.

Therefore, upon renewal, the underlying motion on the **vacatur** of the default is **granted**.

Dated MAR 26 2008

Stephen A. Bucaria
J.S.C.

ENTERED

MAR 26 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE