

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
WESTCHESTER MEDICAL CENTER,

Plaintiff,

-against-

DECISION & ORDER

Index No. 62752/2017

Motion Sequence # 1

Defendants.
-----X

The following papers were read on the plaintiff's motion for an order dismissing the defendant's counterclaim and affirmative defense:

Notice of Motion/Affirmation/Exhibits A	1-3
Memorandum of Law in Support	4
Notice of Cross-Motion/Affirmation	5-6
Affirmation in Opposition to Cross-Motion/Exhibit A	7-8
Memorandum of Law in Opposition to Cross-Motion	

Factual and Procedural Background

The plaintiff commenced this action on August 22, 2017, to recover for medical services rendered to the defendant on March 30, 2016. The defendants served and filed an answer on September 19, 2017, with sixteen affirmative defenses and three counterclaims alleging that (1) the plaintiff outrageously overcharged the defendants for alleged services rendered; (2) as a result of the plaintiff's overcharging, the plaintiff was unjustly enriched in the amount of \$20,000.00; and (3) the defendants demand \$20,000.00 in unjust enrichment.

The plaintiff now files the instant motion seeking an order to dismiss the defendants' first affirmative defense of lack of jurisdiction pursuant to CPLR 3211[e] upon the ground that the defendants have failed to move for dismissal on that basis within sixty days of service of the pleading and an order to dismiss the defendants' counterclaims pursuant to CPLR 3215[c], arguing that the defendants have failed to proceed on the counterclaim within one year and it is therefore, deemed abandoned.

In opposition, the defendants by [REDACTED] filed a cross-motion for an order pursuant to CPLR 3126, to strike the plaintiff's pleading and dismiss the complaint or in the alternative, pursuant to CPLR 3120, 3124, and 3126, to compel the plaintiff to comply with discovery obligations. [REDACTED] argues that he served discovery demands on September 19, 2017 and the plaintiff never responded to any of the discovery demands and the responses are more than two years late. He argues that the plaintiff's refusal and failure to produce documents responsive to his requests flies in the face of New York's long-standing disclosure rules requiring full disclosure of all material necessary in the prosecution or defense of an action (CPLR 3101[a]).

[REDACTED] also argues that the plaintiff's motion must be denied as moot, since the plaintiff never filed a reply to the counterclaims, the time to amend the counterclaims never began to run and thus, the defendants' time to amend the counterclaims never expired and the defendants have amended the counterclaims and the plaintiff's time to respond to the amended counterclaims was extended to January 30, 2020. [REDACTED] also argues that the Court may excuse any default of the defendants because given the

small request for relief, he did not know that the Civil Court rules, wherein counterclaims are deemed denied, did not apply.

In opposition to the cross-motion and opposition, the plaintiff states that the plaintiff's counsel chose not to reply to the counterclaims because they did not allege enough facts to state a claim upon which relief could be granted and the defendants did not allege that he complied with Public Authorities Law 3316, in serving a notice of claim upon Westchester Medical Center.

The plaintiff argues that the defendants do not have an unlimited amount of time to amend the counterclaim under CPLR 3025[a] to save the pleading from being dismissed as abandoned and [REDACTED] misapplied CPLR 3025[a], in that, the time to amend the counterclaim as of right expired on October 2017 or twenty days after [REDACTED] served his answer with counterclaims.

The plaintiff further argues that [REDACTED] has not shown sufficient cause why the counterclaim should not be dismissed. The plaintiff asserts that the Civil Court Act does not apply in Westchester County and [REDACTED] is an attorney, but even if he was not, the defendants are not entitled to another opportunity because he did not know that there was a one year deadline for him to seek a default judgment on his counterclaim.

In response to the cross-motion, the plaintiff argues that [REDACTED] has no right to relief under CPLR 3126 because he did not submit an affirmation of good faith in support of the motion, which is required under 22 NYCRR § 202.7[a].

DISCUSSION

CPLR 3215(c) provides in relevant part that:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed (N.Y. Civ. Prac. L & R 3215[c]).

Pursuant to CPLR 3215(c), a motion court "providently exercise[s] its discretion in dismissing the complaint" if "[t]he plaintiff fail[s] to seek entry of a default judgment within one year following the defendant's default in answering the complaint" (*Ewart v Maimonidies Medical Center*, 239 AD2d 543, 544 [2d Dept 1997]; see also *Mattera v Capric*, 54 AD3d 827 [2d Dept 2008]). "The one exception to the otherwise mandatory language of CPLR 3215[c] is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if 'sufficient cause is shown why the complaint should not be dismissed'" (see *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 751 [2d Dept 2014]). Sufficient cause requires both a reasonable excuse for the delay in seeking a default judgment and a demonstration that the cause of action is potentially meritorious (*Id.*). "The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court" (*Id.*).

Here, the defendant did not provide a reasonable excuse nor demonstrate a potentially meritorious cause of action. Additionally, the defendants' time to amend does not continue to run because the plaintiff defaulted in replying to the counterclaims.

CPLR 3025[a] provides that:

A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for

responding to it expires, or within twenty days after service of a pleading responding to it. (N.Y. Civ. Prac. L & R 3025[a]).

Therefore, the defendants were only entitled to amend their answer within twenty days after it was served upon the plaintiff or at any time before the period for responding to it expired which occurred in 2017. Also, [REDACTED], who is an attorney, is not entitled to an excuse from dismissal because of his lack of knowledge of the law.

With regard to the defendants' application to strike the pleadings due to the plaintiff's failure to respond to discovery demands, such is also denied.

Westchester Supreme Court Differentiated Case Management Protocol ("DCMP") part rules states that:

No motions (including cross-motions) relating to discovery may be interposed until a preliminary conference has been held in the PCP [Preliminary Conference Part]. The parties will be expected to attend such conferences and attempt in good faith to resolve all discovery disputes. In the event that motion practice is necessary, a briefing schedule will be established by the court-attorney referee at the preliminary conference and the motion will be referred to the Compliance Part for disposition. Such motions shall be orally argued and the Compliance Part Justice may render a bench decision or a written decision, as appropriate. Motions relating to a failure to provide discovery or adhere to the preliminary conference order shall be heard in the Compliance Part []. However, no such discovery motion (including a motion to dismiss predicated upon a discovery violation and including any discovery cross-motion) may be interposed until a pre-motion conference has been requested and held in the Compliance Part [].

The DCMP further states that "[i]n the event that a dispositive motion accompanies the RJI rather than a request for a preliminary conference, the case will be referred to the PCP for a preliminary conference and will also be assigned to an IAS Justice.

Here, the case has not yet been referred to the PCP for a preliminary conference, but has been referred to this IAS Justice for a decision on the motions. Additionally, [REDACTED] failed to submit an affirmation of good faith in support of the motion, which is required under 22 NYCRR § 202.7[a]. Therefore, this Court will now deny cross-motion seeking to dismiss due to failure to comply with discovery demands and refer the matter to the PCP for a preliminary conference.

Accordingly, based on the foregoing, it is

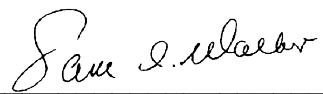
ORDERED that the plaintiff's motion to dismiss the defendants' counterclaims is granted and the defendants' counterclaims are dismissed; and it is further

ORDERED that the defendants' cross-motion is denied.

The parties are directed to appear before the Preliminary Conference Part on a date and time to be later determined by the Court.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
April 28, 2020



HON. SAM D. WALKER