

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

-----X  
FAIR LAWN ASC LLC,

Plaintiff,

-against-

DECISION AND ORDER

Sequence No. 5

Index No. 59230/2016

MIKE CASARELLA a/k/a MICHAEL C. CASARELLA  
a/k/a MIKE C CASARELLA and MELISSA M. MURPHY  
a/k/a MELISSA M CASARELLA,

Defendants.  
-----X

RUDERMAN; J.

The following papers were considered in connection with the motion of defendant Melissa M. Murphy to vacate her default and deem her proposed answer to be timely filed, and related relief:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affidavit	1
Affirmation in Opposition, Exhibits A - C	2

Plaintiff Fair Lawn ASC LLC is a medical and surgical operating facility; defendant Mike Casarella was a patient who was treated at plaintiff's facility. According to the complaint, Casarella did not pay the facility's charges, and when his insurance carrier sent him checks covering the services, he retained and converted the funds to his own use. The original complaint in this action alleged causes of action for services rendered and account stated, and an amended complaint added causes of action for breach of contract, monies had and received, imposition of a constructive trust, conversion, an accounting, and an injunction. Casarella filed

an answer with counterclaims, to which plaintiff replied. This Court then granted plaintiff's motion to join Melissa M. Murphy as a party defendant, based on third-party discovery revealing that the insurance funds were deposited into a joint account held by Casarella and Murphy.

When Murphy failed to file or serve an answer to the supplemental summons and amended complaint, plaintiff submitted a proposed default judgment against defendant Murphy to the County Clerk. Murphy then moved by this order to show cause to vacate and stay enforcement of any entered default judgment, and to deem her proposed answer to be timely filed.

Plaintiff opposes, suggesting that Murphy has not demonstrated either excusable neglect or a meritorious defense.

#### Analysis

"A party seeking to vacate a default in appearing or answering pursuant to CPLR 5015(a)(1), and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*Hamilton Pub. Relations v Scientivity, LLC*, 129 AD3d 1025, 1025 [2d Dept 2015]). Here, the excuse provided by pro se defendant Murphy, that she was unaware that she needed to file an answer, believing that her appearance in court on August 27, 2018 was sufficient to serve the same purpose, is sufficient in these circumstances. While the defenses contained in her proposed answer are minimal, they include that she was not a party to the agreement between plaintiff and Casarella, and was not aware of the debt. Considering the strong public policy in favor of resolving cases on the merits (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]), the question of whether Murphy may be held liable to plaintiff based on her use of her joint checking account with

Casarella, after he deposited the insurance payment in that account, is better addressed on the merits.

“Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default” (CPLR 3012[d]). Defendant Murphy’s untimely answer in the form of the proposed answer appended to her moving papers (NYSCEF Doc. No. 104) is deemed timely filed nunc pro tunc and deemed served on plaintiff as of the filing of this decision and order.

Accordingly, it is hereby,

ORDERED that pro se defendant’s motion is granted insofar as her default in appearing or answering is vacated and her answer in the form proposed is accepted and deemed served as of the date of this order, and it is further

ORDERED that the parties are directed to appear, *as previously directed*, at the Compliance Conference Part, Westchester County Supreme Court, room 800 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York, on February 13, 2019 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
February 4, 2019

  
HON. TERRY JANE RUDERMAN, J.S.C.