

Warner Ins. Co. v Camara
2016 NY Slip Op 31862(U)
October 5, 2016
Supreme Court, New York County
Docket Number: 652563/2015
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

WARNER INSURANCE COMPANY,

Plaintiff,

-against-

INDEX NO. 652563/2015

Motion Seq. No. 003

MAHAMADOU CAMARA, ALL KIND PHYSICAL
THERAPY, P.C., AMERICAN KINETICS LAB INC.,
A.R.A. MEDICALCARE, P.C., ARISDOV MEDICAL,
P.C., BD MEDICAL SERVICES, P.C., BRIJ KUMAR
MITTAL, P.C., DALTON RADIOLOGY, P.C.,
DIAMOND CHIROPRACTIC, P.C., DUNAMIS REHAB
PT, P.C., HARMONY ANESTHEISOLOGY, P.C.,
KSENIA PAVLOVA, DO, L&S TOV DRUGS, LLC,
LAKEVIEW CHIROPRACTIC, P.C., RUSSELL NERESOV,
DC, NYS DIAGNOSTIC MEDICINE, P.C., OK
COMPOUNDING, PARK SLOPE MEDICAL ONE, P.C.,
PROFESSIONAL MEDICAL HEALTHCARE, P.C., SP
ORTHOTIC SURGICAL & MEDICAL, INC., SUNRISE
MEDICAL LABORATORIES, INC., SYNOPTIC
PHYSICAL THERAPY, P.C., THERAPEUTIC
CHIROPRACTIC SERVICES, P.C., TISBURY
ACUPUNCTURE, P.C., VERASO MEDICAL SUPPLY
CORP., XVV INC.,

Defendants.

X

OSTRAGER, J:

Plaintiff Warner Insurance Company (“Warner”) has moved herein for default judgment pursuant to CPLR 3215 against the following twenty-two (22) healthcare providers: All Kind Physical Therapy P.C., American Kinetics Lab Inc., A.R.A. Medical Care P.C., Arisdiv Medical P.C., BD Medical Services P.C., Brij Kumar Mittal P.C., Dalton Radiology P.C., Diamond Chiropractic P.C., Dunamis Rehab P.T. P.C., Harmony Anesthesiology P.C., L&S Tov Drugs LLC, Lakeview Chiropractic P.C., Russell Nersesov D.C., NYS Diagnostic Medicine P.C., OK Compounding, Park Slope Medical One P.C., Professional Medical Healthcare P.C., Sunrise

Medical Laboratories, Inc., Synoptic Physical Therapy PC, Therapeutic Chiropractic Services P.C., Tisbury Psychological Services P.C., and XVV, Inc. (the "Healthcare Provider Defendants"). No relief is being sought as to defendants Ksenia Pavlova, DO, SP Orthotic Surgical & Medical, Inc., or Veraso Medical Supply Corp., all of whom answered the Complaint (see Exh B to Motion). Nor is relief being sought against defendant Top Tap Acupuncture, P.C. against whom the action was discontinued (Exh C).

Plaintiff is seeking default declaration that (a) the plaintiff has no obligation to pay any pending or future claims for no-fault benefits, bodily injury liability or uninsured/underinsured motorist benefits relating to the claims for policy number 1147227 and plaintiff's claim number A017397NY13 relating to defendant Mahamadou Camara; (b) the plaintiff has no duty or obligation to defend and/or indemnify any defaulting party to this action in any claim or action commenced against them related to the claims set forth herein; (c) an Order permanently enjoining the Healthcare Provider Defendants from initiating and/or prosecuting any legal or arbitration proceedings against plaintiff, or continuing to engage in claims, and for costs and disbursements.

The motion is denied as to OK Compounding as the plaintiff has failed to provide an affidavit of service showing that the defendant OK Compounding was served with the Summons and Complaint, and granted as to the remaining twenty-one (21) Healthcare Provider Defendants as the plaintiff has substantially complied with 11 NYCRR 65-1.1 et seq. which governs No-Fault Claims arising from automobile-related injuries in New York State.

This action arises out of a car accident that allegedly occurred on November 16, 2013 at the intersection of Flatlands Avenue and Louisiana Avenue in Brooklyn, New York (Complaint, ¶ 191). At the time of the alleged incident, the defendant Mahamadou Camara was allegedly driving a 2002 Chevrolet Impala owned by plaintiff's insured Tidiani Traure (Complaint, ¶ 189).

The defendant Camara was allegedly side-swiped when another vehicle attempted to merge into his lane, and he sought medical care in connection with injuries allegedly suffered as a result of the incident (Application for No-Fault Benefits annexed to Exh. F in the moving papers).

The plaintiff, through a consultant named Alternative Consulting and Examinations (“ACE”), mailed the defendant Camara a written notice dated January 8, 2014 to appear for an Independent Medical Examination (IME) on January 14, 2014 at the chiropractic practice of Dr. Martin Epstein in Brooklyn (*see* Notice annexed to Exh. F in the moving papers). When defendant Camara failed to appear at the IME (*see* Epstein aff, ¶ 3 in Exh. I), ACE mailed a follow-up written notice dated January 15, 2014 advising Camara he was scheduled to appear for another chiropractic IME on February 3, 2014, also with Dr. Epstein. Defendant Camara failed to appear for the second scheduled IME (Epstein aff, ¶ 6). Based on these alleged facts, plaintiff is seeking to disclaim No-Fault coverage on the ground that defendant Camara failed to appear at two duly scheduled chiropractic IMEs (affirmation of plaintiff’s counsel, ¶ 17, 19).

11 NYCRR 65-1.1 *et seq.* governs No-Fault claims arising from injuries from the use or operation of motor vehicles in New York State. The statute prescribes specific procedures and timelines for insurers to follow. Section 65-3.5 outlines claims procedures, and Section 65-3.6 outlines follow-up procedures.

In general, once an insurer receives a claim from a medical provider who has allegedly provided services to an individual injured in an automobile incident, the insurer has 10 days to send to the provider a verification forms. After receipt of the completed verification form, the insurer may request additional information – e.g. an Examination Under Oath (EUO) or an Independent Medical Examination (IME) - within 15 days.

When the additional verification required by the insurer is an IME, the insurer “shall schedule the examination to be held within 30 calendar days from the date of receipt of

prescribed verification forms.” 11 NYCRR 65-3.5(d). The same follow up procedures that apply to EUOs apply to IMEs. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 (1st Dep’t 2011). The regulations also provide that “[t]he eligible injured person shall submit to medical examinations by physicians selected by, or acceptable to, the Company, when, and as often as the Company may reasonably require.” *See* 11 NYCRR 65-1.1(d), Sec. 1, Proof of Claim [d]. The failure to appear for IMEs as requested by the insurer is a breach of a condition precedent to coverage under the no-fault policy. *Unitrin Advantage Ins. Co.*, 82 AD3d at 560.

Plaintiff here has demonstrated that all Healthcare Provider Defendant except for OK Compounding were properly served with the Summons and Complaint, as well as with the motion papers. The plaintiff has also substantially complied with 11 NYCRR 3.5 and 11 NYCRR 3.6 procedures with respect to the IMEs by demonstrating that two chiropractic IMEs were timely scheduled, and that defendant Camara failed to appear to at either one, after being properly and timely notified of the IMEs.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted; and it is further

ADJUDGED and DECLARED that that (a) plaintiff Warner Insurance Company has no obligation to pay any pending or future claims for no-fault benefits, bodily injury liability or uninsured/underinsured motorist benefits relating to the claims for policy number 1147227 and plaintiff’s claim number A017397NY13 relating to an alleged automobile incident on November 16, 2013 involving defendant Mahamadou Camara; and (b) plaintiff Warner Insurance Company has no duty or obligation to defend and/or indemnify any defaulting party to this action in any claim or action commenced against them related to the claims set forth herein; and it is further

ORDERED that the defaulting defendants All Kind Physical Therapy P.C., American Kinetics Lab Inc., A.R.A. Medical Care P.C., Arisdov Medical P.C., BD Medical Services P.C.,

ORDERED that the defaulting defendants All Kind Physical Therapy P.C., American Kinetics Lab Inc., A.R.A. Medical Care P.C., Arisdov Medical P.C., BD Medical Services P.C., Brij Kumar Mittal P.C., Dalton Radiology P.C., Diamond Chiropractic P.C., Dunamis Rehab P.T. P.C., Harmony Anesthesiology P.C., L&S Tov Drugs LLC, Lakeview Chiropractic P.C., Russell Nersesov D.C., NYS Diagnostic Medicine P.C., OK Compounding, Park Slope Medical One P.C., Professional Medical Healthcare P.C., Sunrise Medical Laboratories, Inc., Synoptic Physical Therapy PC, Therapeutic Chiropractic Services P.C., Tisbury Psychological Services P.C., and XVV, Inc. are permanently enjoined from initiating and/or prosecuting any legal or arbitration proceedings against plaintiff, or continuing to engage in claims; and it is further

ORDERED that the Court in its discretion denies plaintiff's request for costs and disbursements; and it is further

ORDERED that the claims against defendants Ksenia Pavlova, DO, SP Orthotic Surgical & Medical, Inc. and Veraso Medical Supply Corp. are severed and shall continue in accordance with the discovery order issued on October 4, 2016; and it is further

ORDERED that the motion is denied as to OK Compounding and the claim against that party is severed and dismissed for lack of jurisdiction unless plaintiff produces proof of valid service of the pleadings by October 21, 2016.

This constitutes the decision and order of this Court. The Clerk may proceed to enter judgment accordingly.

Dated: October 5, 2016



BARRY R. OSTRAGER
JSC

J.S.C.