Hereford Ins. Co. v Parkchester Med. Servs. of NY, P.C.
2023 NY Slip Op 30291(U)
January 30, 2023
Supreme Court, New York County
Docket Number: Index No. 151564-2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Hereford Insurance Company

INDEX NO. 151564-2021

MOT. DATE

- v -

MOT. SEQ. NO. 001

Parkchester Medical Services of NY, P.C. d/b/a 1121 WPR Medical Services of NY, P.C., et. al.

The following papers were read on this motion to/for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

In this action, plaintiff-insurer, Hereford Insurance Company ("Hereford") seeks a declaration that it does not have an obligation to pay no-fault benefits in connection with a motor vehicle accident. The accident occurred on December 10, 2019, at or near the Bronx River Parkway, Bronx, New York. Now, plaintiff moves pursuant to CPLR § 3215 granting it leave to enter a default judgment against defendants Complete Neuropsychology, P.C., EZ Triboro Services, Inc., Insta Drugs, Inc., Kim Chiropractic, P.C., Laxmidhar Diwan M.D., Masood Chiropractic Diagnostic, P.C., New England Chiropractic, P.C., Ortho City Services, Inc., Reliable One Services, Inc., Riverdale Drugs & Surgical, Inc., Roxbury Anesthesia, LLC, S&K Warbasse Pharmacy, Inc., Supportive Products Corp., Toplab, Christian Cerda, and Derrik Valdez (collectively the "defaulting defendants"). The motion has otherwise been submitted without opposition from any of the defaulting defendants despite proof of service via mail.

Plaintiff has provided proof that the summons and complaint were served on each of the defaulting defendants. Plaintiff has filed affidavits of service demonstrating that it served the summons and complaint upon defendant Roxbury Anesthesia, LLC via personal service on Johanna Colon, the receptionist for the LLC and upon defendant Toplab via personal service upon Veronica Munoz, the office manager of Toplab (CPLR § 311[1]). The summons and complaint were served upon defendants Complete Neuropsychology, P.C., EZ Triboro Services, Inc., Insta Drugs, Inc., Kim Chiropractic, P.C., Masood Chiropractic Diagnostic, P.C., New England Chiropractic, P.C., Ortho City Services, Inc., Reliable One Services, Inc., Riverdale Drugs & Surgical, Inc., S&K Warbasse Pharmacy, Inc., and Supportive Products Corp. via personal service on Ms. Sue Zouky, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306. Plaintiff served the summons and complaint upon defendant Laxmidhar Diwan M.D. via personal service on Rayhon Shaikh, a person of suitable age and discretion at the last known residence of the defendant, 6254 97th Pl. #2H, Rego Park, New York 11374 (CPLR § 308 [2]). Service of the summons and complaint upon defendant Christian Cerda("Cerda") occurred via personal service upon him pursuant to CPLR § 308 (1). Service of the

Dated: 1/30/2023

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

summons and complaint upon defendant Derrik Valdez ("Valdez") occurred via personal service upon him pursuant to CPLR § 308 (1). Despite such service, none of the defaulting defendants have answered the complaint nor has their time to do so been extended by the court. Therefore, they have defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Plaintiff has submitted the police report from the December 10, 2019, collision in support of the motion. According to the police report, Cerda, Valdez, and defendant Joshua Santiago ("Santiago") were passengers in a Hereford-insured vehicle when it was allegedly involved in a collision at or near the Bronx River parkway in Bronx, New York. The report indicates that the adverse vehicle veered out of its lane and made contact with the insured vehicle. The report indicates that the collision was minor, that there was no visible damage to the insured vehicle, and that the airbags did not deploy. Cerda, Valdez, and Santiago did not report any injury or request any medical attention at the scene of the collision.

The motion is also supported by the sworn affidavit of Joronda McBurnie, who is currently employed by plaintiff as a No-Fault Claims Supervisor. Prior to this promotion, she worked for plaintiff as a Senior No-Fault Adjuster. While still working as an Adjuster, she was assigned to the claim upon which this case is based. McBurnie states based upon personal knowledge the following. Prior to the date of the accident, Hereford issued an automobile insurance policy on the vehicle that Cerda, Valdez, and Santiago (collectively the "claimants") occupied at the time of the December 10, 2019, collision. Following the collision, Hereford suspected that the collision did not occur as the claimants alleged or that the subsequent medical treatment was not causally related to the December 10, 2019, collision because: 1) the police report indicated that there was no visible damage to the vehicle; 2) the report indicated that all of the claimants refused medical treatment at the scene of the collision; 3) the report did not list any injuries from the claimants; and 4) after the loss, all claimants retained the same attorney and received identical no-fault treatment from the same providers. Accordingly, Hereford requested IMEs and EUOs from all the claimants

Hereford requested that Valdez appear for an IME on February 20, 2020. The IME was rescheduled due to Valdez's alleged planned shoulder surgery. Accordingly, Hereford requested that Valdez appear for an IME on April 2, 2020. This scheduled IME was also cancelled due to the pandemic. Hereford rescheduled for June 29, 2020. Valdez failed to attend the scheduled June 29, 2020, IME. Hereford scheduled another IME for Jul 17, 2020. Valdez failed to appear at this IME as well. Similarly, Cerda was scheduled for a February 20, 2020, IME which was rescheduled due to his alleged planned shoulder surgery. The IME date was moved to March 19, 2020 but was then canceled due to the pandemic. Cerda's IME was rescheduled to June 19, 2020. Cerda failed to show for the IME. Hereford scheduled another IME for Cerda to take place on July 17, 2020. Cerda failed to attend this IME as well.

As for EUOs, Valdez was noticed to appear for an EUO on March 13, 2020. The EUO was rescheduled to April 2, 2020, and then rescheduled again to June 3, 2020, and again to July 15, 2020. Valdez appeared for his EUO on July 15, 2020. Cerda was similarly noticed to appear for an EUO on March 13, 2020, which was rescheduled multiple times. Cerda appeared for his EUO on July 15, 2020. Santiago was also noticed to appear for an EUO on March 13, 2020, had his EUO rescheduled multiple times, and showed for his EUO on July 15, 2020. The EUO of the three claimants raised addition issues as to the legitimacy and medical necessity of their treatment because their testimony was incongruent. The first incongruency was how the claimants said that they knew each other. Santiago claimed

that he knew Cerda for over ten years and Valdez for seven. Valdez claimed to know both Santiago and Cerda for five years. Cerda stated that he has known both Valdez and Santiago for over ten years. Next; all claimants had different versions of the events leading up to the collision. Santiago claimed that the three of them were in in front of Cerda's apartment for two or three hours and were planning on going to Cerda's cousin's house on Elder Ave. to watch a UFC fight. Cerda testified that he was with Santiago and Valdez for the entire day, and that the three of them were only in front of his house for about one hour and fifteen minutes. Valdez claims that he met Cerda and Santiago at Cerda's house and that he was by himself prior to the meet up that day.

Hereford also believes that questions the legitimacy of the claims because the claimants did not seem to understand what treatments they had allegedly received or why they were being treated. For example, the claims reflect that all three claimants were referred for shoulder surgery. However, in the EUOs, Cerda testified that he did not know what kind of surgery was performed on him nor the name of the doctor who performed it. Valdez could not recall the name of the doctor that performed his surgery, could not describe the doctor, and stated that he never saw the doctor again after the surgery. Santiago states that he could not recall the name of the doctor, could not describe him, and only saw him one time: on the day of the surgery. Also, all three claimants stated that they were asked to provide urine samples. Valdez testified that he could not remember why he was providing a urine sample, and that no one ever sent him any results. Santiago was also unable to remember why he provided a urine sample. Cerda stated that he did not know why he provided a urine sample and that he never received any test results either. Other EUO testimony included Cerda testifying that he had MRIs done but that he was unable to remember the results from the MRIs. Additionally, all the claimants testified that they had reported injuries to the police, but that the police did not record them in the report.

McBurnie states that they EUO testimony in conjunction with the police report raised legitimate concerns about the legitimacy of the claims. Therefore, plaintiff believes that the medical claims submitted by Santiago, Valdez and Cerda are not causally related to the incident and has rejected the claims accordingly.

In its complaint, plaintiff asserts three causes of action. The first cause of action is based on a theory of condition precedent wherein Plymouth asserts that it has no duty to pay the claims asserted by Cerda and Valdez because they did not attend their scheduled IMEs as mandated by the policy as a condition precedent to coverage. The second cause of action is based on a theory of founded belief wherein plaintiff asserts that it has no duty to pay the claims of Cerda, Valdez or Santiago because it has a founded belief that their injuries were not causally related to the collision on December 10, 2019. The third cause of action is based on a theory of irreparable harm wherein the plaintiff asserts that it will suffer irreparable harm if the court does not grant a stay of all arbitrations, lawsuits or claim related to this collision.

An insurer may assert a lack of coverage defense based on the fact or founded belief that a claimant's alleged injury did not arise out of a covered accident (*Cent. Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]). To establish its entitlement to a default judgment based on a founded belief, a no-fault insurer need not "establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence" (*See V.S. Med. Servs., P.C. v Allstate Ins. Co*, 25 Misc 3d 39 [App Term. 2d Dept 2009]). "Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief" (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 NY Slip Op 33306[U] [Sup Ct. New York Cty 2019] and "[c]ircumstantial evidence is sufficient if a defendant's conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence" (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864 [2d Dept 2005]).

Here, the no-fault supervisor of plaintiff has stated, based on personal knowledge, that she and the plaintiff believe that there is no causal relationship between the claims asserted by Cerda, Santiago and Valdez and the December 10, 2019 collision. Plaintiff has pointed to circumstantial evidence that makes up its founded belief that the injuries are not causally related to the collision. Such circumstantial

evidence includes inconsistencies between the claimant's statements in their EUOs, and differences between the EUOs and the claimants' behavior at the scene of the accident as demonstrated by the police report. Additionally, plaintiff points to various testimony in the EUOs that demonstrates that the claimants did not know what treatment they purportedly underwent and could not recall the results of various tests that they allegedly had performed. Based on the foregoing, plaintiff has established a *prima facie* case based on a theory of founded belief. The first and third causes of action based on theories of condition precedent and irreparable harm are therefore moot. In light of this result, the motion is granted as follows.

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for default judgment as against defendants Roxbury Anesthesia, LLC, Toplab, Complete Neuropsychology, P.C., EZ Triboro Services, Inc., Insta Drugs, Inc., Kim Chiropractic, P.C., Laxmidhar Diwan M.D., Masood Chiropractic Diagnostic, P.C., New England Chiropractic, P.C., Ortho City Services, Inc., Reliable One Services, Inc., Riverdale Drugs & Surgical, Inc., Roxbury Anesthesia, LLC, S&K Warbasse Pharmacy, Inc., Supportive Products Corp., Toplab, Christian Cerda, and Derrik Valdez is granted on default; and it is further

ORDERED and DECLARED that plaintiff has no duty to pay any no-fault, bodily injury/liability coverage, or uninsured motorists benefits, in the form of sums, monies, damage, awards, or benefits to Roxbury Anesthesia, LLC, Toplab, Complete Neuropsychology, P.C., EZ Triboro Services, Inc., Insta Drugs, Inc., Kim Chiropractic, P.C., Laxmidhar Diwan M.D., Masood Chiropractic Diagnostic, P.C., New England Chiropractic, P.C., Ortho City Services, Inc., Reliable One Services, Inc., Riverdale Drugs & Surgical, Inc., Roxbury Anesthesia, LLC, S&K Warbasse Pharmacy, Inc., Supportive Products Corp., Toplab, Christian Cerda, and Derrik Valdez, their agents, employees, assignees, or heirs arising out of any current or future proceeding, including without limitation, arbitrations and lawsuits seeking to recover no-fault, bodily injury/liability coverage, or uninsured motorists benefits for the December 10, 2019 collision referenced in the complaint; and it is further

ORDERED that the remaining parties in the above captioned matter are hereby directed to submit a proposed Preliminary Conference order on consent on or before **February 14, 2023**.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11: Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the nycourts.gov website at: https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf

Proposed preliminary conference orders may be filed on NYSCEF or emailed to the Part 8 Clerk, Steven Carney, at scarney@nycourts.gov.

If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 1/30/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.