

**Kemper Independence Ins. Co. v Vista Diagnostic  
Imaging**

2009 NY Slip Op 31768(U)

August 3, 2009

Supreme Court, New York County

Docket Number: 116475/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

DECEMENT.

PART 10

Index Number : 116475/2008

KEMPER INDEPENDENCE INSURANCE CO.

VS.

VISTA DIAGNOSTIC IMAGING

SEQUENCE NUMBER : # 001

DEFAULT JUDGMENT

Justice

INDEX NO.

116475-08

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

pc scheduled for 10/1/09 @ 9:30 am

FILED AUG 06 2009 COUNTY CLERKS OFFICE NEW YORK

Dated:

8/3/09

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
Kemper Independence Insurance Company

Plaintiff,

-against-

Vista Diagnostic Imaging a/k/a/ Total Global  
Medical P.C.,  
All Boro Psychological Services, P.C.,  
O & M Medical P.C.,  
GZ Medical and Diagnostic P.C.,  
Parkview Medical & Surgical, P.C.,  
Sunrise Acupuncture, P.C.,  
Canon Chiropractic Care, P.C. and  
Suze Philippe,

Defendants.  
-----X

**Decision/Order**

Index No.: 116475/08

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**  
AUG 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, DW affd., HRS affirm,, exhibits.....	1
DF affirm. in Opp.....	2
HRS Reply affirm.....	3

Upon the foregoing papers the decision and order of the court is as follows:

The Plaintiff is an insurance company. Suze Phillips was its insured pursuant to a policy of insurance plaintiff issued in connection with her ownership of an automobile. It commenced this action for, inter alia, a declaration that none of the defendants have a right to collect and it has no obligation to pay defendants benefits in connection with a claim for a automobile accident allegedly occurring in April 8, 2008. Plaintiff seeks by

this motion a default judgment on its first and second causes of action making such declaration against all defendants but All Boro Psychological Services ("ABPS").

ABPS opposes the motion only to the extent that a default judgment entered against Suze Phillips would affect its rights to defend this action. No other defendant has opposed the motion.

Defendant Vista Diagnostic Imaging was served via the New York Secretary of State on December 26, 2008 pursuant to BCL 306.

Defendant O & M Medical P.C. was served via the New York Secretary of State on December 26, 2008 pursuant to BCL 306.

Defendant GZ Medical & Diagnostic P.C. was served via the New York Secretary of State on December 26, 2008 pursuant to BCL 306.

Defendant Parkview Medical & Surgical, P.C. was served via the New York Secretary of State on December 26, 2008 pursuant to BCL 306.

Defendant Canon Chiropractic Care, P.C. was served via the New York Secretary of State on December 26, 2008 pursuant to BCL 306.

Defendant Sunrise Acupuncture, P.C. was served via the New York Secretary of State on December 26, 2008 pursuant to BCL 306.

Defendant Suze Philippe was served on January 3, 2009 by the delivery of the summons and complaint to a person of suitable age and discretion at Ms. Philippe's last known residence. A follow up mailing was made on January 6, 2009. CPLR 308(2).

Although there is due proof of service of the underlying summons and verified complaint on the defendants, other than ABPS, none of the defendants have appeared in this action within the time provided for in the CPLR. Defendants' time to do so has

not been extended by the court. Plaintiff has also filed proof of additional service on the non-appearing corporate defendants in compliance with CPLR § 3215 [g].

Plaintiff is, therefore, entitled to a default judgment against the non-appearing defendants, provided it otherwise demonstrates that it has a *prima facie* cause of action against each of them. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> dept. 2001). Moreover, the defendants' 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 N.Y.2d 728 (1984).

Defendant Philippe obtained a policy of insurance from plaintiff, known as policy # VF 882769 ("policy"). She reported that she was in a car accident on April 8, 2008, in which she was struck while parked in her own vehicle. Philippe further claimed that the driver of the other vehicle left the scene of the accident. The other defendants in this action claim that they provided medical care and treatment to Philippe following the accident. They filed claims with plaintiff to have their bills for services paid as Philippe's assignees. At some point, based on conflicting information that it received from Philippe and the large amount of the medical bills submitted given the minor nature of the accident, plaintiff began to question the *bona fides* of the claims being filed.

In connection with the proof of claim provisions of the policy, plaintiff may request that the injured person or his or her assignee:

"As may reasonably be (sic) required submit to examinations under oath by any person named by the Company and subscribe the same."

By separate letters dated August 21, 2008, each of the non-appearing corporate

defendants were notified that the plaintiff was exercising its right to take an examination under oath of them. Defendant Philippe was notified by letter dated July 30, 2008 that plaintiff was exercising its right to take an examination under oath of her. Given the information that plaintiff had available to it at the time it demanded such examinations under oath, the demands were reasonable. Despite such notifications, none of the non-appearing defendants submitted to any examination under oath. Under the policy the failure of defendants to submit adequate proof of the claim entitles plaintiff to disclaim coverage. Here the non-appearing defendants' failure to submit to examination under oath constitutes a failure of proof of the claim and they have the right to disclaim coverage.

ABPS did appear in this action and it is concerned that if a default judgment is entered against the policy holder, Suze Philippe, that it will affect its ability to defend itself. It seeks to either prevent any default being taken against Suze Philippe or to have an exception culled out for its claim. Plaintiff does not object to ABPS preserving whatever defenses it may have notwithstanding Suze Philippe's default in this action. Suze Philippe's failure to appear in this action entitles plaintiff to a default judgment. ABPS's rights can be protected by culling out an exception.

Accordingly, the motion for a default judgment against all non-appearing defendants is granted, except that any default will not substantively bind defendant All Boro Psychological Services from interposing any defense that it otherwise had to the action in its own behalf.

The clerk of the court is directed to enter a default judgment in favor of plaintiff and against defendants:

Vista Diagnostic Imaging a/k/a/ Total Global Medical P.C.,

O & M Medical P.C.,

GZ Medical and Diagnostic P.C.,

Parkview Medical & Surgical, P.C.,

Sunrise Acupuncture, P.C.,

Canon Chiropractic Care, P.C. and

Suze Philippe

declaring, on the first and second causes of action, that such defendants have no rights under the policy of insurance issued by plaintiff and known as VF882769 and plaintiff has no obligation to pay such defendants under such policy with respect to an alleged automobile accident occurring on April 8, 2008 and processed under claim number 331AZ447120.

Any requested relief not otherwise expressly granted herein, is denied. This constitutes the decision and order of the court.

The court schedules a preliminary conference on this matter for October 1, 2009 at 9:30 am.

Dated: New York, NY

August 3, 2008

SO ORDERED:

*J.G. J.S.C.*  
**FILED**  
AUG 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK