

**Unitrin Auto & Home Ins. Co. v Alev Med. Supply  
Inc.**

2010 NY Slip Op 31088(U)

May 3, 2010

Supreme Court, New York County

Docket Number: 105855/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
Justice

PART 10

Unitrin Auto and Home Insurance Co., -v- Aew Medical Supply Inc., et al.

INDEX NO.

105855/09

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

MAY 05 2010

NEW YORK COUNTY CLERK'S OFFICE

NYS SUPREME COURT RECEIVED

MAY 06 2010

MOTION SUPPORT OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.**

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

Dated: 5/3/10

HON. JUDITH J. GISCHE

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

-----X

UNITRIN AUTO AND HOME INSURANCE  
COMPANY,

Plaintiff,

-against-

ALEV MEDICAL SUPPLY INC. *et al.*,

Defendant.

-----X

**Decision/Order**

Index No.: 105855/09  
Seq. No. : 002

Present:  
Hon. Judith J. Gische  
J.S.C.

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>
Pltf's n/m [§ 3215] w/DW affid, JE affirm, exhibits .....	1

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

In this action, plaintiff seeks a declaration that it has no obligation to pay any no-fault benefits to the defendants arising out of a collision. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against all of the defendants. This motion has been submitted to the Court without opposition, despite proof of service. Accordingly, the motion will be considered on default.

On May 28, 2008, the defendant Jason Benn was allegedly riding in a 1995 Nissan owned by Joyce Simmons and insured by plaintiff (policy no. HB753839, hereinafter the "Policy"). On that date, an accident occurred on Atlantic Avenue in Brooklyn, New York and Benn claimed to have sustained bodily injuries as a result of

the use or operation of the insured vehicle. Plaintiff alleges, upon information and belief, that Benn began receiving treatment from the remaining defendants, to wit: Alev Medical Supply Inc., Paul Ackerman MD, Amsterdam Medical, P.C., Dover Acupuncture, P.C., Sadyk Fayzulayev, Good Chiropractic, PLLC, GZ Medical and Diagnostic P.C., Lifeco Medical, P.C., Marina Physical Therapy P.C., Maximum Relief PT P.C., National Medical & Surgical Supply, Inc., North Star Medical PLLC, Omega Diagnostic Imaging, P.C., Parkway Anesthesia Associates, PLLC, Parkway Pain Management, PLLC, Shirom Acupuncture P.C., The Parkway Hospital, and United Ortho Supply Inc. (the "medical provider defendants). To date, the medical provider defendants have submitted over \$39,000 in no-fault claims as the alleged assignees of Benn, excluding interest and attorneys fees.

The Policy contains a "New York Mandatory Personal Injury Protection Endorsement" which sets forth certain conditions and terms with respect to plaintiff's provision of no-fault benefits. The Policy provides in pertinent part:

#### Conditions

Action Against [Plaintiff]. No action shall lie against [plaintiff] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

...

...Upon request by [plaintiff], the eligible injured person or that person's assignee or representative shall:

(a) as may reasonably be required submit to examinations under oath by any person named by [plaintiff] and subscribe the same;

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, [plaintiff], when, and as often as, [plaintiff] may reasonably require.

(b) provide any other pertinent information that may assist [plaintiff] in

determining the amount due and payable.

Plaintiff claims that based upon the number of claims submitted, the minor damage reported at the scene of the accident, the absence of any apparent relationship between Benn and the insured, and that no injuries were reported at the scene of the accident, plaintiff conducted an investigation to determine whether the claims submitted were non-covered events under the Policy. Plaintiff therefore requested that Benn appear for independent medical examinations ("IMEs"), which Benn failed to do.

In the complaint, plaintiff has asserted the following causes of action: [1] a declaration that Benn breached the Policy by failing to appear for IMEs which thereby relieves plaintiff of any obligation to pay any no-fault claims to the defendants arising from the May 28, 2008 collision; [2] a declaration that the medical provider defendants have no rights as assignees under the Policy; [3] a declaration that the medical provider defendants have no standing to recover no-fault claims with respect to the May 28, 2008 collision; and [4] a temporary stay of all arbitrations, lawsuits and/or claims by defendants relating to the no-fault claims of Benn arising from the May 28, 2008 collision.

#### **Discussion**

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 AD2d 844 [3d Dept 2001]). 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]).

Here, plaintiff has provided proof that it served the summons and complaint upon

Alev Medical Supply Inc (BCL § 306 [b]), Paul Ackerman MD (CPLR § 308 [a] [2]), Amsterdam Medical, P.C. (BCL § 306 [b]), Dover Acupuncture (BCL § 306 [b]), Good Chiropractic, PLLC (BCL § 306 [b]), GZ Medical and Diagnostic P.C. (BCL § 306 [b]), Marina Physical Therapy P.C. (BCL § 306 [b]), Maximum Relief PT, P.C. (BCL § 306 [b]), National Medical & Surgical Supply, Inc. (CPLR § 311 [a] [1]), North Star Medical PLLC (CPLR § 311-a [a]), North Star Medical PLLC (CPLR § 311-a [a]), Omega Diagnostic Imaging, P.C. (CPLR § 311 [a] [1]), Parkway Anesthesia Associates, PLLC (CPLR § 311-a [a]), Parkway Pain Management, PLLC (CPLR § 311-a [a]), Shirom Acupuncture (BCL § 306 [b]), United Ortho Supply Inc. (CPLR § 311 [a] [1]), and Jason Benn (CPLR § 308 [a] [1]).

Plaintiff has failed to provide proof that it served the summons and complaint upon Sadyk Fayzulayev, Lifeco Medical, P.C. or The Parkway Hospital. Without such proof, plaintiff cannot establish that it is entitled to a default judgment against these defendants. Accordingly, the motion with respect to these three defendants is denied without prejudice to renew within ninety days upon a proper showing. Failure to renew within the time provided will result in a dismissal for unreasonable failure to prosecute (CPLR § 3216). Any further use of the term “medical provider defendants” in this memorandum decision/order excludes these three defendants.

Despite receipt of the summons and complaint, none of the defendants have interposed an answer, nor has their time to do so been extended by the court. Further, plaintiff has provided proof that it served an additional copy of the summons and complaint on the defendants. Accordingly, the defendants have defaulted in this action.

Based on the foregoing allegations, plaintiff has demonstrated *prima facie*

entitlement to a declaration that Benn breached the Policy by failing to appear for IMEs and that plaintiff therefore duly denied any no-fault claims submitted on his behalf on this basis. Accordingly, a default judgment is granted on the first cause of action.

Plaintiff has further established that the treatment by the medical provider defendants for Benn's alleged injuries is not causally related to the collision which occurred on May 28, 2008. Accordingly, plaintiff is entitled to a judgment declaring that the medical provider defendants proceeding as the purported assignees of Benn have no rights under the Policy. Plaintiff has no duty to pay no-fault claims with respect to Benn's injuries resulting from the May 28, 2008 collision.

Plaintiff has, however, failed to demonstrate that the medical provider defendants have no standing to recover no-fault claims with respect to the May 28, 2008 collision. There simply are not sufficient facts, or even allegations, on this record to show that the medical provider defendants did not perform services for Benn, or that Benn did not assign his purported entitlement to no-fault benefits to these defendants. Accordingly, that branch of the motion with respect to the third cause of action is denied.

The fourth cause of action for a temporary stay is denied as moot since this action is otherwise resolved.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is denied without prejudice to renew within ninety days with respect to defendants Sadyk Fayzulayev, Lifeco Medical, P.C. or The Parkway Hospital. Failure to move to renew within the time provided will result in dismissal for unreasonable failure to prosecute (CPLR § 3216); and it is further

**ORDERED** that plaintiff's motion for a default judgment is granted with respect to the first and second causes of action, only; and it is further

**ORDERED** that plaintiff is entitled to a judgment declaring that: [1] Benn breached the Policy by failing to appear for IMEs and that plaintiff therefore duly denied any no-fault claims submitted on his behalf on this basis; and [2] that Alev Medical Supply Inc., Paul Ackerman MD, Amsterdam Medical, P.C., Dover Acupuncture, P.C., Good Chiropractic, PLLC, GZ Medical and Diagnostic P.C., Marina Physical Therapy P.C., Maximum Relief PT P.C., National Medical & Surgical Supply, Inc., North Star Medical PLLC, Omega Diagnostic Imaging, P.C., Parkway Anesthesia Associates, PLLC, Parkway Pain Management, PLLC, Shirom Acupuncture P.C., and United Ortho Supply Inc. proceeding as the purported assignees of Benn have no rights under the Policy. Plaintiff has no duty to pay no-fault claims by the aforementioned persons/entities with respect to Benn's injuries resulting from the May 28, 2008 collision; and it is further

**ORDERED** that the third and fourth causes of action are hereby severed and dismissed; and it is further

**FILED**


**ORDERED** that plaintiff's motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby denied.

MAY 05 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 3, 2010

So Ordered:  
  
HON. JUDITH J. GISCHE, J.S.C