

**Kemper Independence Ins. Co. v Alev Med. Supply,
Inc.**

2010 NY Slip Op 31465(U)

June 8, 2010

Sup Ct, NY County

Docket Number: 111450-09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. _____

PART 10

Index Number : 111450/2009

KEMPER INDPENDENCE INSURANCE

VS.

ALEV MEDICAL SUPPLY, INC.,

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: JUN 08 2010

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
Kemper Independence Insurance Company,

Plaintiff (s),

DECISION/ ORDER
Index No.: 111450-09
Seq. No.: 001

-against-

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

Alev Medical Supply, Inc., Amsterdam
Medical Supply, P.C., Dover Acupuncture, P.C.,
Essential Radiology, P.C., Good
Chiropractic, PLLC, GZ Medical and
Diagnostic, P.C., National Media and
Surgical Supply, Inc., Marina Physical
Therapy, P.C., Shirom Acupuncture, P.C.
Jefferson Mayers,

Defendant (s).

UNFILED JUDGMENT
*This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Office (Room
141B).*

-----X

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

Papers	Numbered
Pltf's n/m (3215) w/JE affirm, DW affid, exhs w/AOS	1

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

GISCHE J.:

This is an action by plaintiff, Kemper Insurance Company ("Kemper"), for a judgment declaring that Kemper owes no duty to pay any of the No-Fault claims filed by the defendants in connection with a collision that took place on May 27, 2008. The vehicle that defendant Jefferson Mayers ("Mayers") was in at the time of the collision is insured by Kemper. After the collision, Kemper received a number of claims seeking to recover no-fault benefits for treatment Mayers allegedly received. Kemper contends the

collision was staged or intentionally caused and/or that the medical services/treatment submitted by the defendants, all medical providers, was not related to the collision.

Although Kemper notified Mayers that it wanted to conduct a medication examination of him ("IME") to verify his claim and that the providers had, in fact, provided the treatment alleged, Mayers did not respond to plaintiff's demands.

Kemper separately served each of the defendants with the summons and complaint. All the corporate defendants were served through the secretary of state in the manner required under BCL 306. Mayers was personally served by delivering the summons and complaint to his mother who lives with him a person of suitable age and discretion (CPLR 308[2]). Kemper mail another copy of the summons and complaint to each defendant with a Notice of Default, notifying them that a default would be taken against them if they did not answer the complaint or appear. There is no opposition to this motion though there is due proof of service of the motion on each defendant.

Despite such notice and additional notice, none of the defendants have answered the complaint or appeared in this action and their time to do so has not been extended the court. A default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Therefore, Kemper is entitled to the relief sought in its verified complaint which seeks declaratory relief and a stay of all arbitration proceedings, lawsuits or other proceedings arising from these claims based upon the following claims:

The police accident report completed at the scene of the accident indicates there was some light damage to the vehicle Mayers was in and that he had complained of

some injuries to his lower back and neck. Kemper claims the more than \$14,000 in claims that have been submitted by the health care providers (i.e. Mayers' assignees) are disproportionate to the accident alleged, showing that the accident was staged, or the claims have been padded if not outright manufactured. Since Mayers' has not cooperated by appearing for his IME, Kemper seeks a declaration that it is not obligated to pay any of the No Fault claims submitted by these defendants or in connection with the May 27, 2008 collision. In its 3rd claim against defendant Amsterdam Medical, P.C., plaintiff claims Amsterdam has not standing to recover for services rendered by independent contractors.

Kemper's motion decided as follows:

It is hereby

ORDERED that plaintiff Kemper's motion for entry of a default judgment on its 1st and 2nd causes of action against each of the named defendants is **GRANTED** on default; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff Kemper owes no duty to the defendants to pay No-Fault claims to the defendants with respect to the May 27, 2008 collision under policy number VF861525 and claim number 331A6448300; and it is further

ORDERED that plaintiff Kemper's motion for entry of a default judgment on its 4th cause of action which is for a permanent stay of any arbitrations, or other proceedings related to or arising from the May 27, 2008 collision under policy number VF861525 is and claim number 331A6448300 is also **GRANTED** on default and those proceedings,

etc., are permanently stayed; and it is further

ORDERED that plaintiff's motion for a declaration on its 3rd cause of action, that Amsterdam Medical, P.C., has no standing to recover for services of independent contractors is severed and dismissed without prejudice since this claim is not supported by any facts; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated; New York, New York
June 8, 2010

So Ordered:



Hon. Judith J. Gische, JSC

UNFILED JUDGMENT
This judgment has not been entered by the Court and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).