

**Kemper Independence Insurance Company v Easy  
Care Acupuncture, P.C.**

2010 NY Slip Op 33508(U)

December 21, 2010

Sup Ct, NY County

Docket Number: 107180-10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_  
*Justice*

PART 10

Index Number : 107180/2010  
KEMPER INDEPENDENCE INSURANCE  
vs.  
EASY CARE ACUPUNCTURE P.C.  
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

**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).

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

DEC 21 2010

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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),

**-against-**

Easy Care Acupuncture, P.C., Active  
Chiropractic, P.C., U&R City Supply, Inc.,  
Village Medical Supply, Inc., Ko Medical, P.C.,  
Hillside Open MRI, P.C., YME Psychological, P.C.,  
MIY Medical Care, P.C., Shanon Pryce and  
Tiffany Morrow,

Defendant (s).

-----X

**DECISION/ ORDER**  
Index No.: 107180-10  
Seq. No.: 001

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

**UNFILED JUDGMENT**

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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/JE affirm, DP 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 October 1, 2009 ("accident"). None of the defendants in this action have answered the complaint or appeared and their time to do so has expired and not been extended by the court. Kemper has filed proof of service on each corporate defendant. Each was served through the Secretary of State. Diligent attempts were made to personally serve each

of the individually named defendants ("Pryce" and "Morrow"). Since the attempts were unsuccessful, Kemper served Pryce and Morrow by affixing a copy of the summons and verified complaint on June 22, 2010. Service was complete with the mailing of these legal papers on June 24, 2010.

Kemper has complied with the additional notice requirements of CPLR 3215 and BCL 306 by sending copies of the summons and complaint to each defendant by mail and to the Secretary of State. This motion for entry of a default judgment is itself additional notice of this action against the defendants. Despite such notice and additional notice, this motion is submitted to the court unopposed.

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 facts:

Pryce and Morrow were occupants of a car insured by Kemper on the date of the accident. Morrow is Kemper's insured. Kemper has received medical claims for these individuals in excess of \$25,000. The treatment for Pryce and Morrow is virtually identical and it also appears to be inconsistent with the type of accident that occurred.

Although Kemper notified Pryce and Morrow they had to appear for a physical examination, as required under the insurance contract Morrow has with Kemper, neither of them appeared. Kemper has provided proof that Pryce and Morrow were each notified of these appointments.

Kemper has asserted four causes of action. They are for a declaration that: Kemper owes no duty to the defendants or claimants to pay their No-Fault claims (1<sup>st</sup> COA), the medical defendants have no right to recover No-Fault claims with respect to the accident (2<sup>nd</sup> COA), that defendants Easy Care Acupuncture, P.C., Active Chiropractic, P.C., KO Medical, P.C., Hillside Open MRI, P.C., YME Psychological, P.C., and MIY Medical Care, P.C. have no standing to recover No-Fault claims with respect to the accident (3<sup>rd</sup> COA), and temporary stay on all No-Fault lawsuits, etc., pending the outcome of this action (4<sup>th</sup> COA).

Kemper's motion is decided as follows:

It is hereby

**ORDERED** that plaintiff Kemper's motion for entry of a default judgment on its 1<sup>st</sup> and 2<sup>nd</sup> 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 October 1, 2009 collision under policy number VF911284 and claim number 331A6472915; and it is further

**ORDERED** that plaintiff Kemper's motion for entry of a default judgment on its 4<sup>th</sup> cause of action which is for a temporary stay of any arbitrations, or other proceedings related to or arising from the October 1, 2009 collision under policy number VF911284 and claim number 331A6472915 pending the outcome of this action is moot since Kemper has obtained a default judgment against each of the defendants and this action

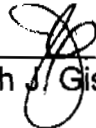
is now completed; and it is further

**ORDERED** that plaintiff's motion for a declaration on its 3<sup>rd</sup> cause of action, that defendants Easy Care Acupuncture, P.C., Active Chiropractic, P.C., KO Medical, P.C., Hillside Open MRI, P.C., YME Psychological, P.C., and MIY Medical Care, P.C. lack standing to recover No-Fault benefits with respect to the October 1, 2009 collision is denied and that claim is hereby 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  
                    December 21, 2010

**So Ordered:**

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**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 1411).**