

**Unitrin Advantage Ins. Co. v PDG Psychological,  
P.C.**

2010 NY Slip Op 34095(U)

September 8, 2010

Supreme Court, New York County

Docket Number: 110809/09

Judge: Judith J. Gische

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This opinion is uncorrected and not selected for official publication.

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

UNITRIN ADVANTAGE INSURANCE COMPANY,  
Plaintiff,

DECISION/ ORDER  
Index No.: 110809/09  
Seq. No.: 001

*-against-*

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

✓ PDG PSYCHOLOGICAL, P.C., ✓ IDF MEDICAL  
DIAGNOSTIC, P.C., ✓ CLINTON PLACE MEDICAL,  
P.C., ✓ NEW WAY ACUPUNCTURE, P.C.,  
✓ BROOKLYN HEIGHTS PHYSICAL THERAPY, P.C.,  
✓ EAST 75<sup>TH</sup> STREET DIAGNOSTIC IMAGING, P.C.,  
✓ BR CLINTON CHIROPRACTIC, P.C., ✓ ALROF, INC.,  
✓ SOCRATES MEDICAL HEALTH, P.C., ✓ YESNIER  
MERCED, ✓ JENSS CASTILLO, and ✓ MARTA MERCED,  
Defendants.

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
Stips of withdrawal/settlement .....	2

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

This is an action by plaintiff, Unitrin Advantage Insurance Company ("Unitrin"),  
for a judgment declaring that Unitrin owes no duty to pay any of the no-fault claims filed  
by the defendants in connection with a collision that took place on November 9, 2008.  
The parties have filed stipulations of withdrawal/settlement as to all defendants except  
Yesnier Merced, Jeness Castillo Marta Merced (collectively "individual claimants") and  
IDF Medical Diagnostic, P.C. ("IDF"), East 75<sup>th</sup> Street Diagnostic Imaging, P.C., and  
Alrof, Inc. (collectively "defendant medical providers"). Therefore, although the motion

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is brought as to all defendants, it will only be decided as to the remaining defendants (see letters dated 8/10/10 and 8/18/10). As to those defendants with whom plaintiff has withdrawn/settled, the motion is moot.

Unitrin has filed proof of service showing that it separately served each of the defendants with the summons and complaint. Each of the defendant medical providers are domestic corporations. They were served through the secretary of state in the manner required under BCL § 306. The individual claimants were each personally served by delivering the summons and complaint on persons of suitable age and discretion (CPLR § 308[2]). Unitrin mailed 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 remaining 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, Unitrin is entitled to the relief sought in its complaint which is supported by the sworn affidavit of Denise Winant, a claims representative for plaintiff, provided plaintiff sets forth its *prima facie* case. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001).

### Facts

The vehicle that the individual claimants were in at the time of the collision is insured by Unitrin. After the collision, Unitrin received a number of claims seeking to recover no-fault benefits for treatment the individual claimants allegedly received. Unitrin contends that the medical services/treatment submitted by the individual claimants and the defendant medical providers were not causally related to the collision.

Unitrin brings four causes of action against the defendants for breach of the policy of insurance; lack of a causal relationship between the individual claimants' injuries and the collision; lack of standing for IDF; and a temporary stay of arbitration/lawsuits to prevent irreparable harm.

Although Unitrin notified the defendant medical providers that each of them had to appear for an examination under oath ("EUO") to confirm the legitimacy of the individual claimants' loss and of the alleged treatment, the defendant medical providers did not respond to plaintiff's demands or appear for their EUO's. Unitrin claims that the \$91,000 in no-fault claims that the medical providers submitted are disproportionate to the accident alleged and that the claims are padded, if not outright fabrications. Since the defendant medical providers have not cooperated by appearing for their EUO's, Unitrin 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 November 9, 2008 collision. The medical providers have not come forward with any explanation why they did not provide the information demanded or appear for their EUO's, as required. Having failed to refute plaintiff's claims, the court finds that the defendant medical providers are

not able to prove entitlement to benefits under the insurance policy.

Although the individual claimants complied with plaintiff's notice and appeared for their EUO's, Unitrin alleges that their testimony about what their injuries are is wholly inconsistent with the relatively minor accident that was reported. Thus, while they complied with their contractual obligations, they have not come forward with any explanation for why they incurred more than \$90,000 in medical treatments for what can best be characterized as a minor "fender bender." Therefore, the court finds that there is a lack of a causal relationship between the individual claimants' injuries and the collision.

In its 3<sup>rd</sup> claim against defendant IDF, Unitrin claims IDF has no standing to recover for services rendered by independent contractors, however, this claim is not supported by any facts, nor does plaintiff articulate what it means.

Unitrin's 4<sup>th</sup> cause of action seeks a temporary stay of all arbitrations, lawsuits, and/or claims by defendants pending the determination of this action, based upon the belief that defendants have commenced or will commence legal action or file for arbitration against Unitrin seeking money damages to contest Unitrin's denials of claim. This issue of temporary relief is moot, based on the court's decision as to Unitrin's other causes of action.

Unitrin's motion decided as follows:

It is hereby:

**ORDERED** that plaintiff, Unitrin Advantage Insurance Company's motion for entry of a default judgment on its 1<sup>st</sup> and 2<sup>nd</sup> causes of action against defendants, Yesnier Merced, Jeness Castillo, Marta Merced, IDF Medical Diagnostic, P.C., East 75<sup>th</sup> Street

Diagnostic Imaging, P.C., and Alrof, Inc., is GRANTED on default; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff owes no duty to the defendants to pay no-fault claims to the defendants with respect to the November 9, 2008 collision under policy number WY521829 and claim number 331AZ458078; and it is further

ORDERED that plaintiff's motion for a declaration on its 3<sup>rd</sup> cause of action, that IDF Medical Diagnostic, 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 plaintiff's 4<sup>th</sup> cause of action is dismissed as moot; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

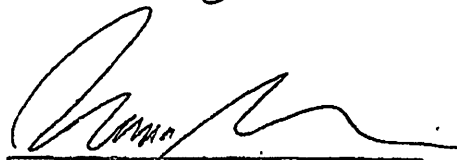
ORDERED that this constitutes the decision, order, and judgment of the court.

Dated: New York, New York  
September 8, 2010

So Ordered:

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

**FILED**  
OCT. 14 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

  
CLERK