

Allstate Prop. & Cas. Ins. Co. v Okona

2011 NY Slip Op 31249(U)

May 10, 2011

Supreme Court, New York County

Docket Number: 112505/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 112505/2010
ALLSTATE PROPERTY & CASUALTY
vs.
OKONA, SAMMY
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

:his 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: 5/10/11

HON. JUDITH J. GISCHE J.S.C.
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: PART 10**

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Allstate Property & Casualty Insurance,
Company,

Plaintiff (s),

-against-

Sammy Okona, Advanced Medical Care, P.C.,
All Boro Psychological Services, P.C.,
Better Health Care Chiropractic, P.C.,
Bronx Acupuncture Therapy, P.C.,
Doctor of Medicine in the House, P.C.,
Green Heights Physical Therapy, P.C.,
Heaven's Touch Massage Therapy, P.C.,
I.D.F. Medical Diagnostic, P.C., Olmeur
Medical, P.C., Orange Acupuncture, P.C.,
Park Avenue Medical Care, P.C., Star
Medical & Diagnostic, PLLC, Supreme
Acupuncture, P.C. and Windy City
Medical Supply, Inc.,

Defendant (s).

-----x

DECISION/ORDER

Index No.: 1125050/10

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):

Papers

Numbered

Pltf's n/m (3215) w/CDT affirm, MF affid, exhs, AOS 1

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

This is an action brought by an insurance company ("plaintiff"), against its insured, defendant Sammy Okona ("Okona"), who was required, but failed, to appear for an examination under oath ("EUO") in connection with his application in December 2009 for motor vehicle no-fault benefits ("application"). This motion seeks entry of a default judgment against Okona and the health care providers who have failed to

answer or appear in this action, i.e. Advanced Medical Care, P.C., All Boro Psychological Services, P.C., Better Health Care Chiropractic, P.C., Bronx Acupuncture Therapy, P.C., Doctor of Medicine in the House, P.C., Heaven's Touch Massage Therapy, P.C., I.D.F. Medical Diagnostic, P.C., Olmeur Medical, P.C., Orange Acupuncture, P.C. and Supreme Acupuncture, P.C. ("healthcare providers"). The relief sought is a declaration that Okona is not eligible for no fault benefits because he did not appear for his EUO and that plaintiff is not obligated to pay claims for reimbursement submitted by the defaulting healthcare providers. Some of the other defendant healthcare providers have answered the complaint ("Green Heights" "Park Avenue" "Star Medical" and "Windy City"). Although they duly served with this motion, they have not filed opposition with the court. Plaintiff has not articulated the relief sought as to the appearing defendants.

Plaintiff has provided proof the summons and complaint were served on Okona's mother, a person of suitable age and discretion, at his apartment. Service was completed October 14, 2010. The healthcare provider defendants that defaulted were each served through the secretary of state on October 15, 2010. Such service comports with the requirements of BCL 306 and LLC 303. Thereafter, on December 22, 2010, plaintiff provided additional notice to all the defendants of this action by mailing another copy of the summons and complaint to each defendant, including Okona. This motion is, itself, additional notice that this action was commenced. Despite such notice and additional notice, none of the defaulting defendants have answered the complaint or appeared. Their time to do so has expired and not been extended by 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]). The following is established by the complaint, the documents provided and the sworn affidavit of Michael Flaherty, plaintiff's claims analyst who is familiar with the facts:

Okona filed for no-fault benefits in December 2009, following a collision in November 2009 involving a vehicle he was driving. Although Okono was notified he had to appear for an EUO, he failed to appear on separate occasions (January 5, 13 and 28, 2010) for the EUO. His appearance for an EUO is a condition precedent to payment under Policy No. 913961859 ("policy") and New York State Regulations. The defaulting and non-defaulting healthcare providers have submitted claims for payment related to alleged services provided to Okono.

Plaintiff has proved that Okono is not eligible for no-fault benefits under the policy because he did not comply with a material obligation under his agreement with the insured. Furthermore, since the healthcare providers stand in the shoes of the insured who is assigning his rights, they can assert no greater rights than Okono has (Long Island Radiology v. Allstate Ins., 36 AD3d 763 [2nd Dept 2007]). Consequently, plaintiff is entitled to a declaration that Okona is not an eligible insured person entitled to no-fault benefits under the policy (1st cause of action) and a declaration that Allstate is not obligated to honor or pay any of the claim submitted by the defaulting health care providers. The application for attorney's fees is, however, denied as there is no contractual provision that would allow plaintiff to recoup those expenses.

As for the answering healthcare providers, plaintiff has not moved for summary judgment and it cannot obtain a default against an appearing party. Since their rights, however, are also derivative from Okona and Okona has no rights, the court directs that plaintiff move for summary judgment as to them within 90 day of the date of this decision. In the event no motion is made, the court will deem plaintiff's action a neglect to prosecute and remainder of this matter will be dismissed without prejudice.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that plaintiff's motion for entry of a default judgment is granted as to defendants Sammy Okono and Advanced Medical Care, P.C., All Boro Psychological Services, P.C., Better Health Care Chiropractic, P.C., Bronx Acupuncture Therapy, P.C., Doctor of Medicine in the House, P.C., Heaven's Touch Massage Therapy, P.C., I.D.F. Medical Diagnostic, P.C., Olmeur Medical, P.C., Orange Acupuncture, P.C. and Supreme Acupuncture, P.C.; and it is further

ORDERED, ADJUDGED AND DECLARED that Okona is not an eligible insured person entitled to no-fault benefits under the policy (1st cause of action) and Allstate is not obligated to honor or pay any of the claim submitted by the defaulting healthcare providers (Advanced Medical Care, P.C., All Boro Psychological Services, P.C., Better Health Care Chiropractic, P.C., Bronx Acupuncture Therapy, P.C., Doctor of Medicine in the House, P.C., Heaven's Touch Massage Therapy, P.C., I.D.F. Medical Diagnostic,

P.C., Olmeur Medical, P.C., Orange Acupuncture, P.C. and Supreme Acupuncture, P.C.); and it is further

ORDERED that as to the healthcare providers who have answered Green Heights Physical Therapy, P.C., Park Avenue Medical Care, P.C., Star Medical & Diagnostic, PLLC and Windy City Medical Supply, Inc., the plaintiff is directed to move for summary judgment within 90 days of the date of this decision. Failure to timely move will result in a dismissal as to these defendants; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

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

Dated: New York, New York
May 10, 2011

So Ordered:



Hon. Judith J. Gische, JSC

UNFILED JUDGMENT

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