

Liberty Mut. Ins. Co. v Jerome
2016 NY Slip Op 31488(U)
August 4, 2016
Supreme Court, New York County
Docket Number: 650784/16
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

Liberty Mutual Insurance Company, and
LM Insurance Company,

Plaintiffs,
- v -

Index No.
650784/16
**DECISION
and ORDER**
Mot. Seq. 1

Brunel Jerome,

“Individual Defendant”

-v-

Allay Medical Services, P.C.,
Charles Deng Acupuncture, P.C.,
Darren T. Mollo, D.C., P.C.,
Dr. Eliezer L. Offenbacker M.D. PLLC,
Haar Orthopaedics & Sports Medicine, P.C.,
Hank Ross Medical P.C.,
Island Life Chiropractic Pain Care PLLC,
Jules Francois Parisien, M.D., P.C.,
Ksenia Pavlova DO,
Personal Home Care Products Corp.,
Quality Custom Medical Supply, Inc.,

“Medical Provider Defendants”

Collectively, the Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

On February 12, 2016, Plaintiffs commenced this action by filing a
Summons and Verified Complaint seeking a declaratory judgment pursuant to
CPLR 3017(b). Plaintiffs request a declaration that Individual Defendant, Brunel

Jerome (“Jerome”), and Medical Provider Defendants are not entitled to reimbursement for medical services billed to Plaintiffs under the no-fault regulations and laws pursuant to the Insurance Law of the State of New York stemming from the April 12, 2015 motor vehicle accident involving Jerome.

Defendants Jerome, Allray Medical Services, P.C., Charles Deng Acupuncture, P.C., Darren T. Mollo, D.C., P.C., Island Life Chiropractic Pain Care PLLC, Jules Francois Parisien, M.D., P.C., Ksenia Pavlova DO, and Personal Home Care Products Corp. (collectively, “Movants”) move pursuant to CPLR 3211(a)(7) to dismiss the Complaint. Plaintiffs oppose. Plaintiffs cross move for an Order granting the following non-answer Defendants for their failure to answer the Complaint: Dr. Eliezer L. Ofenbacher M.D., PLLC; Haar Orthopaedics & Sports Medicine, P.C., and Hank Ross Medical P.C. (“Defaulting Defendants”). Plaintiffs also cross move for summary judgment against Movants.

CPLR § 3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex. rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D. 2d 91 [1st Dept 2003])(see CPLR 3211[a][7]).

An insurer is entitled to commence an action seeking a declaratory judgment that there is no coverage under the policy of insurance for No-Fault benefits if an applicant for benefits breached a condition precedent to coverage pursuant to the No-Fault Regulation. (*See generally American Tr. Ins. Co. v. Solorzano*, 968 N.Y. 3d 449 [1st Dept. 2013]). “To the extent the petitioner seeks a declaration of the rights and obligations of plaintiff under New York’s No-Fault Regulation (11 NYCRR 65 et. seq.), the complaint states a justiciable controversy between the parties, and is not subject to dismissal for failure to state an action.” (*Eveready Ins. Co. v. Felder*, 2013 WL 1212748 [N.Y. Sup. July 18, 2013]). “A motion to

dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration.” (*State Farm Mut. Auto. Ins. Co. v. Anikeyeva*, 89 A.D.3d 1009, 1010 [2d Dep't 2011]).

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to attend duly scheduled medical exams voids the policy ab initio. (*See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dept 2011]).

Here, Plaintiff brings this declaratory action seeking a declaration that Defendants are not eligible for no-fault benefits stemming from an April 12, 2015 motor vehicle accident based on the failure to comply with a condition precedent to the subject insurance policy and No-Fault Insurance Regulations. The Complaint sufficiently pleads that Defendants submitted claims to Plaintiff, and as such, there is an actual controversy to adjudicate here. Accepting the allegations as true, the four corners of the Complaint state a claim for a declaration of rights concerning the subject insurance policy and No-Fault Regulations.

Plaintiffs move for a default judgment pursuant to CPLR § 3215 against Defaulting Defendants based on their failure to answer or otherwise appear. Plaintiffs submit the Verified Complaint; affidavit of merit of Anthony Augugliaro; affidavit of service showing service upon Defaulting Defendants. Defaulting Defendants do not oppose. Plaintiffs have demonstrated entitlement to default judgment against Defaulting Defendants.

Wherefore, it is hereby,

ORDERED that Moving Defendants' motion to dismiss is denied; and it is further

ORDERED that defendants Brunel Jerome, Allray Medical Services, P.C., Charles Deng Acupuncture, P.C., Darren T. Mollo, D.C., P.C., Island Life Chiropractic Pain Care PLLC, Jules Francois Parisien, M.D., P.C., Ksenia Pavlova DO, and Personal Home Care Products Corp., shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof

ORDERED that Plaintiffs' cross motion for default judgment against Defaulting Defendants is granted without opposition; and it is further

ORDERED and ADJUDGED that Plaintiffs owe no duty to defendants Dr. Eliezer L. Ofenbacker M.D., PLLC; Haar Orthopaedics & Sports Medicine, P.C., and Hank Ross Medical P.C., pay no-fault claims arising out of the April 12, 2015 motor vehicle accident as referenced in the Complaint; and it is further

ORDERED that Plaintiffs' cross motion for summary judgment against Movants is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 4, 2016

AUG 04 2016



Eileen A. Rakower, J.S.C.