

Country-Wide Ins. Co. v Duluc
2016 NY Slip Op 31599(U)
August 15, 2016
Supreme Court, New York County
Docket Number: 162551/14
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----x
COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

POLINA DULUC, et al.

Defendants.
-----x

Index No. 162551/14
Motion Sequence 004

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Plaintiff Country-Wide Insurance Company (“Plaintiff” or “Country-Wide”) moves pursuant to CPLR 3215¹ for default judgments against all of the defendants for failing to answer or otherwise appear in this action. Plaintiff further seeks on this motion a declaratory judgment that defendant Polina Duluc (“Duluc”) is not entitled to motor vehicle no-fault benefits under Country-Wide insurance policy DS-3527549-13 (“the Policy”) regarding Claim No. 000294699-002 (“Claim”)² and that Country-Wide is not obligated to pay any claims for reimbursement submitted under the Policy and the Claim by Ms. Duluc’s health care providers, defendants Third Avenue Medical Care, P.C., Agyal Physical Therapy PLLC, Yin Yang NY Acupuncture, P.C., Third Ave Chiropractic Care, P.C., Solution Bridge, Inc., and Lantsman Acupuncture, P.C (“the Providers”). The motion is unopposed.

According to the complaint, the Policy was in effect on April 6, 2014 when Ms. Duluc was injured in a motor vehicle accident. Thereafter she allegedly sought medical treatment from the Providers and submitted a claim to Country-Wide as an eligible insured under the Policy.³

¹ CPLR 3215(a) provides in relevant part that “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.”

² The Policy and Claim number are listed on the Denial of Claim form submitted herein as exhibit J.

³ Exhibit A, ¶¶ 19-21.

By letter dated August 5, 2014 Plaintiff requested that Ms. Duluc appear for an Independent Medical Examination (“IME”) on August 21, 2014.⁴ Ms. Duluc failed to attend the scheduled IME. By letter dated August 24, 2014 Plaintiff rescheduled the IME for September 11, 2014. Again Ms. Duluc did not appear. Thereafter Plaintiff denied Ms. Duluc’s claim. Plaintiff’s denial of claim form, which is dated September 12, 2014, recites Ms. Duluc’s failure to appear for her IME’s as the reason for the denial.

Plaintiff commenced this action on December 19, 2014. Copies of the summons and verified complaint were served upon Ms. Duluc on April 30, 2015 and upon the Providers on February 23, 2015. However, Plaintiff did not file its affidavits of service thereof until June 16, 2015 in derogation of CPLR 306-b. By order dated April 26, 2016 (“April 26 Order”), the court held that Plaintiff’s service of the summons and complaint was timely, *nunc pro tunc*, as of June 15, 2015, and the court directed Plaintiff to serve copies of the April 26 Order with notice of entry upon all parties within 15 days from the date thereof by first class mail. The April 26 Order granted Defendants 30 days from the date of such service to respond to the summons and complaint. Plaintiff served copies of the April 26 Order upon all Defendants by mail on or about April 28, 2016.

The verified complaint recites that “[t]his is a Declaratory Judgment action for a judgment declaring that Plaintiffs [sic] have no obligation to pay the Defendants’ claims for no fault benefits because of Defendant’s breach of a condition precedent to coverage pursuant to the policy of insurance” (Exh. A, ¶ 16). The relief requested by Country-Wide pursuant to the complaint is: on the first cause of action, a declaration that Country-Wide owes no duty to pay no-fault claims to the Providers or to Ms. Duluc with regard to the April 6, 2014 accident; and on the second cause of action, a permanent stay preventing all Defendants from commencing no-fault lawsuits or arbitrations arising from the April 6, 2014 accident.

⁴Exhibit E.

An application for a default judgment must include proof of service of the summons, proof of the claim, and proof of the default. Here, the moving papers establish that Plaintiff duly served Ms. Duluc pursuant to CPLR 308(4) and the Provider defendants pursuant to Business Corporation Law 306 and Limited Liability Company Law 303.⁵ The Provider defendants were served with additional copies of the summons and complaint on August 27, 2015 as required by CPLR 3215(g)(4)(i)⁶. The verified complaint sets forth the facts constituting Plaintiff's claims herein. See CPLR 3215(f).⁷ Defendant Agyal Physical Therapy, PLLC's verified answer was filed on July 7, 2016, long after the deadline set in the court's April 26 Order. To date, no other defendant has answered or otherwise appeared and the time within which to do so was neither tolled nor extended. Based on the foregoing, the court finds that all of the Defendants are in default.

However, Plaintiff is not entitled to the declaratory relief sought herein for several reasons, foremost of which is that the moving papers do not contain a copy of the Policy under which Plaintiff claims Ms. Duluc violated a condition precedent to coverage. The Application for Motor Vehicle No-Fault Benefits (NF-2) which Plaintiff claims to have received from Ms. Duluc⁸ is also not

⁵ CPLR 308(4) provides that personal service upon a natural person can be made "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence" Business Corporation Law 306 authorizes service of process upon a domestic corporation by service on the New York State Secretary of State as agent of the corporation.

Limited Liability Company Law 303 authorizes service of process upon a limited liability company by service on the New York State Secretary of State as agent of the limited liability company.

⁶ See exhibit C. CPLR 3215(g)(4)(i) provides that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment."

⁷ CPLR 3215(f) provides in relevant part that "[o]n any application for judgment by default, the applicant shall file . . . proof of the facts constituting the claim Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due."

⁸ Affirmation of R. Diego Velazquez, Esq. dated June 13, 2016, ¶ 16.

produced in support of the motion. And of particular concern to the court is the substance of an affidavit prepared by Jessica Mena Sibrian, who is employed by Plaintiff as a No-Fault Litigation/Arbitration Supervisor,⁹ specifically the following (Sibrian Affidavit, ¶ 9):

Plaintiff received seven (7) bills from Gordon C. Davis on August 12, 2014, August 19, 2014 and August 23, 2014 for dates of service between June 25, 2014 and August 1, 2014 in the amount totaling \$3,421.51; Plaintiff received one (1) bill(s) from New Millennium Medical Imaging PC on August 18, 2014 for dates of service of July 8, 2014 in the amount totaling \$2,670.40; Plaintiff received two (2) bills from Z.M.S. and Y Acupuncture, PC on August 1, 2014 for dates of service between July 1, 2014 and July 16, 2014 in the amount totaling \$848.76.

Gordon C. Davis, New Millennium Medical Imaging, PC., and Z.M.S. and Y Acupuncture, PC. are not named defendants herein, and no explanation is offered as to their connection to Ms. Duluc or this action.

These omissions are important because of the strict procedural and time constraints associated with New York's no-fault law, which is designed "to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists". *Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 317 (2007) (quoting *Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]). In furtherance thereof, regulations have been promulgated which prescribe specific time frames for requesting and scheduling IME's. 11 NYCRR 65-3.5(a) provides that "within 10 business days after receipt" of an NF-2 form, an insurer shall forward, to the parties required to complete them, the verification forms it will require prior to payment of the initial claim. Under 11 NYCRR 65-3.5(b), "[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms," and under 11 NYCRR 65-3.5(d), "[i]f the additional verification required by the

⁹ Ms. Sibrian's affidavit, sworn to June 17, 2016, is submitted as exhibit I (Sibrian Affidavit).

insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms.”

In order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for a medical examination an insurer must affirmatively establish its compliance with these claim procedures and time frames. *American Transit Ins. Co. v Vance*, 131 AD3d 849 (1st Dept 2015); *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015).

There is nothing presented on this motion to show that Ms. Duluc actually submitted an NF-2 claim to Country-Wide, and if she did, when her NF-2 claim was received by Country-Wide. There is also nothing to show that Ms. Duluc ever sought treatment from any of the Provider defendants, when such treatment occurred, and whether and when they filed verifications for reimbursement under the Policy. Without such dates and pieces of information, all of which are essential to determining whether Country-Wide has complied with the no-fault regulations' time frames and procedures, Country-Wide cannot establish its entitlement to the relief it seeks.

Accordingly, it is hereby

ORDERED that Country-Wide's motion is denied with leave to renew within 30 days from the date of entry of this decision and order, failing which this action shall be dismissed in its entirety.

This constitutes the decision and order of the court.

ENTER:

DATED:

Aug 15, 2014



 SHERRY KLEIN HEITLER, J.S.C.