

Hereford Ins. Co. v Klein
2016 NY Slip Op 32145(U)
October 24, 2016
Supreme Court, New York County
Docket Number: 153589/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Hereford Insurance Company,

Plaintiff,

- v -

Index No.
153589/2016

**DECISION
and ORDER**

Mot. Seq. 1

Daniel Klein, M.D., Enzo Clinical Labs, Inc.,
BCT Medical Associates Limited Liability
a/k/a BCT Medical Associates, et. al.,

Defendants.

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

This case arises from an automobile accident on April 10, 2015 in which defendants Hilario Pena-Paulino and Genaro Martinez (collectively, “claimants”) were allegedly involved in a motor vehicle collision while occupants of a motor vehicle insured by plaintiff Hereford Insurance Company (“Hereford” or “plaintiff”). Claimants reported that they had sustained serious bodily injuries as a result of the alleged collision, and made a claim to plaintiff under the insurance policy issued by plaintiff. Claimants assigned the rights to collect no-fault benefits to medical provider defendants.

Plaintiff commenced this action on April 28, 2016 by filing a summons and complaint seeking a judgment declaring that plaintiff is not obligated to reimburse the medical provider defendants for alleged medical treatment, therapy and/or medical supplies rendered to claimants based on claimants’ suspect testimony, and certain medical provider defendants’ failure to appear for duly scheduled examinations under oath on two occasions.

Defendants SB Chiropractic, P.C. (“SB”), Acupuncture Now, P.C. (“Acupuncture”), Healthway Medical Care, P.C. (“Healthway”), Ksenia Pavlova, D.O. (“Pavlova”), and Jules Francois Parisien, M.D. (“Parisien” and collectively, “movant defendants”) now move for an order, pursuant to CPLR 3211(a)(7),

dismissing the complaint in its entirety. Movant defendants submit the affirmation of Oleg Rybak, Esq., annexing, *inter alia*, a copy of the summons and verified complaint.

Plaintiff submits the affirmation of David F. Boucher Jr., Esq. in opposition to the motion. Plaintiff argues that declaratory relief is appropriate and that plaintiff has properly stated a cause of action against movant defendants by alleging that the claimed injuries of the claimants were not causally related to an insured incident.

Plaintiff cross-moves for an order, pursuant to CPLR 3215, granting plaintiff leave to enter a default judgment against SB, Acupuncture, Healthway, and Pavlova. Plaintiff does not seek default judgment against Parisien. By stipulation of discontinuance and withdrawal filed September 14, 2016, SB agreed to withdraw the pre-answer motion to dismiss (Mot. Seq. 001) on behalf of itself only, and plaintiff agreed to withdraw its cross motion (Mot. Seq. 001) as to SB only. The stipulation further states that the action is discontinued as against SB.

In support of its cross-motion for default judgment, plaintiff submits the affirmation of David F. Boucher Jr., Esq.; the affidavit of Joronda McBurnie, a no-fault claims representative and medical management specialist employed by plaintiff; and the affidavit of Stephen Englert, a special investigative unit investigator and auditor employed by plaintiff.

CPLR 3211(a) provides that “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the pleading fails to state a cause of action.” CPLR § 3211(a)(7). 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 Mapfre Ins. Co. of N.Y. v. Manoo*, 140 A.D.3d 468 (1st Dept. 2016); *American Tr. Ins. Co. v. Solorzano*, 968 N.Y.3d 449 (1st Dept. 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 Dept. 2011).

Here, the complaint alleges that the medical provider defendants, including the movant defendants, submitted bills for treatment alleged to have been provided to the claimants totaling over \$70,000. Plaintiff specifically alleges that its investigation revealed, *inter alia*, that: one of the claimants and the three occupants of the other vehicle reported serious injuries, but the police report indicates that only one claimant alleged injuries at the scene of the alleged collision; neither vehicle was towed; the air bags on both vehicles did not deploy; one claimant underwent shoulder surgery even though his no-fault application did not include shoulder injuries; the same claimant testified that the shoulder surgery took place in Manhattan, but the billing indicates that the surgery took place in New Jersey; claimants were treated with the same group of medical providers; and claimants could not recall details of the loss. Accepting the allegations as true and according every favorable inference, the complaint sufficiently states a claim for a declaration of rights concerning the subject insurance policy and no-fault regulations. *See Eveready Ins. Co. v. Felder*, 2013 WL 1212748 (N.Y. Sup. 2013) (“To the degree the petition 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 a cause of action.”). Accordingly, movant defendants’ motion to dismiss the complaint is denied.

Finally, turning to plaintiff’s cross-motion for default judgment against defendants Acupuncture, Healthway, and Pavlova, a party is entitled to a default judgment pursuant to CPLR 3215 upon “submitting proof of service of the summons and the complaint, the facts constituting the claim, and the [defendant’s] default.” *Integon Nat. Ins. Co. v. Noterile*, 88 A.D.3d 654, 655 (2d Dept. 2011); *see* CPLR 3215(f).

Defendants Acupuncture, Healthway, and Pavlova filed the pre-answer motion to dismiss the complaint on August 3, 2016. Acupuncture, Healthway, and Pavlova allege that their delay in appearing was due to late receipt of the summons and complaint. Plaintiff has not shown either that their default was willful or that plaintiff was prejudiced thereby. Because the delay was of relatively short duration and public policy favors the resolution of cases on the merits, plaintiff’s motion for leave to enter a default judgment based on defendants Acupuncture, Healthway,

and Pavlova's failure to timely appear is denied. *See Brice v. City of N.Y.*, 139 A.D.3d 888, 889 (2d Dept. 2016) ("The motion is addressed to the broad discretion of the court, which should also consider whether prejudice has resulted from the delay, whether there is evidence of willfulness on the defaulting defendant's part, and the strong public policy in favor of resolving cases on the merits.").

Wherefore, it is hereby,

ORDERED that defendants Acupuncture Now, P.C., Healthway Medical Care, P.C., Ksenia Pavlova, D.O., and Jules Francois Parisien, M.D.'s motion to dismiss is denied; and it is further

ORDERED that plaintiff's cross-motion seeking a default judgment against defendants Acupuncture Now, P.C., Healthway Medical Care, P.C., and Ksenia Pavlova, D.O. pursuant to CPLR 3215 is denied; and it is further

ORDERED that defendants Acupuncture Now, P.C., Healthway Medical Care, P.C., Ksenia Pavlova, D.O., and Jules Francois Parisien, M.D. shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof.

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

DATED: October 24, 2016

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Eileen A. Rakower, J.S.C.