

Global Liberty Ins. Co. v Sikder
2016 NY Slip Op 33101(U)
December 22, 2016
Supreme Court, Bronx County
Docket Number: 23287/2016E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

GLOBAL LIBERTY INS. CO.,

Plaintiff,

Index No.: 23287/2016E

-against-

**MEMORANDUM
DECISION/ORDER**

JOYNAL SIKDER
I & E MASSAGE THERAPY, P.C.
WARREN MEDICAL, P.C.
SUCCESS REHAB, P.T.,P.C.
JAMAICA HEALTHY MEDICAL, P.C.
URBAN WELL ACUPUNCTURE, P.C.
AFFORDABLE CHIROPRACTIC CARE, P.C.
HMP ORTHOPAEDICS, P.C.
VILLAGE MEDICAL SUPPLY, INC.

Defendants.

HON. RUBEN FRANCO

Plaintiff moves for an Order as follows: (1), pursuant to CPLR § 3215, for a default judgment against defendants I & E Message Therapy, P.C. ("I & E"), Jamaica Healthy Medical, P.C. ("Jamaica"), Affordable Chiropractic, P.C. ("Affordable"), HMP Orthopaedics, P.C. ("HMP"), and Village Medical Supply, Inc. ("Village"), adjudging that these defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on August 29, 2010, as a result of defendant Joynal Sikder's ("Sikder") failure to attend properly scheduled Independent Medical Examinations ("IMEs"); and, (2) pursuant to CPLR § 3212(b), for summary judgment against Warren Medical, P.C. ("Warren"), Success Rehab, P.T., P.C. ("Success"), and Urban Well Acupuncture, P.C. ("Urban"), for defendant Sikder's failure to attend properly scheduled IMEs.

This action concerns no-fault insurance claims submitted by Sikder, related to an automobile accident which occurred on August 29, 2010. Sikder assigned his right to collect his

no-fault benefits to the other defendants, who claim that they provided services to Sikder in connection with injuries he claims to have sustained as a result of the motor vehicle accident.

Plaintiff submits affidavits of service evidencing that defendants I & E, Jamaica, Affordable, HMP, and Village, were duly served with the Summons and Verified Complaint by service upon the Secretary of State, pursuant to BCL§306; additional copies of the Summons and Verified Complaint were mailed to these defendants, pursuant to CPLR § 3215. None of these five corporate defendants has appeared, answered or opposed plaintiff's instant application. Plaintiff's attorney states in his affirmation in support of the motion, that this matter is discontinued as to Sikder. However, no Stipulation of Discontinuance, Voluntary Discontinuance, or Court Order, pursuant to CPLR § 3217, has been filed or obtained.

Plaintiff also submits affidavits from Regina Abbatiello ("Abbatiello"), Amanda Cadwallader ("Cadwallader"), and Dr. Ariel Goldin ("Goldin").

Cadwallader states that she is employed by Corvel, apparently, the IME scheduler for plaintiff, as Supervisor of the No-Fault Department. At the request of plaintiff, on November 17, 2010, Corvel served Sikder and his attorney by mail, with notice for Sikder to appear at Dr. Goldin's office for a chiropractic/acupuncture examination at 9:15 a.m. on November 29, 2010. Sikder did not appear and on December 8, 2010, Corvel served Sikder and his attorney by mail, with notice for Sikder to appear at Dr. Goldin's office for a chiropractic/acupuncture examination on December 27, 2010, at 9:45 a.m. This appointment was cancelled due to a snowstorm. On December 30, 2010, Corvel served Sikder and his attorney by mail, with notice for Sikder to appear at Dr. Goldin's office for a chiropractic/acupuncture examination on January 24, 2011, at 10:00 a.m. Dr. Goldin states in his affidavit that he was present in his office on both November

29, 2010 and January 24, 2014, and that Sikder failed to appear on either date for an IME.

Abbatiello states that she is a No-Fault Claims Adjuster for plaintiff. Her job duties include the handling and management of no-fault claims files in litigation or arbitration, including the payment and denials of no-fault benefits. She states that as a result of Sikder's failure to appear on two separate occasions for an IME, a letter was generated and sent to Sikder and his attorney denying all medical health care provider claims received on or after November 1, 2010.

The failure to appear for the IMEs requested by the insurer "when, and as often as, [it] may reasonably require" (Insurance Department Regulations [11 NYCRR] §65-1.1), is a breach of a condition precedent to coverage under the no-fault policy. Accordingly, when defendants' assignor (Sikder) failed to appear for the IMEs, plaintiff had the right to deny all claims retroactively to the date of loss (*see* Insurance Department Regulations [11 NYCRR] §65-3.8[c]). Defendant Sikder's non-appearance constitutes a failure of a condition precedent to receipt of insurance benefits for the motor vehicle accident, by all parties potentially entitled to benefits under Insurance Law §5103, or their assignees (11 NYCRR §65-1.1[a]; *see also* Insurance Law §5103[d] and [h]; Mapfre Ins. Co. of New York v. Manoo, 140 A.D.3d 468 [1st Dept. 2016]; Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 560 [1st Dept. 2011]; Stephen Fogel Psychological, PC v. Progressive Cas. Ins. Co., 35 A.D.3d 720, 721 [2nd Dept. 2006]).

The affidavits submitted by plaintiff have established its entitlement to a default judgment under CPLR § 3215. Plaintiff has also established a *prima facie* case for summary judgment.

In opposition to the motion for summary judgment, defendants Warren, Success, and

Urban (“the appearing defendants”) allege that: plaintiff cannot establish its entitlement to summary judgment in that it failed to comply with Insurance Department Regulations (11 NYCRR) §65-3.5[d]), which prescribe a 30-calendar-day time frame for the holding of IMEs; plaintiff failed to annex any proof that it denied any of defendants’ bills for an alleged failure of Sikder to appear for IMEs; Dr. Goldin’s affidavit is insufficient to establish Sikder’s non-appearance for IMEs; and, the affidavits of plaintiff’s doctor and IME scheduler are facially defective.

Attorney Silvia M. Surdez informed plaintiff by letter dated September 22, 2010, that she represented Sikder for all claims resulting from the automobile accident of August 29, 2010, and enclosed a copy of an N/F-2 form. This letter was received by plaintiff on September 27, 2010. However, Abbatiello states in her affidavit that plaintiff did not receive no-fault claims from medical providers prior to November 1, 2010. As previously stated, plaintiff caused to be scheduled an IME examination of defendant Sikder for November 29, 2010, within 30 days of receipt by plaintiff of a no-fault claim on behalf of a medical provider. Defendant Sikder failed to appear on this date and on a subsequent date, as noted above. Accordingly, the contention of the appearing defendants that plaintiff failed to comply with the time frame prescribed by Insurance Department Regulations (11 NYCRR) §65-3.5(d), lacks merit.

Having failed to appear for properly noticed IMEs, there is no need to demonstrate that the no-fault claims were timely disclaimed since the failure to attend medical exams is an absolute coverage defense (Mapfre Ins. Co. of New York v. Manoo, supra). Accordingly, the appearing defendants’ claim of a failure to submit proof of timely denial of claim, fails.

The appearing defendants’ contention that the affidavits of plaintiff’s doctor and IME

scheduler are facially defective, also lacks merit. The defendants' claim that Dr. Goldin's affidavit is conclusory and insufficient to prove Sikder's non-appearance because he does not state that he "reviewed a file in preparation for his affidavit, executed six years after the alleged nonappearances" (citing Metro 8 Med. Equip., Inc., v. Elrac, Inc., 2016 NY Slip Op 50174 (U), to support their position. In that case, the court stated that the chiropractor/acupuncturist's affidavit lacked probative value because she stated in her affidavit that she did not maintain records of a claimant's non-appearance for IMEs scheduled with her office, and she failed to state the basis of her recollection of the non-appearance some 18 months after the claimant had not appeared for the IME. That is not the case here. Dr. Goldin stated in his affidavit that he was present in his office on November 29, 2010 and January 24, 2011, and that defendant Sikder did not appear on either date. He further stated that it his office practice is that following a claimant's failure to attend an IME, "the non-appearance will be noted." The court finds that Dr. Goldin's affidavit has probative value and is sufficient to help establish Sikder's failure to appear for the IMEs.

Accordingly, plaintiff's motion for a default judgment against defendants I & E, Jamaica, Affordable, HMP, and Village, and for summary judgment against defendants Warren, Success, and Urban, is granted (see CPLR §§ 3215 and 3212; Amer. Tr. Ins. Co. v. Wilfred, 296 A.D.2d 360, 361 [1st Dept. 2002]; Utica First Ins. Co. v. Santagata, 66 A.D.3d 876, 878 [2nd Dept 2009]; Lancer Ins. Co. v. Whitfield, 61 A.D.3d 724, 725 [2nd Dept. 2009]; Travelers Indem. Co. of Am. v. Pullini Servs., Inc., 35 A.D.3d 846, 847 [2nd Dept. 2006]).

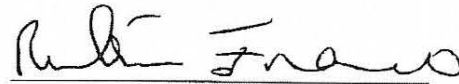
The court determines that plaintiff is not obligated to pay any of the no-fault claims submitted by these defendants relating to the motor vehicle accident of August 29, 2010,

involving Sikder.

The Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: December 22, 2016



Ruben Franco, J.S.C.

HON. RUBÉN FRANCO