

Hertz Vehs., LLC v Activepro Physical Therapy, P.C.
2017 NY Slip Op 30222(U)
January 30, 2017
Supreme Court, New York County
Docket Number: 159842/2015
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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HERTZ VEHICLES, LLC,

Plaintiff,

-against-

ACTIVEPRO PHYSICAL THERAPY, P.C., DYNAMIC
HEALTHCARE CENTER, LLC a/k/a DYNAMIC
HEALTHCARE CENTER LIMITED LIABILITY
COMPANY, QUALITY MEDICAL & SURGICAL
SUPPLIES, LLC, SPIRIT NY ACUPUNCTURE, P.C.,
WESTCHESTER RADIOLOGY & IMAGING, ANTHONY
RESTIYO, DARRYL ALEXANDER, JONATHAN
ROSARIO, and NATHANIEL VELEZ,

Defendants.

-----X
SHERRY KLEIN HEITLER, J.S.C.

Index No. 159842/15
Motion Sequence 001

DECISION AND ORDER

Plaintiff Hertz Vehicles, LLC (“Plaintiff” or “Hertz”) moves pursuant to CPLR 3215¹ for default judgments in this action against defendants Activepro Physical Therapy, P.C., Dynamic Healthcare Center, LLC a/k/a Dynamic Healthcare Center Limited Liability Company, Quality Medical & Surgical Supplies, LLC, Westchester Radiology & Imaging (collectively, “Medical Providers”), and defendants Anthony Restityo and Darryl Alexander for failing to answer the verified complaint.²

Plaintiff does not seek any relief against defendants Jonathan Rosario and Nathaniel Velez since Plaintiff has yet to serve them with the summons and Complaint. By stipulation dated

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 summons and verified complaint are annexed to the moving papers as exhibit B (“Complaint”).

November 3, 2015, Plaintiff agreed to discontinue this action as against defendant Spirit NY Acupuncture, P.C.³

The Complaint alleges that on December 6, 2014, defendants Restityo, Alexander, Rosario, and Velez (“Claimants”) were involved in a collision while occupants of a motor vehicle owned and self-insured by Hertz.⁴ The Claimants allegedly reported to Plaintiff that they sustained serious bodily injuries and as a result sought treatment from the Medical Providers.

The Complaint seeks a declaration that Hertz owes no duty to pay any current or future claims for reimbursement submitted by the Medical Providers because the Medical Providers, Restityo, and Alexander breached a condition precedent to coverage under New York’s no-fault rules by failing to appear for duly scheduled examinations under oath (“EUO”). The Complaint further alleges that Hertz owes no duty to pay reimbursement claims to the defendants because the Claimants’ alleged injuries and their subsequent medical treatment are not causally related to the accident.

Annexed to the moving papers is an affidavit by Karen Layne, Plaintiff’s senior no-fault examiner.⁵ Ms. Layne avers that the Medical Providers submitted “tens of thousands of dollars in No-Fault claims as the alleged assignees of the Claimants” (Layne Affidavit ¶9) which Plaintiff sought to verify. Plaintiff’s counsel mailed letters to Restityo, Alexander, Rosario, and Velez on January 15, 2015 requesting that they appear for EUO’s (see exhibits I & J). It is alleged that neither Restityo nor Alexander appeared for their EUO’s despite such notices.⁶ Rosario and Velez appeared for their EUO’s on March 11, 2015. Based on their testimony, Plaintiff concluded “that

³ Exhibit A.

⁴ A police report of the incident is annexed to the moving papers as exhibit F.

⁵ Ms. Layne’s affidavit is sworn to February 1, 2016 (“Layne Affidavit”).

⁶ See Affirmation of Kevin Davis, Esq. dated January 28, 2016, ¶¶8-10. Follow-up letters were mailed to Restityo and Alexander on February 9, 2015.

much of the treatments the Claimants received from the Medical Provider Defendants were unnecessary, excessive, and abusive of the no-fault system” (Layne Affidavit ¶17). Plaintiff sought to investigate further by examining the Medical Providers, and Plaintiff’s counsel mailed letters to them on March 30, 2015 and April 23, 2015 (see exhibits I & J). It is alleged that all of the Medical Providers except Westchester Radiology and Imaging failed to appear for their EUO’s.⁷ Based on the foregoing, Plaintiff denied all No-Fault coverage relating to the accident.

DISCUSSION

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 the Medical Providers pursuant to Business Corporation Law § 306 and Limited Liability Company Law § 303.⁸ Plaintiff duly served Messrs. Restityo and Alexander pursuant to CPLR 308(1) and CPLR 308(4). Additional copies of the summons and complaint were mailed to the Medical Providers with the motion papers as required by CPLR 3215(g)(4)(i)⁹. The affirmations and affidavits that are annexed to the moving papers set forth the facts constituting Plaintiff’s claims herein in compliance with CPLR 3215(f).¹⁰ Based on the foregoing, the court finds that the Medical Providers, Restityo, and Alexander are in default.

⁷ Davis Affirmation, ¶¶ 8-10.

⁸ 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.

⁹ 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.”

¹⁰ 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.”

However, Plaintiff has not shown its entitlement to declaratory relief. New York's no-fault system 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]). As part of this framework, the New York State Department of Financial Services has promulgated regulations which require self-insurers to provide benefits to persons injured in the use or operation of vehicles in New York State, subject to certain conditions. See 11 NYCRR § 65-2.2.

Among other things, these regulations require an accident victim to submit a notice of claim to the insurer "as soon as reasonably practicable, but in no event more than 30 days after the date of the accident. . . ." 11 NYCRR 65-2.4(b). The injured party or the assignee must then "submit written proof of claim to the self-insurer" no later than 45 days after services are rendered. 11 NYCRR 65-2.4(c). Benefits must generally be paid or the claim denied within 30 days after receipt of the proof of claim. (Insurance Law § 5106(a)). If an insurer seeks additional verification, the 30-day window is tolled until the insurer receives the relevant information requested.

In this case, Plaintiff sought additional information in the form of EUO's pursuant to 11 NYCRR § 65-2.4, which provides in relevant part that:

No action shall lie against the self-insurer unless, as a condition precedent thereto, there shall have been full compliance with the terms of this section.

* * * *

Upon request by the self-insurer, the eligible injured person or that person's assignee or representative shall . . . as may reasonably be required submit to examinations under oath by any person named by the self-insurer and subscribe the same . . . provide any other pertinent information that may assist the self-insurer in determining the amount due and payable.

Plaintiff has demonstrated its compliance with 11 NYCRR § 65-2.4, but as a self-insurer Plaintiff must also comply with 11 NYCRR § 65-3.5 (see 11 NYCRR § 65-3.1). In this regard, 11 NYCRR

65-3.5(a) provides that “within 10 business days after receipt” of a completed application for No-Fault benefits, an insurer shall forward to the parties required to complete them the verification forms it will require prior to payment of the initial claim. After the insurer’s receipt of the completed verification forms, any additional verification (i.e. an examination under oath) required by the insurer to establish proof of the claim must be requested within 15 business days of receipt of one or more of the completed verification forms. 11 NYCRR 65-3.5(b). Strict compliance with these claim procedures is required in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for an EUO. *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).

The accident which gave rise to this action occurred on December 6, 2014, and Plaintiff noticed examinations of the Claimants less than 30 days later on January 15, 2015. Despite this rapid turnaround, the motion papers do not indicate when Plaintiff received Claimants’ completed applications for No-Fault benefits or the reimbursement claims from the Medical Providers. As such Plaintiff has not shown that it noticed the EUO’s within 11 NYCRR § 65-3.5(b)’s narrow time frame. Under *Vance*, this omission precludes Plaintiff’s request for a declaratory judgment, regardless of whether or not the defendants violated a condition precedent to coverage. *See also Bronx Acupuncture Therapy, P.C. v Hereford Ins. Co.*, 53 Misc. 3d 137(A), 2016 NY Misc. LEXIS 3748, *1 (App. Term 1st Dept 2016).

With respect to Plaintiff’s claim that Claimants’ medical treatment was excessive, there is a narrow exception to the requirement that an insurer must pay or deny a claim within the 30-day period prescribed by the No-Fault Law where there is a “founded belief that the alleged injury does not arise out of an insured incident.” *See Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d

195, 199 (1997). An insurer who invokes this exception must “come forward with proof in admissible form to establish ‘the fact’ or the evidentiary ‘found[ation for its] belief’ that the patient’s treated condition was unrelated to his or her automobile accident.” *Mount Sinai Hosp. v Triboro Coach, Inc.*, 263 AD2d 11, 19-20 (2d Dept 1999) (quoting *Central Gen. Hosp.*, 90 NY2d at 199); see also *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 18-19 (2d Dept 2009). “Only an expert’s affirmation can give the courts the proper guidance in such specialized scientific matters, and can provide, in the majority of instances, a proper factual foundation for an insurer’s good faith belief.” *Id.* at 21. In this case, no such expert affirmation has been submitted. Instead Plaintiff reaches its conclusion based solely on its characterization of Rosario’s and Velez’ testimony, which is insufficient to meet its burden.

Accordingly, it is hereby

ORDERED that Plaintiff’s motion for an order finding Activepro Physical Therapy, P.C., Dynamic Healthcare Center, LLC a/k/a Dynamic Healthcare Center Limited Liability Company, Quality Medical & Surgical Supplies, LLC, Westchester Radiology & Imaging, Anthony Restitoyo, and Darryl Alexander to be in default is granted; and it is further

ORDERED that Plaintiff’s motion is otherwise denied with leave to renew upon proper papers within 30 days from the date of entry of this decision and order, failing which this action shall be dismissed in its entirety.

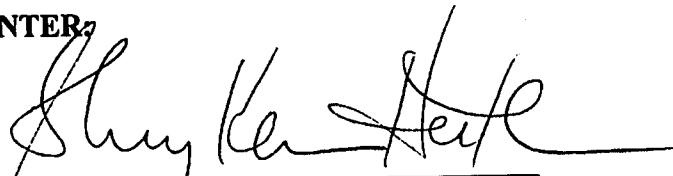
The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED:

1-30-17



SHERRY KLEIN HEITLER, J.S.C.