

Country-Wide Ins. Co. v Murchison
2017 NY Slip Op 31629(U)
August 4, 2017
Supreme Court, New York County
Docket Number: 151528/17
Judge: Sherry Klein Heitler
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 30

-----X
COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

Index No. 151528/17
Motion Sequence 001

-against-

DECISION & ORDER

EDWARD MURCHISON
("Eligible Injured Party Defendant")

and

NYC ACUPUNCTURE, P.C.,
SOUTHERN BLVD. CHIROPRACTIC P.C.,
SMART CHOICE MEDICAL P.C. and RX FOR YOU
("Medical Provider Defendants"),

Defendant(s).

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

By notice of motion dated May 12, 2017, Plaintiff Country-Wide Insurance Company ("Plaintiff" or "Country-Wide") seeks a default judgment pursuant to CPLR 3215¹ against defendant Edward Murchison ("Mr. Murchison") and defendants NYC Acupuncture, P.C., Southern Blvd. Chiropractic P.C., Smart Choice Medical P.C., and Rx For You (collectively, "Medical Providers") for failing to answer or otherwise appear in this action. Plaintiff also seeks a declaratory judgment that it is not obligated to pay any current or future claims for reimbursement submitted by the Medical Providers under Country-Wide insurance policy RT 7103762 16 ("the Policy") regarding Claim No. 000316655-002 ("Claim") which concerns an alleged motor vehicle accident involving

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."

Mr. Murchison on May 10, 2016. The court notes that a copy of the Policy has not been provided on this motion.

According to Mr. Murchison's New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle Benefits form ("NF-2"), on May 10, 2016, Mr. Murchison was a passenger in a motor vehicle covered under the Policy when it was involved in an accident.² Mr. Murchison reported that he sustained multiple injuries for which he sought treatment from the Medical Providers. The Medical Providers allegedly submitted claims to Plaintiff with an assignment of benefits from Mr. Murchison, claiming that they rendered services to Mr. Murchison that are reimbursable under the terms of the Policy.

Annexed to the moving papers is an affidavit by Jessica Mena-Sibrian, Plaintiff's No-Fault Litigation/Arbitration Supervisor.³ Ms. Mena-Sibrian avers that the Medical Providers submitted medical bills to Plaintiff for reimbursement which Plaintiff sought to verify by examining Mr. Murchison under oath ("EUO").⁴ Specifically, on September 6, 2016 Plaintiff mailed a notice to Mr. Murchison requesting that he appear for an EUO on September 28, 2016. Despite this notice, he apparently did not appear. Plaintiff mailed another notice to Mr. Murchison on October 4, 2016 advising him that his EUO had been rescheduled for October 24, 2016. Again Mr. Murchison failed to appear. On November 3, 2016, Plaintiff denied all No-Fault coverage relating to the accident, indicating that Mr. Murchison's "failure to observe the terms and conditions of the policy has prevented the company from obtaining proper proof of claim."⁵

² The NF-2 is annexed to the moving papers as Exhibit K. It appears that Plaintiff received it on Jun 14, 2016. The NF-2 provides that the Policy was issued to "Charles Koroma."

³ See Exhibit I.

⁴ *Id.* at ¶¶ 9-10.

⁵ Plaintiff's NF-10 is annexed to the moving papers as Exhibit H.

Plaintiff seeks a declaration that it owes no duty to pay any current or future claims for reimbursement submitted by the Medical Providers because Mr. Murchison breached a condition precedent to coverage under New York's no-fault rules by failing to appear for duly-scheduled EUO's.⁶ Plaintiff further argues that in the absence of evidence obtained through an EUO, Defendant's alleged injuries and subsequent medical treatment cannot be shown to be causally related to the accident.

This motion was fully submitted to the court on July 10, 2017. It is unopposed.

DISCUSSION

An application for a default judgment must include proof of service of the summons and complaint, proof of the claim, and proof of the default. Here, the moving papers establish that Plaintiff duly served Mr. Murchison pursuant to CPLR 308(2) and the Medical Providers pursuant to Business Corporation Law 306.⁷ 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).⁸ 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).⁹ Based on the foregoing, the court find that Mr. Murchison and the Medical Providers are in default.

⁶ The summons and verified complaint are annexed to the moving papers as Exhibit A ("Complaint").

⁷ Business Corporation Law 306 authorizes services of process upon a domestic corporation by service on the New York Secretary of State as agent of the corporation.

⁸ 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."

⁹ 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 Prop. 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]). Pursuant to Insurance Law 5106(a), benefits must generally be paid or the claim denied within 30 days after receipt of the proof of claim. If an insurer seeks additional verification, the 30-day window is tolled until it receives the relevant information requested. Among other forms of verification, insurers are permitted to request that insureds appear for an EUO pursuant to 11 NYCRR 65-1.1.

Regulations have been enacted which prescribe specific time frames for requesting and scheduling EUO's. 11 NYCRR 65-3.5(a) provides that "within 10 business days after receipt" of a completed application for No-Fault benefits (in this case an NF-2), an insurer shall forward the verification forms which are required by the insurer prior to payment of the initial claim to the parties required to complete them. After the insurer receives the completed verification forms, any additional verification required by the insurer to establish proof of the claim, in this case an EUO, must be requested within 15 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. See *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 May 10, 2016 and it appears that Plaintiff received the completed NF-2 on July 14, 2016. Plaintiff does not contend, much less, show, that it mailed verification forms to the various Medical Providers and/or Mr. Murchison within 10 business days thereof as required by 11 NYCRR 65-3.5(a). Plaintiff further does not indicate if it received completed verification forms back from Mr. Murchison or any of the Medical Providers that would have tolled Plaintiff's time to request an EUO. Accordingly, Plaintiff has not shown that it noticed the EUO's within the time frames set forth in 11 NYCRR 65-3.5(a) and (b). Under *Vance*, these omissions preclude Plaintiff's request for a declaratory judgment, regardless of whether or not Mr. Murchison violated a condition precedent to coverage by failing to appear for his EUO's. *See Vance, supra; 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).

It also bears repeating that Plaintiff did not provide a copy of the Policy for the court's review. The court therefore cannot confirm that the appearance at duly-scheduled EUO's is, in fact, a condition precedent to coverage under the Policy.

Accordingly, it is hereby

ORDERED that Plaintiff's motion is granted to the extent that the court finds defendants Edward Murchison, NYC Acupuncture, P.C., Southern Blvd. Chiropractic P.C., Smart Choice Medical, P.C., and Rx For You to be in default; and it is further

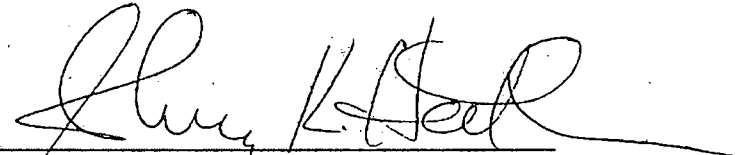
ORDERED that Plaintiff's motion is otherwise denied with leave to renew within 30 days from the date of entry of this decision and order upon proof of proper service thereof, failing which this action shall be dismissed in its entirety; and it is further

ORDERED that Plaintiff shall serve a copy of this decision and order upon all parties by first class mail within 15 days from the date of entry hereof.

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

This constitutes the decision and order of the court.

DATED: *Aug. 4, 2017*



SHERRY KLEIN HEITLER, J.S.C.