

Country-Wide Ins. Co. v Thompson
2017 NY Slip Op 31777(U)
August 22, 2017
Supreme Court, New York County
Docket Number: 151530/17
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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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- against -

CLARICK THOMPSON

("Eligible Injured Party Defendant"),

And

PATCHOGUE OPEN MRI PC D/B/A SOUTHWEST
RADIOLOGY, COMPREHENSIVE
PSYCHOLOGICAL EVALUATION, LIDA'S
MEDICAL SUPPLY INC., REAL CHIROPRACTIC
CARE, PC, FREEDOM PHYSICAL THERAPY, P.C.,
HEALTHY AGE MEDICAL, PC, PROFIT REHAB PT,
PLLC, YANGZI RIVER ACUPUNCTURE PC, GREEN
LAND ACUPUNCTURE P.C., ELSANAA PT PC, AND
LN MEDICAL DIAGNOSTIC, PC

("Medical Provider Defendants").

Defendant(s).
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Motion sequence no.'s 001 ("MS 001") and 002 ("MS 002") are consolidated for disposition herein.

In MS 001, plaintiff Country-Wide Insurance Company ("Plaintiff" or "Country-Wide") moves pursuant to CPLR 3215¹ for a default judgment against defendant Clarick Thompson ("Mr. Thompson") and his alleged medical providers, defendants Patchogue Open MRI PC d/b/a

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."

Southwest Radiology, Comprehensive Psychological Evaluation, Real Chiropractic Care OC, Freedom Physical Therapy, P.C., Healthy Age Medical, PC, Profit Rehab PT, PLLC, Yangzi River Acupuncture PC, Green Land Acupuncture P.C., Elsanaa PT PC, and LN Medical Diagnostic, PC.

In MS 002, Plaintiff moves pursuant to CPLR 3212² for summary judgment against defendant Lida's Medical Supply, Inc.³

Plaintiff further seeks a declaratory judgment that it owes no duty to pay any current or future claims for reimbursement submitted by the Medical Providers under Country-Wide policy PS 9397205-16 ("Policy") because Mr. Thompson breached a condition precedent to coverage under New York's no-fault rules by failing to appear for two examinations under oath ("EUO"). A copy of the Policy has not been provided to the court on these motions.

This case arises from an alleged automobile accident on July 5, 2016 involving a vehicle insured by Plaintiff. Mr. Thompson's New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle Benefits form ("NF-2") provides that he was a passenger in the vehicle at the time of the accident.⁴ As a result of the accident Mr. Thompson allegedly sustained personal injuries and sought treatment from the Medical Providers.

Plaintiff specifically alleges that Mr. Thompson breached a condition to no-fault coverage by failing to appear for two properly requested and scheduled EUO's. In this regard, on or about September 27, 2016, Plaintiff mailed Mr. Thompson a letter requesting that he attend an EUO on October 18, 2017.⁵ Mr. Thompson allegedly failed to appear, and Plaintiff mailed a second notice

² CPLR 3212 provides in relevant part that "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue."

³ With the exception of Mr. Thompson, all defendants herein shall be collectively referred to as "Medical Providers"

⁴ See Exhibit K. Mr. Thompson signed his NF-2 form on July 6, 2016. It is unclear when Plaintiff received it.

⁵ See Exhibit D.

to Thompson on or about October 25, 2016 requesting that he attend an EUO on November 8, 2016. Again Mr. Thompson allegedly failed to appear. On or about November 16, 2016 Plaintiff denied Mr. Thompson's claim in its entirety.⁶

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. Thompson with the summons and complaint pursuant to CPLR 308(2) and the Medical Provider Defendants pursuant to CPLR 311, Limited Liability Law 303, and Business Corporation Law 306. Plaintiff mailed additional copies of the summons and complaint to the Medical Providers as required by CPLR 3215(g)(4)(i)⁷. With the exception of Lida's Medical Supply, Inc, none of the defendants have answered or otherwise appeared in this action and their time to do so has not been extended, and 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).⁸

However, MS 001 targeted and was served only upon defendants Thompson, Patchogue Open MRI PC d/b/a Southwest Radiology, Comprehensive Psychological Evaluation, Real Chiropractic Care OC, Freedom Physical Therapy, P.C., Healthy Age Medical, PC, Profit Rehab

⁶ Plaintiff's NF-10 denial form is annexed to the moving papers as exhibit H.

⁷ 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."

⁸ 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."

PT, PLLC, Yangzi River Acupuncture PC, Green Land Acupuncture P.C., Elsanaa PT PC, and LN Medical Diagnostic, PC. It was not served upon defendant Lida's Medical Supply, Inc.

MS 002, which seeks summary judgment against Lida Medical Supply, Inc, was served upon this defendant, but not on any of the other defendants. Since due process requires that all parties in a case be notified of a motion, both MS 001 and MS 002 are procedurally defective and are denied as such.

These motions are also denied on substantive grounds. 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 Disease v Travelers Property Cas. Ins. Co.*, 90 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 (see 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 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. After the insurer's receipt of the completed verification forms, any additional verification 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). An insurer must affirmatively establish its compliance with these claim procedures 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).

As noted above, the moving papers do not include a copy of the Policy, without which Plaintiff cannot prove that Mr. Thompson was even required to attend an EUO as a condition to coverage. Plaintiff also has not shown when it received Mr. Thompson's NF-2 form, and, while Plaintiff claims to have received medical bills from each of the Medical Providers, the record only contains bills from one such provider, Real Chiropractic Care, P.C.⁹ Plaintiff cannot demonstrate that it complied with the applicable regulations in the absence of such information, precluding its bid for a declaratory judgment and for summary judgment.

Accordingly, it is hereby

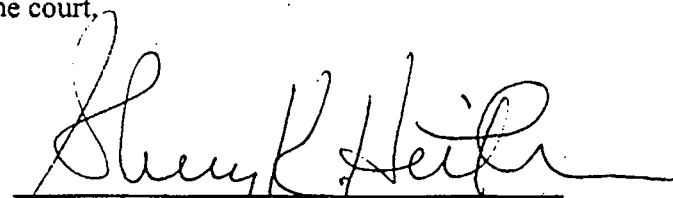
ORDERED that Plaintiff's motions are denied, on both procedural and substantive grounds, with leave to renew upon complete papers within 30 days from the date of entry of this decision and order and upon proof of proper service thereof, failing which this action shall be dismissed in its entirety; and it is further

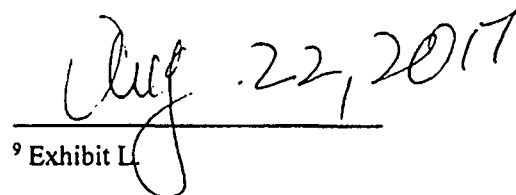
ORDERED that Plaintiff shall serve a copy of this decision and order upon all parties by first class mail within 20 days of the date of entry hereof.

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

This constitutes the decision and order of the court.

DATED:


SHERRY KLEIN HEITLER, J.S.C.


⁹ Exhibit L