

Ace Am. Ins. Co. v Dr Watson Chiropractic, P.C.

2017 NY Slip Op 32323(U)

November 2, 2017

Supreme Court, New York County

Docket Number: 150558/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

ACE AMERICAN INSURANCE COMPANY,

Plaintiff,

INDEX NO. 150558/2017

MOTION DATE 8/15/17

MOTION SEQ. NO. 001

- v -

DR WATSON CHIROPRACTIC, P.C., GOOD CARE
PHARMACY, INC., PREMIER PHYSICAL MEDICINE &
REHABILITATION, P.C., STAND-UP MRI OF
LYNBROOK, P.C., PAUL LERNER, M.D., KATZMAN
ORTHOPEDICS, P.C., SHAKAY GREAVES and
JONATHAN WILLIAMS,

Defendants.

The following papers, numbered 14–29, were read on this motion for entry of a default judgment.

Notice of Motion—Affirmation in Support—Exhibits A–J—Affidavit of
Service—RJI—840A Addendum—Stipulation of Discontinuance (Dr. Lerner)

■ Nos. 14–29

Motion by Plaintiff Ace American Insurance Company pursuant to CPLR 3215 for entry of a default judgment against medical provider defendants Dr. Watson Chiropractic, P.C. (“Chiropractic”), Good Care Pharmacy, Inc. (“Pharmacy”), Stand-Up MRI of Lynbrook, P.C. (“MRI”), Katzman Orthopedics, P.C. (“Orthopedics”) (collectively, “Provider-Defendants”) and individual claimant-defendants Shakay Greaves (“Greaves”) and Jonathan Williams (“Williams”) (collectively, “Claimant-Defendants”) is denied.

BACKGROUND

I. Plaintiff’s Allegations

In the instant case, Plaintiff alleges that Claimant-Defendants have made specious and fraudulent no-fault claims relating to a motor vehicle accident which occurred on May 27, 2016 (the “Collision”) involving Greaves’ Hertz rental car

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

(Boucher affirmation, exhibit A, at 2). Plaintiff further alleges that Provider-Defendants have submitted over \$20,000 in bills for treatment provided to Claimant-Defendants and related to the Collision (*id.* ¶ 16).

Plaintiff asserts that the defendants are not entitled to payment of the bills based on the following:

- (1) a founded belief that both Claimant-Defendants' alleged injuries and subsequent billing by Provider-Defendants were not causally related to an insured incident;
- (2) that Pharmacy and MRI breached conditions precedent to coverage under the No-Fault Law by failing to appear at scheduled Examinations Under Oath ("EUOs");
- (3) that Claimant-Defendants breached conditions precedent to coverage under the No-Fault Law by failing to return subscribed copies of their EUO transcripts; and
- (4) that the Collision was an intentional and staged event in furtherance of a scheme to defraud Plaintiff

(*id.* ¶¶ 29–42). Plaintiff now moves for a stay of all arbitrations, lawsuits, or claims by Claimant-Defendants and Provider-Defendants and for a judgment declaring that it owes no duty to Claimant-Defendants or Provider-Defendants to pay for no-fault claims related to the Collision and submitted to Hertz¹.

II. The No-Fault Claims

Williams submitted to Plaintiff an application for motor vehicle no-fault benefits ("NF-2") dated June 16, 2016 (Boucher affirmation, exhibit D, at 5). In his NF-2, Williams stated that he was a passenger in a 2016 Dodge owned by Hertz (the "Dodge") involved in the Collision and suffered "[m]ultiple personal [i]njuries including, but not limited to[,] head, body[,] and limbs; details to follow with submission of medical specials" [sic] (*ibid.*). Williams' NF-2 listed his treating provider as "Premier Physical Medicine & Rehabilitation, P.C., 54 West Merrick Road, Valley Stream, NY 11580" ("Premier")² (*ibid.*).

¹ "All claims of Hertz-owned vehicles that are insured by [Plaintiff] are handled by Hertz Claims Management Corporation, a subsidiary of The Hertz Corporation" (affirmation of Boucher ¶ 4). Herein, "Hertz" shall refer to all Hertz entities, including The Hertz Corporation and its subsidiaries and affiliates.

² By means of a stipulation e-filed on June 20, 2016, the instant action was discontinued as to Premier.

Greaves' NF-2, dated June 24, 2016, lists the same injuries and treating provider as were listed in Williams' NF-2 (*id.* at 1). Greaves' NF-2 indicates that she was the driver of the Dodge involved in the Collision.

Plaintiff does not indicate when it received Claimant-Defendants' NF-2s.

Plaintiff alleges in its papers that Hertz has received "a variety of medical claims" from Provider-Defendants (affirmation of Boucher ¶ 7). There are no claim forms from Provider-Defendants in the papers. The only specific claims mentioned in the papers and allegedly submitted by Provider-Defendants are:

- (1) \$2,205.44 by Pharmacy, for date of service September 23, 2016, which Hertz received on October 11, 2016; and
- (2) \$878.67 by MRI, for date of service August 15, 2016, which Hertz received on August 29, 2016

(affidavit of Stromberg ¶¶ 19–20).

III. The EUOs

On or around July 15, 2016, Plaintiff allegedly sent Claimant-Defendants each a notice by mail which stated that Plaintiff required they each appear for an EUO on July 29, 2016 (Boucher affirmation, exhibit E). Both Claimant-Defendants appeared for their EUOs on July 29, 2016 (affirmation of Schreiber ¶ 7).

On or around August 4, 2016, Plaintiff allegedly sent MRI a notice by mail requesting that MRI appear for an EUO on or before August 18, 2016 (Boucher affirmation, exhibit H, at 7). On or around August 24, 2016, after MRI allegedly did not appear for the August 18, 2016 EUO, Plaintiff allegedly sent MRI a follow-up letter affording MRI one final opportunity to appear for its EUO on September 9, 2016 (*id.* at 10). MRI allegedly did not appear for the September 9, 2016 EUO (affirmation of Schreiber ¶ 23).

On or around August 11, 2016, Plaintiff allegedly sent Pharmacy a notice by mail requesting that Pharmacy appear for an EUO on August 26, 2016 (Boucher affirmation, exhibit H, at 1). On or around September 2, 2016, after Pharmacy allegedly did not appear for the August 26, 2016 EUO, Plaintiff allegedly sent Pharmacy a follow-up letter affording Pharmacy one final opportunity to appear

for its EUO on September 19, 2016 (*id.* at 4). Pharmacy allegedly did not appear for the September 19, 2016 EUO (affirmation of Schreiber ¶ 19).

a. EUO of Williams

At his EUO, Williams stated that he could not remember where he was or exactly what happened that led to the crash, but that he was a passenger in the back seat of a two-door rental car, a Dodge Challenger, on May 27, 2016, and was headed home from a road trip to Atlanta. Williams said that his girlfriend of two years, Shakay Greaves, was driving, and that their mutual friend Jasmine was in the front passenger seat.

Williams said that he felt a “medium” impact when another car hit the Dodge on the driver’s side (Williams tr at 34, lines 22–25). Williams said further that, after the Collision, his right knee struck the back edge of the front passenger-side seat and then hit the side panel on the passenger door. Williams said that his body moved to the right, that he experienced whiplash, and that he was not wearing a safety belt. Thereafter, he had “pain on [the] right side of [his] body” and was “stressed” (*id.* at 15, lines 11–13). Williams said that he told the responding officer that he did not need medical attention and was permitted to drive away from the scene (as a passenger) and continue home.

Williams stated that, several weeks after the Collision, he went to a doctor located in Valley Stream for an evaluation on the advice of his lawyer. Williams said that the examination lasted about 20 minutes. Thereafter, Williams said he was told to come to therapy five times a week. Williams reported that his provider had cut the number of visits to four times a week. Williams also reported doing exercises at therapy and being given an ointment for home use. Williams further reported receiving 15-minute heat and electrical stimulation treatments to his right knee, right shoulder, neck, and upper and lower back at therapy. Williams said that while the therapy did relieve some of his discomfort as it was ongoing, it nevertheless provided him with no lasting relief. Williams stated that he had suffered no injury to the treated parts of his body before the Collision.

b. EUO of Greaves

At her EUO, Greaves recalled much of the same information as Williams, including: the date of the accident, that they were coming from Atlanta, that she had been dating Williams for two years, that they were traveling with Jasmine, and

that she had been driving a two-door Dodge. Greaves added that they were headed back to Williams' home from a trip to the aquarium in Atlanta.

Greaves also added that they had been shopping on Jamaica Avenue and were leaving their parking space on the right-hand side of the street when they were struck between the driver-side door and the front-left tire by a passing vehicle. Greaves stated that the impact was "hard" (Greaves tr at 20, line 2). Greaves further stated that she was sure she had been wearing her seatbelt at the time of the Collision. Greaves also stated that, upon impact, she was pushed to the right, experienced whiplash, and felt dizzy afterward. Greaves believes she may have briefly lost consciousness. Greaves said that she told the responding officer she did not need medical attention and was permitted to drive away from the scene and to continue to Williams' home.

Greaves said that, about two weeks after the Collision, she went with Williams to a treatment center in Valley Stream for therapy on the advice of her attorney. Greaves had her neck and back examined and was tested for blurry vision and a concussion. Greaves did not have the results of those tests as of the EUO. Greaves also reported having headaches, upper and lower back pain, and pain her neck and her left knee. The Valley Stream provider ordered an initial treatment protocol of therapy sessions five times a week for the first two weeks of treatment. Thereafter, Greaves had therapy three or four times a week. Greaves' therapy consisted of 15-minute sessions involving heat, electrical stimulation, and stretching for her back, neck, and knee. Greaves was also given an anesthetic cream to apply at home. Greaves reported experiencing short-term relief from the therapy and stated that she has been getting better.

IV. Service of Process and the Defendants' Failure to Appear

Plaintiff commenced this action on January 17, 2017 by e-filing the summons and complaint (Boucher affirmation, exhibit A). On February 1, 2017, a process server allegedly served process upon Provider-Defendants pursuant to Business Corporation Law § 306 (b) (1) (Boucher affirmation, exhibit B, at 1–3, 5). A different process server allegedly served process upon Claimant-Defendants pursuant to CPLR 308 (2) by: (1) on January 28, 2017, leaving copies of the summons and complaint with persons of suitable age and discretion at their respective usual places of abode; and (2) on February 7, 2017, mailing copies of the same to their respective last known residences (*id.* at 6–7). On July 19, 2017,

both copies of the instant motion and notice pursuant to CPLR 3215 (g) (3) (i) were allegedly mailed to the defendants.

As Provider-Defendants and Claimant-Defendants have not appeared in this action, Plaintiff now moves for entry of a default judgment.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing (*see* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015]).

Here, Plaintiff established presumptively valid proof of service of process on Claimant-Defendants and Provider-Defendants. Plaintiff has also established that Claimant-Defendants and Provider-Defendants have defaulted in answering and that it complied with the CPLR 3215 (g) (3) (i) notice requirement. As such, Plaintiff is entitled to the relief it seeks, provided it submits sufficient proof of the facts constituting its claim.

To meet its prima facie burden, Plaintiff must establish that it requested the EUOs in accordance with the procedures and time frames set forth in the no-fault implementing regulations (*see Am. Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015]; *see also Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). With respect to an insurer's verification needs and requests, 11 NYCRR § 65-3.5 (b) states that:

[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms. Any requests by an insurer for additional verification need not be made on any prescribed or particular form. If a claim is received by an insurer at an address other than the proper claims processing office, the 15[-]business day period for requesting additional verification shall commence on the date the claim is received at the proper claims processing office. In such event, the date deemed to constitute receipt of claim at the proper claim processing office shall not exceed 10 business days after receipt at the incorrect office.

11 NYCRR § 65-3.6 (b) states:

Verification requests. At a minimum, if any requested verifications has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested.

“[T]he failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage” as to the eligible person, including all related billing from medical providers assigned to the insurer (*Natl. Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]). A provider’s failure to appear for a properly noticed EUO also constitutes a breach of a condition precedent, vitiating coverage as to that provider (*see Hertz Corp. v Active Care Medical Supply Corp.*, 124 AD3d 411 [1st Dept 2015]). Further, as a “condition precedent” to no-fault coverage, an “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 [insurer] and subscribe the same” (11 NYCRR § 65-1.1; *see also Pogo Holding Corp. v NY Prop. Ins. Underwriting Assn.*, 73 AD2d 605 [2d

Dept 1979] [holding that a failure to subscribe an EUO transcript was “a material breach”] [emphasis added]).

In the instant motion, Plaintiff has failed to show prima facie that it complied with the timeliness requirements of 11 NYCRR §§ 65-3.5 (b) and 65-3.6 (b) with respect to Claimant-Defendants. Like in the case of *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.* (147 AD3d 437 [1st Dept 2017]), here, “[P]laintiff failed to provide . . . evidence reflective of the dates on which [P]laintiff had *received* [Claimant-Defendants’] verification forms” (emphasis added).

Because Plaintiff has not shown prima facie that it complied with 11 NYCRR § 65-3.5 (b), this Court need not find, at this time, whether Claimant-Defendants’ failure to subscribe their EUO transcripts is a breach of a condition precedent (*but see Pogo* at 606).

With respect to Provider-Defendants, although Plaintiff has stated when it received two of Provider-Defendants’ claims—one from MRI and the other from Pharmacy—Plaintiff has not shown whether these were the first claims it received from MRI or Pharmacy or whether there were claims prior to those it cited in the papers which it approved or denied.

Further, Plaintiff fails to make any showing whatsoever in the papers as to proof of the facts constituting its claims as to defendants Chiropractic and Orthopedics. Only paragraph seven of Boucher’s affirmation, which is verbatim paragraph nine of Stromberg’s affidavit, references Chiropractic and Orthopedics by stating that they allegedly submitted a portion of the “variety of medical claims” amounting to “over \$20,000 in bills for treatment allegedly provided to [Claimant-Defendants].”

Upon a review of the papers, including Claimant-Defendants’ EUOs, this Court finds that Plaintiff has failed to show prima facie either that the Collision was staged or that there exists a valid foundation upon which to form a belief that either the claims or the billing were not causally related to the Collision. The mere fact that Claimant-Defendants were allegedly involved in one or more prior

accidents and may have received no-fault benefits does not imply that the Collision was staged or that the claims arising from it are fraudulent or excessive.

Plaintiff has submitted an affidavit by Maureen Stromberg which is nearly identical both to attorney Boucher’s affirmation and to the affirmation and affidavit which they submitted in support of a virtually identical motion decided in *Hertz Vehicles, LLC v Advanced Orthopedics and Joint Preservation, P.C.* (2017 WL 1246567 [Sup Ct, NY County 2017, Freed, J.]). Like the *Hertz* Court, this Court finds counsel’s contentions and the contentions in Stromberg’s “almost verbatim” affidavit “conclusory and speculative” and contrary to the actual content of Claimant-Defendants’ NF-2s and EUOs.

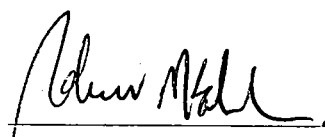
CONCLUSION

Accordingly, it is

ORDERED that Plaintiff’s motion for entry of a default judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 2, 2017
New York, New York


J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE