

Country-Wide Ins. Co. v Ackloo
2017 NY Slip Op 32577(U)
December 7, 2017
Supreme Court, New York County
Docket Number: 153774/2017
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

COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

INDEX NO. 153774/2017
MOTION DATE 11/9/17
MOTION SEQ. NO. 002

- v -

RAJESH ACKLOO, et al,
Defendants.

The following papers, numbered 33-47 and 50 were read on this motion for entry of a default judgment.

Notice of Motion—Affirmation in Support—Exhibits A-M—10/23/17 Tr | Nos. 33-47, 50

Motion by Plaintiff Country-wide Insurance Company pursuant to CPLR 3215 for entry of a default judgment against defendants Rajesh Ackloo (“Ackloo”), Real Chiropractic Care, PC, Healthy Age Medical, PC, Gamil Kostandy Physician, PC, Yangzi River Acupuncture PC, LN medical Diagnostic, PC, and Nina Kononchuk LCSW (the “Medical Providers”) is granted, there being no opposition submitted.

BACKGROUND

This case arises from an automobile accident on July 17, 2016 where Ackloo was involved in a motor vehicle accident while allegedly in a vehicle insured by Plaintiff. Ackloo made a claim to Plaintiff as a purported injured person under an insurance policy issued by Plaintiff, No. CS-4524759-16 (the “Policy”).

Plaintiff commenced an action on or about April 24, 2017 by the filing of a summons and complaint seeking a declaratory judgment against all defendants in this action due to the alleged breach of contract by Ackloo in failing to appear for a properly requested and scheduled examination under oath (“EUO”). Plaintiff alleges that it received a bill from a provider on November 2, 2016 and sent the first letter on November 4, 2016 requesting an EUO of Plaintiff to be held on Monday, November 21, 2016, at 9:30 a.m. When Ackloo allegedly failed to appear for that EUO, Plaintiff allegedly sent a second letter on November 22, 2016

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

requesting a rescheduled EUO of Plaintiff to be held on Thursday, December 8, 2016, at 1:30 p.m.

Plaintiff now seeks a declaration that Ackloo is not an eligible insured person entitled to no-fault benefits under the Policy and that Plaintiff is not obligated to reimburse Ackloo for alleged medical treatment, therapy, and/or medical supplies rendered.

ARGUMENT

On October 23, 2017, Plaintiff's counsel appeared before the Court for oral argument on Plaintiff's unopposed motion. Plaintiff's counsel argued that the EUO notices were sent in accordance with requirements of 11 NYCRR 65-3.5 (e). Plaintiff's counsel argued further that Plaintiff has shown the merits of its action by means of its affidavits as to service, the merits, and its usual mailing procedures.

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 the defendants. Plaintiff has also established that the defendants have defaulted in answering and that it complied with the CPLR 3215 (g) notice requirements. 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].) “[The Appellate Division, First Department’s] holding in *Unitrin* applies to EUOs.” (*Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014].) 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].)

In the instant motion, Plaintiff has shown prima facie that Ackloo failed to appear for his scheduled EUOs and that it complied with the procedures and time frames set forth in the no-fault implementing regulations. As such, Plaintiff has submitted sufficient proof of the facts constituting its claim.

CONCLUSION

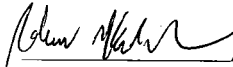
Accordingly, it is

ORDERED that Plaintiff Country-wide Insurance Company's motion pursuant to CPLR 3215 for entry of a default judgment against defendants Rajesh Ackloo, Real Chiropractic Care, PC, Healthy Age Medical, PC, Gamil Kostandy Physician, PC, Yangzi River Acupuncture PC, LN medical Diagnostic, PC, and Nina Kononchuk LCSW is granted without opposition submitted; and it is further

ORDERED and ADJUDGED that on the first cause of action Plaintiff owes no duty to Ackloo or the Medical Providers to pay no-fault claims submitted in relation to the July 17, 2016 loss, Claim No. 000318008 006, Policy No. CS-4524759-16 referenced in the complaint.

The foregoing constitutes the decision, order, and judgment of the Court.

Dated: December 7, 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