

<b>Liberty Mut. Ins. Co. v Mercer</b>
2018 NY Slip Op 31284(U)
June 4, 2018
Supreme Court, New York County
Docket Number: 652949/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon
Justice

PART 42

LIBERTY MUTUAL INSURANCE COMPANY and LIBERTY
MUTUAL FIRE INSURANCE COMPANY

INDEX NO. 652949/2017

- v -

MOTION DATE 11/27/2017

MOTION SEQ. NO. 003

NATASHA MERCER, LARRY FANUS, EVENA JEROME,
21ST CENTURY PHARMACY INC., ACCU REFERENCE
MEDICAL LAB LIMITED LIABILITY COMPANY, ADVANCE
ORTHOPAEDICS & JOINT PRESERVATION P.C.,
ADVANCED CLINICAL LABORATORY SOLUTIONS, INC.,
AMBULATORY SURGICAL CENTER OF ENGLEWOOD,
LLC, ARTHUR AVENUE MEDICAL SERVICES, P.C., AXIAL
CHIROPRACTIC P.C., BARNERT SURGICAL CENTER, LLC,
BIG APPLE MEDICAL SUPPLY, INC., BRONX
CHIROPRACTIC REHABILITATION P.C., BRUCE
JACOBSON, DAMADIAN MRI IN CANARSIE, P.C.,
ELEGANCE REHAB PT P.C., EXPRESS BILLING &
COLLECTION INC., HAMZA PHYSICAL THERAPY PLLC,
HANK ROSS MEDICAL P.C., INTERVENTIONAL PAIN
CONSULTANTS OF NORTH JERSEY LLC d/b/a METRO
PAIN CENTERS, ISLAND AMBULATORY SURGERY
CENTER, L.L.C., JOSEPH BATER, DC, KINGS MEDICAL
PLUS, P.C., LENOX HILL RADIOLOGY & MEDICAL
IMAGING ASSOCIATES, P.C., LONGEVITY MEDICAL
SUPPLY, INC., LR MEDICAL, PLLC, MASTER CHENG
ACUPUNCTURE P.C., MEDICSURG, METRO PHARMACY
INC., ORTHO-MED EQUIP INC., PA MEDICAL SERVICES,
P.C., PFJ MEDICAL CARE P.C., RALPH INNOVATIVE
MEDICAL P.C., and UNITED NYC MEDICAL ASSOCIATES,
LLC

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

The following papers were read on this motion for leave to enter a default judgment:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) —
Exhibits — Memorandum of Law----- No(s). 1

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave
to enter a default judgment against the defendants Natasha Mercer, Larry Fanus, and Evena
Jerome (collectively, the "individual defendants"), as well as the defendants 21st Century
Pharmacy, Inc., Accu Reference Medical Lab Limited Liability Company, Advance Orthopaedics
& Joint Preservation PC, Advanced Clinical Laboratory Solutions, Inc., Ambulatory Surgical
Center of Englewood, LLC, Arthur Avenue Medical Services, P.C., Barnert Surgical Center,
LLC, Big Apple Medical Supply, Inc., Bronx Chiropractic Rehabilitation, P.C., Bruce Jacobson,

Elegance Rehab PT P.C., Express Billing & Collection Inc., Hamza Physical Therapy PLLC, Hank Ross Medical P.C., Interventional Pain Consultants of North Jersey LLC, d/b/a Metro Pain Centers, Island Ambulatory Surgery Center, L.L.C., Joseph Bater, DC, Lenox Hill Radiology & Medical Imaging Associates, P.C., LR Medical, PLLC, Master Cheng Acupuncture P.C., Medicsurg, Metro Pharmacy Inc., Ortho-Med Equip. Inc., and Ralph Innovative Medical P.C. (collectively, the "non-answering provider defendants"), declaring that they are not obligated to pay no-fault benefits to the individual defendants in connection with injuries that they sustained in a motor vehicle accident, or to reimburse the non-answering provider defendants for treatment they rendered or equipment and supplies they provided to the individual defendants for those injuries. The plaintiffs also move to permanently stay any arbitrations or court hearings brought by the individual defendants or the non-answering provider defendants for no-fault benefits stemming from the alleged occurrence involving the individual defendants. No opposition is submitted.

The motion is granted inasmuch as the plaintiffs have provided proof of service of the summons and complaint upon the defendants, proof of the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1<sup>st</sup> Dept 2016]), timely moved for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1<sup>st</sup> Dept 2015]), and satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

As to the facts constituting their claim, the plaintiffs submitted proof to demonstrate, *prima facie*, that they properly denied coverage on the basis that the subject motor vehicle collision in which the individual defendants claimed to have been injured was not accidental but was intentional or staged, and thus not a covered incident under the subject no-fault policy. "An intentional and staged collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance." Matter of Liberty Mut. Ins. Co. v Goddard, 29 AD3d 698, 699 (2<sup>nd</sup> Dept 2006); see Matter of GEICO v Robbins, 15 AD3d 484 (2<sup>nd</sup> Dept. 2005). In their applications for no-fault benefits, the individual defendants alleged, *inter alia*, that they were injured in a motor vehicle accident on March 16, 2016, and that they thereafter obtained medical treatment or medical supplies from the non-answering provider defendants. According to the plaintiffs, the non-answering provider defendants sought payment, as assignees of the individual defendants, for no-fault benefits under insurance policy number AOS22808965470, issued by the plaintiffs to Victor Smith, the owner of the vehicle operated by defendant Fanus, under claim numbers LA000-033525299-02, -03, and -09. See Insurance Law 5106(a); 11 NYCRR 65-1.1. Each of the individual defendants timely appeared for and submitted to an examination under oath (EUO).

As proof of the facts constituting their claim, the plaintiffs submissions include the affidavits of their Claims Team Manager in their Special Investigations Unit, Michael Schwarcz, and of their Claims Department Team Manager, Dennis Dehler, as well as the transcripts of the individual defendants' EUOs, and the denials of claim issued by the plaintiffs. The plaintiffs' submissions are sufficient to demonstrate the *prima facie* validity of the uncontested cause of

action (see Joosten v Gale, 129 AD2d 531, 535 [1<sup>st</sup> Dept 1987]), which establishes that the individual plaintiffs could not have sustained injuries as serious as those claimed by the individual defendants as a result of the minor collision, that alleged collision was likely intentionally caused by the individual defendants, and that no-fault coverage was thereby vitiated. See Matter of Travelers Indem. Co. v Cruz, 40 AD3d 362 (1<sup>st</sup> Dept. 2007); Progressive Advanced Ins. Co. v McAdam, 139 AD3d 191 (2<sup>nd</sup> Dept. 2016).

More specifically, the affidavit of Michael Schwarcz and the annexed EUO transcripts show that (a) each of the individual plaintiffs declined medical care at the scene of the accident, only to begin seeking very significant medical treatment a few days after the accident, and ultimately seeking treatment resulting \$309,279.85 in medical bills, although none of such treatment included any surgical procedure; (b) the individual defendants contradicted one another and gave inconsistent responses when asked about their relationships with one another and with the policyholder, the events surrounding the collision, and the seating arrangements of the parties at the time of the accident; and (c) neither Jerome nor Fanus knew what type/kind of vehicle they were in and Jerome did not know the color of the car. See DSD Acupuncture, P.C. v Met Life Auto & Home, 49 Misc 3d 153(A) (App Term, 2<sup>nd</sup> Dept. 2<sup>nd</sup> & 11th Jud. Dists. 2015); 21<sup>st</sup> Century Ins. Co. v Peebles, 2015 NY Slip Op 31695(U), 2015 N.Y. Misc. LEXIS 3255 (Sup Ct, NY County 2015); cf. Nationwide Gen. Ins. Co. v Bates, 130 AD3d 795 (2<sup>nd</sup> Dept. 2015). Moreover, having failed to answer or oppose this motion, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

The court notes that pursuant to a stipulation dated November 9, 2017, the plaintiffs discontinued this action as against the non-answering provider defendants Advance Orthopaedics & Joint Preservation PC and Ortho-Med Equip. Inc. As such, the instant motion is deemed withdrawn as against those defendants.

The court further notes that this action was discontinued prior to the filing of this motion as against defendants PFJ Medical Care P.C. and United NYC Medical Associates, LLC, that defendants Longevity Medical Supply, Inc. and Avial Chiropractic, P.C., have filed answers and counterclaims, and that defendants Kings Medical Plus, P.C., Longevity Medical Supply, Inc., and PA Medical Services, P.C. have filed motions to dismiss currently pending before this court. This judgment does not apply to those defendants.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment is deemed withdrawn as against Advance Orthopaedics & Joint Preservation PC and Ortho-Med Equip. Inc., and that the motion is granted as modified; and it is further,

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the to the defendants Natasha Mercer, Larry Fanus, and Evena Jerome (the "individual

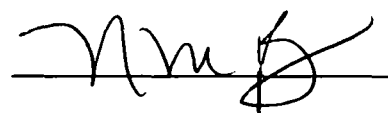
defendants") in connection with claims made under insurance policy number AOS22808965470, claim numbers LA000-033525299-02, -03, and -09 for injuries that they sustained in a motor vehicle accident on March 16, 2016, or to reimburse the defendants 21st Century Pharmacy, Inc., Accu Reference Medical Lab Limited Liability Company, Advanced Clinical Laboratory Solutions, Inc., Ambulatory Surgical Center of Englewood, LLC, Arthur Avenue Medical Services, P.C., Barnert Surgical Center, LLC, Big Apple Medical Supply, Inc., Bronx Chiropractic Rehabilitation, P.C., Bruce Jacobson, Elegance Rehab PT P.C., Express Billing & Collection Inc., Hamza Physical Therapy PLLC, Hank Ross Medical P.C., Interventional Pain Consultants of North Jersey LLC, d/b/a Metro Pain Centers, Island Ambulatory Surgery Center, L.L.C., Joseph Bater, DC, Lenox Hill Radiology & Medical Imaging Associates, P.C., LR Medical, PLLC, Master Cheng Acupuncture P.C., Medicsurg, Metro Pharmacy Inc., or Ralph Innovative Medical P.C. (the "non-answering provider defendants") for treatment they rendered or equipment and supplies they provided to the individual defendants for those injuries; and it is further,

ADJUDGED AND DECLARED that all actions, proceedings or arbitrations commenced by the individual defendants or the non-answering provider defendants arising from injuries alleged to have been sustained by the individual defendants as a result of the March 16, 2016 accident are permanently stayed, and that the individual defendants and the non-answering provider defendants are enjoined from commencing any such further actions, proceedings or arbitrations; and it is further,

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order.

This constitutes the Decision, Order, and Judgment of the court.

**Dated: June 4, 2018**

 , JSC

**HON. NANCY M. BANNON**

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER