

Country-Wide Ins. Co. v Cheney

2018 NY Slip Op 31403(U)

June 26, 2018

Supreme Court, New York County

Docket Number: 158375/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 158375/2017

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ENOCK CHENEY, KINGSBROOK JEWISH MEDICAL CENTER,
ROCKAWAY PARK MEDICAL, P.C., SILVER NEEDLE
ACUPUNCTURE, P.C., JC CHIROPRACTIC PLLC, OM PHYSICAL
THERAPY PLLC, RADADVANTAGE, A PROFESSIONAL
CORPORATION, SAGE MEDICAL, P.C., LUBOV KLIMOVA M.D.,
NEW YORK MEDICAL & DIAGNOSTIC CARE P.C.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for

DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this breach of contract action, plaintiff Country-Wide Insurance Company (“Country-Wide”) moves, pursuant to CPLR 3215, for a default judgment against defendant Enock Cheney (“Cheney”) and his medical providers (“Medical Provider Defendants”). After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is denied with leave to renew upon proper papers.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Cheney was allegedly injured on June 7, 2016, when he was struck by a motor vehicle insured by Country-Wide. Doc. 16.¹ Following the accident, Cheney sought medical

¹ All references are to the documents filed with NYSCEF in this matter.

treatment from the Medical Provider Defendants, to whom he assigned his right to collect no-fault benefits. Docs. 16, 18, 27. Cheney filed an NF-2 form claiming no-fault benefits under policy number 01 ES 7908907 15. Docs. 19, 26. The NF-2 form was stamped as received by Country-Wide on July 1, 2016. Doc. 19. On August 19, 2016, Country-Wide requested Cheney to appear for an examination under oath (“EUO”) to be held on September 15, 2016, to verify his claim as well as the circumstances surrounding the accident. Doc. 14. However, Cheney failed to appear for the EUO on that date. Docs. 14, 21. Country-Wide rescheduled the EUO for October 10, 2016. Doc. 16. Again, Cheney failed to appear. Docs. 16, 22, 23. According to Country-Wide, pursuant to 11 NYCRR §§ 65-1.1 and 65-3.5(e), attending the requested EUOs was a condition precedent to coverage with which Cheney did not comply. Doc. 14.

On September 13, 2017, Country-Wide commenced this declaratory judgment action against Cheney and the Medical Provider Defendants by filing a summons and verified complaint alleging that it was not required to provide coverage due to Cheney missing his scheduled EUOs. Doc. 16. Process was properly served on all the Medical Provider Defendants on October 6, 2017, via the Secretary of State and on Cheney on October 9, 2017. Docs. 17, 18. Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against all defendants. The motion is unopposed.

LEGAL CONCLUSIONS

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.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins.*

Co. v. RJNJ Servs. Inc., 89 AD3d 649, 651 (2d Dept. 2011). Proof of the facts constituting the claim may be provided by the plaintiff's affidavit or by a verified complaint. *See* CPLR 3215(f).

Counsel for plaintiff has submitted affidavits of service establishing that the summons and complaint were properly served on defendant Cheney at his last known address. Docs. 14, 17. The affidavits also establish that the Medical Provider Defendants were properly served via the Secretary of State, and that they were mailed additional copies of the summons and complaint pursuant to CPLR 3215(g). Doc. 17. Moreover, in an affirmation in support of the motion, plaintiff has shown that none of the defendants have answered or have otherwise appeared in this matter. Doc. 14.

Although Country-Wide has proved that process was properly served on all defendants and that none of the defendants have answered or appeared in this matter, the Court nevertheless denies Country-Wide's motion for a default judgment in its favor because it failed to establish the facts constituting the claim. *See* CPLR 3215(f). Plaintiff has failed to demonstrate that it timely scheduled Cheney's initial EUO within fifteen days after it received the NF-2 form, which is a requirement set forth in 11 NYCRR § 65-3.5(b). *See Hertz Vehs, LLC v. Significant Care, PT, P.C.*, 157 AD3d 600, 601 (1st Dept. 2018); *American Tr. Ins. Co. v. Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept. 2015); *Natl. Liab. & Fire Ins. Co. v. Tam Med. Supply Corp. et al.*, 131 A.D.3d 851 (1st Dept. 2015).

Here, a time stamp on the NF-2 form reflects that Country-Wide received Cheney's NF-2 on July 1, 2016. Doc. 19. However, Country-Wide, which also fails to provide a date on its NF-10 to Cheney, did not request Cheney to attend an EUO until August 19, 2016. Thus, Country-Wide did not comply with 11 NYCRR § 65-3.5(b)'s requirement that the EUO notice be sent within fifteen days. Additionally, although Country-Wide submits affidavits of its employees in support

of the motion, neither employee makes any representation as to whether Country-Wide received the NF-2 form on July 1, 2016. Thus, this Court has no reason to conclude that the NF-2 form was not received on that date. Further, "the moving papers do not include a copy of the Policy, without which Plaintiff cannot proof (sic) that [Cheney] was even required to attend an EUO as a condition to coverage" *Country-Wide Ins. Co. v. Thompson*, 2017 N.Y. Misc LEXIS 3175*, 2017 NY Slip Op 31777[U], *5 (Sup Ct, NY County 2017).


Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for default judgment against Cheney and the Medical Provider Defendants is denied with leave to renew upon proper papers, and it is further

ORDERED that Country-Wide is to serve a copy of this order, with notice of entry, on all parties within twenty days hereof; and it is further

ORDERED that this constitutes the decision and order of this Court.

6/26/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE