

**Ace Am. Ins. Co. v Lapaix**

2018 NY Slip Op 32257(U)

September 12, 2018

Supreme Court, New York County

Docket Number: 652097/2017

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM**

*Justice*

-----X	INDEX NO.	<u>652097/2017</u>
ACE AMERICAN INSURANCE COMPANY,	MOTION DATE	<u>01/31/2018</u>
Plaintiff,	MOTION SEQ. NO.	<u>001</u>

- v -

MYRLINE LAPAIX, JACQUES AUGUSTIN, RAMEEK DAVIS, AB  
QUALITY HEALTH SUPPLY CORP, ACH CHIROPRACTIC, P.C.,  
THE BROOKDALE HOSPITAL MEDICAL CENTER, CHARLES  
DENG ACUPUNCTURE, P.C., ENERGY CHIROPRACTIC, P.C.,  
FJL MEDICAL SERVICES P.C., JFL MEDICAL CARE P.C.,  
KSENIA PAVLOVA D.O., MSB PHYSICAL THERAPY, P.C.,  
QUALITY CUSTOM MEDICAL SUPPLY, INC., READY MEDICAL  
SERVE, P.C., and WILLIAM L. KING M.D., P.C.

**DECISION, ORDER, AND  
JUDGMENT**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9,  
10, 11, 12, 13, 14, 16, 17, 18, 20

were read on this motion to/for JUDGMENT - DECLARATORY

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Jacques Augustin and Rameek Davis, as well as the defendants AB Quality Health Supply Corp, Ach Chiropractic, P.C., The Brookdale Hospital Medical Center, Charles Deng Acupuncture, P.C., Energy Chiropractic, P.C., FJL Medical Services, P.C., JFL Medical Care, P.C., Ksenia Pavlova, D.O., MSB Physical Therapy, P.C., and Quality Custom Medical Supply, Inc. (collectively, the "non-answering provider defendants"), declaring that it is not obligated to pay no-fault benefits to Augustin and Davis 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 defaulting defendants to recover no-fault benefits stemming from the alleged occurrence involving the Augustin, Davis, and the defendant Myrline Lapaix. No opposition is submitted. The motion is granted.

Augustin, Davis, and the defendant Myrline Lapaix (collectively, the individual defendants) allege that they were injured in a motor vehicle accident on October 19, 2016, involving a motor vehicle owned by Hertz Vehicles, LLC, and insured by the plaintiff, and that they thereafter obtained medical treatment or equipment and supplies from the non-answering provider defendants. Augustin and Davis submitted claims for no-fault benefits to the plaintiff dated October 20, 2016. Although the plaintiff's submissions do not indicate when Augustin's and Davis's NF-2 no fault claim forms were received, the plaintiff sent requests for examinations under oath (EUOs) of Augustin and Davis dated December 20, 2016. Augustin and Davis failed

to appear for their scheduled EUOs on two occasions. The non-answering provider defendants allegedly sought payment, as assignees of Augustin and Davis, for treatment or equipment and supplies provided to Augustin and Davis, under claim number 8B-564953411760, and the plaintiff denied those claims. The plaintiff avers that by failing to appear for their EUOs, Augustin and Davis breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1<sup>st</sup> Dept. 2017); Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1<sup>st</sup> Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1<sup>st</sup> Dept. 2014). The plaintiff further asserts that it properly requested EUOs and subsequently denied coverage because it had evidence that the subject motor vehicle collision in which Augustin and Davis claimed to have been injured was not accidental, but rather was intentional or staged, and thus not a covered incident under the subject no-fault policy.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1<sup>st</sup> Dept 2016]), timely move 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 satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

In support of its motion, the plaintiff submits the complaint, an attorney's affirmation, the relevant police accident report, an affidavit from one of its claims adjusters, an affidavit of the legal assistant who mailed the EUO notices, the transcripts of the EUOs of Augustin and Davis indicating that they failed to appear, and the affidavits of service referable to service of process upon Augustin, Davis, and the non-answering provider defendants. It also submits copies of the NF-2 claim forms submitted by Augustin and Davis and the requests for EUOs that it sent to them.

The plaintiff's submissions, however, fail to demonstrate when it received NF-2 claim forms from Augustin or Davis. Hence, the plaintiff fails to show that, within 15 business days after its receipt of any particular NF-2 form, it timely mailed notices for EUOs to Augustin and Davis, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., *supra*; National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131

AD3d 851, 851 (1<sup>st</sup> Dept 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441, 441 (1<sup>st</sup> Dept 2015). Rather, the proof demonstrates only that the plaintiff received NF-2 forms dated October 20, 2017, from Augustin and Davis on unspecified dates, and first mailed EUO notices to them on December 20, 2017. Thus, the plaintiff fails to demonstrate, prima facie, that Augustin and Davis breached a condition precedent to the effectiveness of no-fault insurance coverage, or that coverage was thereby vitiated. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., supra; Hertz Corp. v Active Care Med. Supply Corp., supra; Allstate Ins. Co. v Pierre, 123 AD3d 618, supra.

As to the plaintiff's second argument that it properly denied coverage on the basis that the subject motor vehicle collision was intentional or staged, it is true that "[a]n 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). The plaintiff's submissions, which include an affidavit of the claims adjuster who personally investigated claim number 8B-564953411760, establish that the individual defendants 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). Specifically, the plaintiff's submissions show that (a) in spite of the individual defendants receiving over \$72,000.00 in medical treating for injuries allegedly arising from the collision, the damage to the individual defendants' vehicle was minor and the vehicle was drivable after the collision, requiring only minor repair (b) Davis was not listed on the police report as a person injured in the subject accident, (c) the accident involved a "phantom" vehicle, and (d) the individual defendants received excessive and mirror treatment from the same medical facilities. 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, Augustin, Davis, and the non-answering provider 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 October 25, 2017, the plaintiff withdrew the instant motion as against the non-answering provider defendants AB Quality Health Supply, Corp, Ach Chiropractic, P.C., Charles Deng Acupuncture, P.C., Energy Chiropractic, P.C., FJL Medical Services, P.C., JFL Medical Care, P.C., Ksenia Pavlova, D.O., and MSB Physical Therapy, P.C. Accordingly, the instant motion is deemed withdrawn as against those defendants.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment is deemed withdrawn as against AB Quality Health Supply, Corp, Ach Chiropractic, P.C., Charles Deng Acupuncture, P.C., Energy Chiropractic, P.C., FJL Medical Services, P.C., JFL Medical Care, P.C., Ksenia Pavlova, D.O., and MSB Physical Therapy, P.C., and that the motion is otherwise granted as modified; and it is further,

ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to the to the defendants Jacques Augustin and Rameek Davis in connection with claims made under claim number 8B-564953411760 for injuries that they sustained in a motor vehicle accident on October 19, 2016, or to reimburse the defendants The Brookdale Hospital Medical Center and Quality Custom Medical Supply, Inc. (the "non-answering provider defendants") for treatment they rendered or equipment and supplies they provided to Augustin and Davis for those injuries; and it is further,

ADJUDGED AND DECLARED that all actions, proceedings or arbitrations commenced by the Augustin, Davis, or the non-answering provider defendants arising from injuries alleged to have been sustained by the individual defendants as a result of the October 19, 2016 accident are permanently stayed, and that Augustin, Davis, and the non-answering provider defendants are enjoined from commencing any such further actions, proceedings or arbitrations; and it is further,

ORDERED that the plaintiff 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.

9/12/2018  
DATE

  
NANCY M. BANNON, J.S.C.

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