

Hereford Ins. Co. v Bon Acupuncture & Herbs, P.C.
2018 NY Slip Op 32445(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 155884/2017
Judge: Kathryn E. Freed
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IAS MOTION 2

155884/2017

MOTION SEQ. NO.

001

DECISION AND ORDER

were read on this motion to/for

JUDGMENT - DEFAULT

1 of 7

INTEGRATED PAIN MANAGEMENT, PLLC, (“the medical provider defendants”) and individual claimant defendants WEI GAO, and JIE FENG (collectively “the defaulting defendants”) due to their failure to answer the complaint. After a review of plaintiff’s papers and the relevant statutes and case law, plaintiff’s motion, which is unopposed, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

In this declaratory judgment action, Hereford seeks a judgment declaring that it has no obligation to pay defendants’ claims for No-Fault benefits because said defendants breached a condition precedent to coverage pursuant to the relevant policy of insurance. Doc. 1.¹

This action was commenced by the filing of a summons and verified complaint on June 28, 2017. Doc. 1. In its complaint, Hereford alleged that, on August 28, 2016, GAO and FENG, the alleged injured parties, were passengers in a motor vehicle which was involved in an accident. Doc. 1, at par.17. As a result of the accident, GAO and FENG made claims (under claim number 62609-02) to Hereford for no-fault benefits pursuant to a policy number CA257767, issued by Hereford to GAO. The individual defendants sought medical treatment from the medical provider defendants and assigned their rights to recover no-fault benefits from Hereford to the said providers.

Because the accident gave rise to numerous questions and inconsistencies, Hereford demanded that both GAO and FENG appear for examinations under oath (“EUOs”). These unclear issues included, inter alia, that FENG was not mentioned as a passenger in the police report (Doc.23); that GAO did not mention her as being a passenger; there was minimal damage to the

¹Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this action.

insured vehicle, which was driven away from the scene of the accident; and no one sought medical attention or required an ambulance at the time of the accident.

Both GAO and FENG appeared for their EUOs, but both gave inaccurate, conflicting and inconsistent answers. Doc.1, at pars. 25 and 26. Additionally, neither claimant returned a subscribed copy of the transcript of their EUO, which is also a violation of a condition precedent under the no-fault laws of New York. Hereford, upon investigating the claims, and based on the above inconsistencies, felt that the facts gave rise to a founded belief that both claimants had made material misrepresentations in their testimony. Hereford pointed out, inter alia, that the car sustained no damage and that the driver of the said vehicle testified under oath that the accident was very mild and that no one was injured. He further failed to place FENG in the car. Finally, although FENG testified that she was in the front passenger seat, the vehicle was a livery vehicle. Pursuant to the foregoing facts, plaintiff denied all claims under the policy. See Docs. 44 and 45.

Hereford further alleged that the policy it issued contained the "New York Mandatory Personal Injury Protection Endorsement" of the No-Fault regulations, which provide No-Fault benefits pursuant to certain conditions and terms. Such conditions prohibit any action against a No-Fault insurer, such as Hereford, unless, as a condition precedent thereto, there was full compliance with the terms of the coverage.

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." *See Atlantic Cas. Ins. Co. v. RJNJ Servs. Inc.*, 89 A.D.3d 649, 651 (2d Dept. 2011). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 63 (2003).

Hereford's application for a default judgment on the complaint is granted. The summons and complaint were duly served on all defendants herein, with follow-up mailings thereafter. Additional copies of the summons and complaint were served on the medical provider defendants pursuant to CPLR 3215(g). Doc. 27. According to the affirmation (Doc. 20) of Hereford's attorney, Kyeko M. Stewart, Esq., an associate of the law firm Rubin, Fiorella & Friedman, LLP., in support of the motion, defendants failed to answer or appear in this matter and are now in default. Hereford filed the instant motion for default on March 28, 2018 (Doc. 19) and defendants failed to oppose the same.

Hereford has also set forth the facts constituting the claim. "The No-Fault Regulations provide that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage." *Hertz Vehicles, LLC v Delta Diagnostic Radiology, P.C.*, 2015 WL 708610, 2015 NY Slip Op 30242(U), *3 (Sup Ct, NY County, Feb. 18, 2015, No. 158504/12) (Rakower, J.). In particular, 11 NYCRR 65-1.1 states that "[n]o action shall lie against [a No-Fault insurer] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." The Regulation at 11 NYCRR 65-1.1 also mandates that: "Upon request by the Company, the eligible injured person or that person's assignee or representative shall: . . . (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same."

In *Hertz Vehicles, supra*, this Court further stated, inter alia, that:

The failure to appear for a scheduled [EUO] is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dep't 2011]; *Hertz Corp. v. V.S. Care Acupuncture, P. C.*, 2013 NY Slip Op 30895(U), *3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A), *1 [N.Y. App. Term 2012]. Accordingly, when the claimants or the assignors fail to appear for the requested exams, "the . . . insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the 30 day period . . . Since the contract has been vitiated, [the insurer] may deny all the claims retroactively to the date of loss." See *LK Health Care Prods. Inc. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1230(A), *5 [N.Y. Civ. Ct. 2013].

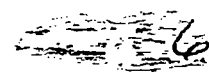
Id., *3; see also *Hertz Vehicles, LLC v New Utrecht Servs., Inc.*, 2014 WL 5426997, 2014 NY Slip Op 32767(U), *2-3 (Sup Ct, NY County, Oct. 27, 2014, No. 151559/12).

Hereford has demonstrated its entitlement to a default judgment by submitting its summons and complaint, the affirmation of its attorney, and proof of the failure of the individual defendants GAO and FENG to provide a subscribed copy of their EUOs, despite being asked to do so in letters to them and their attorney (Doc.26), thereby breaching a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. Additionally, given that the EUO testimony led Hereford to have a founded belief that the alleged accident was not a covered event within the meaning of the policy, Hereford also met its prima facie entitlement to a judgment upon default declaring that defendants are not entitled to No-Fault coverage for the subject claims. Given the breach of this condition precedent, as well as Hereford's founded belief that the incident did not occur as alleged, neither the defendant individual claimants nor the medical provider defendants are entitled to coverage under the Hereford policy. Additionally, Hereford is entitled to a permanent stay of any arbitration, lawsuit, or claim relating to the subject claims.

Therefore, in light of the foregoing, it is hereby:

ORDERED, DECLARED AND ADJUDGED that the motion by plaintiff Hereford Insurance Company seeking a default judgment against defendants BON ACUPUNCTURE & HERBS, P.C., SAM CHANG, D.C., JONATHAN WANG, NEW YORK SPINE & PAIN CARE, P.C., NOVEL MEDICAL DIAGNOSTICS, P.C., DAVID HONG D.C., P.C., ADVANCED RECOVERY EQUIPMENT AND SUPPLIES, LLC, PARK WEST SURGICAL GROUP LLC D/B/A PARK WEST MEDICAL GROUP, NORTHEAST ANESTHESIA AND PAIN MANAGEMENT, LLC, CTO MANAGEMENT, LLC D/B/A HEALTH EAST AMBULATORY SURGICAL CENTER, ALLIANCE MEDICAL GOODS SERVICES LIMITED LIABILITY COMPANY, CENTRAL RADIOLOGY, P.C., INTEGRATED PAIN MANAGEMENT, PLLC., WEI GAO, and JIE FENG is granted; and it is further,

ORDERED, DECLARED AND ADJUDGED that plaintiff Hereford Insurance Company is not obligated to provide No-Fault coverage to defendants BON ACUPUNCTURE & HERBS, P.C., SAM CHANG, D.C., JONATHAN WANG, NEW YORK SPINE & PAIN CARE, P.C., NOVEL MEDICAL DIAGNOSTICS, P.C., DAVID HONG D.C., P.C., ADVANCED RECOVERY EQUIPMENT AND SUPPLIES, LLC, PARK WEST SURGICAL GROUP LLC D/B/A PARK WEST MEDICAL GROUP, NORTHEAST ANESTHESIA AND PAIN MANAGEMENT, LLC, CTO MANAGEMENT, LLC D/B/A HEALTH EAST AMBULATORY SURGICAL CENTER, ALLIANCE MEDICAL GOODS SERVICES LIMITED LIABILITY COMPANY, CENTRAL RADIOLOGY, P.C., INTEGRATED PAIN MANAGEMENT, PLLC,



WEI GAO, and JIE FENG for the No-Fault claims submitted to Hereford Insurance Company pursuant to policy number CA257767 and claim number 62609-02; and it is further,

ORDERED, DECLARED AND ADJUDGED that plaintiff Hereford Insurance Company is granted a permanent stay of any arbitration, lawsuit, or claim relating to the subject claims;

ORDERED that plaintiff Hereford Insurance Company is to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED the Clerk is directed to enter judgment accordingly; and it is further,

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

<u>9/28/2018</u>			
DATE		KATHRYN E. FREED, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART ☐ OTHER	
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT ☐ REFERENCE	