

Country-Wide Ins. Co. v Andrew
2018 NY Slip Op 32513(U)
October 4, 2018
Supreme Court, New York County
Docket Number: 155614/2017
Judge: Melissa A. Crane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

Index No.
155614/2017

**DECISION
and ORDER**

Mot. Seq. 001
and 002

LLOYD M. ANDREW
("Eligible Injured Party Defendant"), and

LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C.,
HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C.,
PATCHOGUE OPEN MRI P.C., D/B/A SOUTHWEST RADIOLOGY,
NEW HORIZON SURGICAL CENTER, LLC,
LA CHIROPRACTIC, P.C.,
HORIZON ANESTHESIA GROUP, P.C.,
NJ PAIN SOLUTIONS, P.C.,
ABO PHARMACY CORP.,
PARK AVENUE ORTHOPAEDICS, P.C.,
ORTHOCARETECH INC
NY ORTHOPEDICS, P.C.,
SUN CHIROPRACTIC SERVICES, P.C.,
A.L.E CHIROPRACTIC, P.C.,
BLUELIGHT ACUPUNCTURE, P.C.,
LDU THERAPY, INC,
ST. SEBESTIAN MEDICAL, P.C.,
METROPOLITAN INTERVENTIONAL MEDICAL SERVICES, P.C.,
AVA CUSTOM SUPPLY, INC,
YONG QUAN ACUPUNCTURE, P.C.,
GW ACUPUNCTURE SERVICES, P.C., and
POTECHMED, INC,
("Medical Provider Defendants")
Defendants.

-----X
HON. MELISSA A. CRANE, J.S.C.

This case arises from an automobile accident that occurred on September 10, 2016, that allegedly involved individual defendant Lloyd M. Andrew ("Andrew"). Andrew then assigned the rights to collect no-fault benefits to co-defendants under insurance policy CS 4097631-15.

Andrew allegedly sustained serious bodily injuries because of the collision. On June 20, 2017, plaintiff commenced an action seeking a declaratory judgment against the assignor and numerous medical provider co-defendants.

Defendant Lenox Hill Radiology and Medical Imaging Associates, P.C. filed their answer on August 21, 2017 (*see* NYSCEF doc no 25). Plaintiff discontinued this action as to defendants LDU Therapy, Inc. and Protechmed, Inc. (*see* NYSCEF doc no 27).

Plaintiff now moves for default judgment pursuant to CPLR 3215 against individual defendant Lloyd M. Andrew. In response, Andrew opposed the motion and filed an answer. Plaintiff argues in their reply papers that the court should hold Andrew in default because he filed his answer late, on March 26, 2018, and failed to contact plaintiff to extend his time to answer. It is undisputed that Andrew served an answer nine months late. In addition, defendant Andrew did not provide a reasonable excuse for the delay. Nor does he attempt to describe a meritorious defense. Therefore, the court grants plaintiff's motion for default as to Lloyd M. Andrew.

Plaintiff also moves for default judgment pursuant to CPLR 3215 against the following non-answering defendants: Haar Orthopedics & Sports Medicine, P.C., Patchogue Open MRI, P.C., d/b/a Southwest Radiology, New Horizons Surgical Center, LLC., LA Chiropractic, P.C., Horizon Anesthesia Group, P.C., NJ Pain Solutions, P.C., ABO Pharmacy Corp., Park Avenue Orthopedics, P.C., Orthocaretech, Inc., NY Orthopedics, P.C., Sun Chiropractic Services, P.C., A.L.E. Chiropractic, P.C., Bluelight Acupuncture., P.C., St. Sebastian Medical, P.C., Metropolitan Interventional Medical Services, P.C., AVA Custom Supply, Inc., Yong Quan Acupuncture, P.C., GW Acupuncture Services, P.C., (the "non-answering defendants") for their failure to answer the summons and complaint. Plaintiff has submitted proof of service of the

summons and complaint, proof of the facts constituting the claim, and proof of defendants' failure to answer or appear in this action (*see* CPLR 3215[f]). The non-answering defendants have not opposed plaintiff's default motion and did not appear for oral argument on June 25, 2018. Therefore, the court grants plaintiff's default motion as to those defendants.

Plaintiff also moves for summary judgment against defendant Lenox Hill Radiology and Medical Imaging Associates, P.C. based on the defendant Lloyd M. Andrew's failure to appear for Examinations Under Oath ("EUOs"). Defendant Lenox Hill did not file opposition to plaintiff's motion. Defendant also did not appear for oral argument on June 25, 2018.

Plaintiff asserts in its attorney affirmation, that they requested an EUO because the police report indicated no injuries and no tows. Andrew did not seek emergency room treatment after the alleged incident and did not refuse medical treatment at the scene. Andrew also sought follow-up treatment at St Sebastian Medical, P.C., rather than his primary physician. Plaintiff wanted to question defendant Andrew about why he needed to receive multiple specialty treatments and how Andrew chose those providers.

Plaintiff submits: (1) an affidavit from Jessica Mena-Sibrian, No-Fault Litigation/Arbitration Supervisor at Country-Wide Insurance Company, who handled the no-fault claims in this case and attests to Country-Wide's policy and procedures for the generation, issuance, and mailing denials of no-fault claims; (2) an affidavit from Annie Persuad f/k/a Fatima Zuhra, EUO Clerk at Country-Wide Insurance Company, who attests to the timely and proper mailing of the EUO scheduling letters to defendant Lloyd M. Andrew; and (3) EUO transcripts from plaintiff's attorneys, who attest to the non-appearance of Lloyd M. Andrew on December 7, 2016, December 22, 2016, January 26, 2017, and February 10, 2017.

A summary judgment movant carries the initial burden of tendering sufficient, admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once a movant meets its initial burden, the burden then shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The failure to appear for a scheduled examination under oath 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 AD3d 559, 560 [1st Dept 2011]). Although the instant case involves the failure to appear at EUOs, and not Independent Medical Examinations (“IMEs”), the court’s holding in *Unitrin* applies to EUOs (see, *Seacoast Med., PC v. Praetorian Ins. Co.*, 38 Misc3d 127 [App. Term, 1st Dept 2012]). “The failure to comply with the provision of an insurance policy requiring the insured to submit to an examination under oath ... is a material breach of the policy, precluding recovery of the policy proceeds” (see *Argento v. Aetna Casualty & Surety Co.*, 184 AD2d 487, 487–488 [2nd Dept 1992]).

Plaintiff has demonstrated *prima facie* entitlement to summary judgment against defendant Lenox Hill, who did not oppose plaintiff’s motion or appear for oral argument on June 25, 2018. Annie Persaud f/k/a Fatima Zuhra’s affidavit. establishes timely and properly mailing of the EUO notices. The EUO transcripts from plaintiff’s attorneys establish that defendant Andrew failed to appear for his EUO on December 7, 2016, December 22, 2016, January 26, 2017, and February 10, 2017 (see *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2nd Dept 2006]).

Further, having failed to object to defendant's EUO requests, defendant cannot now challenge the propriety of those requests (*see generally, Crescent Radiology, PLLC v Am. Tr. Ins. Co.*, 31 Misc 3d 134(A) at *2 [App Term 2011] [plaintiff who ignored EUO request "will not be heard to complain that there was no reasonable basis for the EUO request"]; *see also, Westchester County Med. Ctr. v New York Cent. Mut. Fire Ins. Co.*, 262 AD2d 553, 555 [2d Dept 1999] [failure by plaintiff to object to verification requests "should have been addressed by further communication, not inaction..."]). That plaintiff incorrectly addressed the first and fourth EUO request to defendant's attorney is inconsequential. Those requests were properly addressed to defendant Andrew. Further, plaintiff properly mailed the second and third letter to the individual defendant's attorney.

Accordingly, it is,

ORDERED that the court grants plaintiff's default motion for default judgment as to defendant Lloyd M. Andrew; and it is further

ORDERED that the court grants plaintiff's motion for default judgment, without opposition, against defendants Haar Orthopedics & Sports Medicine, P.C., Patchogue Open MRI, P.C., d/b/a Southwest Radiology, New Horizons Surgical Center, LLC., LA Chiropractic, P.C., Horizon Anesthesia Group, P.C., NJ Pain Solutions, P.C., ABO Pharmacy Corp., Park Avenue Orthopedics, P.C., Orthocaretech, Inc., NY Orthopedics, P.C., Sun Chiropractic Services, P.C., A.L.E. Chiropractic, P.C., Bluelight Acupuncture., P.C., St. Sebastian Medical, P.C., Metropolitan Interventional Medical Services, P.C., AVA Custom Supply, Inc., Yong Quan Acupuncture, P.C., GW Acupuncture Services, P.C.,

ORDERED that the court grants plaintiff's motion for summary judgment, without opposition, against defendant Lenox Hill Radiology and Medical Imaging Associates, P.C.; and it is further

ADJUDGED AND DECLARED that defendants Lloyd M. Andrew, Lenox Hill Radiology and Medical Imaging Associates, P.C., Haar Orthopedics & Sports Medicine, P.C., Patchogue Open MRI, P.C., d/b/a Southwest Radiology, New Horizons Surgical Center, LLC., LA Chiropractic, P.C., Horizon Anesthesia Group, P.C., NJ Pain Solutions, P.C., ABO Pharmacy Corp., Park Avenue Orthopedics, P.C., Orthocaretech, Inc., NY Orthopedics, P.C., Sun Chiropractic Services, P.C., A.L.E. Chiropractic, P.C., Bluelight Acupuncture., P.C., St. Sebastian Medical, P.C., Metropolitan Interventional Medical Services, P.C., AVA Custom Supply, Inc., Yong Quan Acupuncture, P.C., GW Acupuncture Services, P.C., are not entitled to no-fault coverage for the motor vehicle accident that occurred on September 10, 2016, involving individual defendant Lloyd M. Andrew, for claims submitted under insurance policy CS 4097631-15, as referenced in the complaint, and plaintiff Country-Wide Insurance Company is under no obligation to pay the no-fault claims filed by Lloyd M. Andrew and the above defendants, in connection with the September 10, 2016 accident at issue.

DATED: 10-4, 2018
New York, New York

ENTER:


MELISSA A. CRANE, J.S.C

HON. MELISSA A. CRANE
J.S.C.