

Country-Wide Ins. Co. v Pimentel

2019 NY Slip Op 31157(U)

April 23, 2019

Supreme Court, New York County

Docket Number: 651224/2018

Judge: Joel M. Cohen

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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. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

ONASIS PIMENTEL, ALL COUNTY, LLC, WELLNESS PLAZA
ACUPUNCTURE P.C., GARA MEDICAL CARE, P.C., TOP Q INC,
SKY OF NY 1, INC., PARAMOUNT MEDICAL SERVICES, P.C., B
AND H PHARMACY D/B/A CHELSEA MOBILITY, PARKSIDE
CHIROPRACTIC, P.C., WISE REHAB P.T. P.C., ELLNER PLAZA II
CORP. D/B/A MAIN PHARMACY, WELCOME CHIROPRACTIC,
P.C., ACTIVE RANGE P.T. P.C.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 59

were read on this motion to/for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents:

Plaintiff Country-Wide Insurance Company seeks a default judgment in its declaratory judgment action against Defendants Onasis Pimentel, All County, LLC, Gara Medical Care, P.C., Top Q Inc., Sky of NY 1, Inc., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Wise Rehab P.T. P.C., and Ellner Plaza II Corp. d/b/a Main Pharmacy (“Non-Answering Defendants”), and summary judgment in the same declaratory judgment action against Wellness Plaza Acupuncture P.C., Parkside Chiropractic, P.C., Welcome Chiropractic, P.C., and Active Range P.T. P.C. (“Answering Defendants”).

Plaintiff filed its summons and complaint with the Court on March 14, 2018 and served all Defendants by April 5, 2018. (NYSCEF 1-13). The Answering Defendants filed answers to

DECISION AND ORDER

the complaint on May 4, 2018. (NYSCEF 18). Plaintiff filed for summary judgment against the Answering Defendants on November 7, 2018. (NYSCEF 39-57). The Non-Answering Defendants have failed to appear, answer or otherwise move in this action. Plaintiff filed an unopposed motion for default judgment against the Non-Answering Defendants on November 1, 2018. (NYSCEF 20-35).

Default Judgment

Plaintiff has submitted unrebutted evidence demonstrating compliance with the requirements of CPLR §3215. Plaintiff is entitled to a default judgment and the declaratory relief sought in the Complaint against the Non-Appearing Defendants. *See Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 A.D.3d 617 (1st Dep't 2018) (properly awarding declaratory judgment by default upon Plaintiff's showing proof of facts constituting the claims and Defendant's failure to appear in action or oppose motion).

The Non-Appearing Defendants may seek a vacatur of the instant default judgment if they can satisfy the requirements of CPLR § 5015 or CPLR § 317, or any other applicable law.

Summary Judgment

CPLR § 3212 provides in relevant part that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party... [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Answering Defendants fail to raise a genuine issue of material fact sufficient to defeat Plaintiff's motion for summary judgment.

At issue, in large part, is whether Defendant Pimentel's failure to appear for two scheduled Examination Under Oaths (EUOs) warrants declination of all related no-fault benefits.

Pursuant to Insurance Regulation 68, a no-fault insurance carrier's contractual obligation to pay the injured party's claim does not arise where the latter has failed to satisfy a condition precedent to payment. Insurance Regulation § 65-1.1, Conditions, Proof of Claim clearly states: "No action shall lie against the [insurance] Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage... 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."

Thus, it is a black letter rule that appearance at a scheduled Examination Under Oath is a condition precedent to no-fault reimbursement and, if not complied with, provides sufficient legal grounds to deny claims for no-fault benefits. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 2011 NY Slip Op 01948 (1st Dep't 2011) ("A denial premised on breach of a condition precedent to coverage voids the policy *ab initio* and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage.").

It is undisputed that Mr. Pimentel was noticed for three EUOs. The first EUO was scheduled for June 6, 2017 and Mr. Pimentel did not appear. It was then rescheduled for June 21, 2017 for which Mr. Pimentel did appear. He did so, however, without counsel which necessitated an adjournment and rescheduling of the EUO. The third and final EUO was noticed for July 11, 2017 which Mr. Pimentel did not attend. As such, Mr. Pimentel missed two scheduled EUOs thereby failing to satisfy the required condition precedent for obtaining no-fault coverage and permitting Plaintiff to decline to pay any additional medical bills submitted in connection with Mr. Pimentel's April 2, 2017 accident.

With Mr. Pimentel failing to meet the condition precedent, and thereby voiding eligibility to no-fault coverage, it is axiomatic that the Answering Defendants, as assignees of the no-fault benefits, cannot stand in any better a position than Mr. Pimentel, the assignor. *Central Gen. Hosp. v. Chubb*, 90 N.Y.2d 195 (1997); *Grossi v. Rialto Security Corp.*, 273 N.Y. 403 (1937). As Mr. Pimentel is now precluded from recovering no-fault benefits under the insurance policy because of his failures, the Answering Defendants are also precluded from recovering as well.

Therefore it is:

ORDERED that Plaintiff's Motion for a Default Judgment against Onasis Pimentel, All County, LLC, Gara Medical Care, P.C., Top Q Inc., Sky of NY 1, Inc., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Wise Rehab P.T. P.C., and Ellner Plaza II Corp. d/b/a Main Pharmacy is Granted; it is further

ORDERED that, consistent with the foregoing, it is adjudged and declared that, with respect to the motor vehicle accident that occurred on April 2, 2017, Plaintiff has no duty to provide coverage or make payment to claims for no-fault benefits made by or on assignment of Onasis Pimentel, All County, LLC, Gara Medical Care, P.C., Top Q Inc., Sky of NY 1, Inc., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Wise Rehab P.T. P.C., and Ellner Plaza II Corp. d/b/a Main Pharmacy and is entitled to a permanent injunction and dismissal of all pending litigation and arbitration in connection with the no-fault billing submitted under the policy; that Onasis Pimentel, All County, LLC, Gara Medical Care, P.C., Top Q Inc., Sky of NY 1, Inc., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Wise Rehab P.T. P.C., and Ellner Plaza II Corp. d/b/a Main Pharmacy are barred from submitting any new bills to Plaintiff with regards to the Onassis Pimentel, and are barred from commencing any new litigation or arbitration for any previously submitted bills that

were denied; that Plaintiff's denial of Onasis Pimentel, All County, LLC, Gara Medical Care, P.C., Top Q Inc., Sky of NY 1, Inc., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Wise Rehab P.T. P.C., and Ellner Plaza II Corp. d/b/a Main Pharmacy's bills were properly denied; and that Plaintiff's denial of such bills were based on Onassis Pimentel's failure to cooperate and provide necessary documents; and it is further


ORDERED, that upon presentation of a copy of this Decision and Order with notice of entry, accompanied by a proper form of judgement, the Clerk is hereby directed to permit entry of judgment in favor of Plaintiff Country-wide Insurance Company and against Defendants Onasis Pimentel, All County, LLC, Gara Medical Care, P.C., Top Q Inc., Sky of NY 1, Inc., Paramount Medical Services, P.C., B and H Pharmacy d/b/a Chelsea Mobility, Wise Rehab P.T. P.C., and Ellner Plaza II Corp. d/b/a Main Pharmacy; it is further

ORDERED that Plaintiff's Motion for Summary Judgment against Wellness Plaza Acupuncture P.C., Parkside Chiropractic, P.C., Welcome Chiropractic, P.C., and Active Range P.T. P.C is Granted; it is further

ORDERED that, consistent with the foregoing, it is adjudged and declared that, with respect to the motor vehicle accident that occurred on April 2, 2017, Plaintiff has no duty to provide coverage or make payment to claims for no-fault benefits made by or on assignment of Wellness Plaza Acupuncture P.C., Parkside Chiropractic, P.C., Welcome Chiropractic, P.C., and Active Range P.T. P.C and is entitled to a permanent injunction and dismissal of all pending litigation and arbitration in connection with the no-fault billing submitted under the policy; that Wellness Plaza Acupuncture P.C., Parkside Chiropractic, P.C., Welcome Chiropractic, P.C., and Active Range P.T. P.C are barred from submitting any new bills to Plaintiff with regards to the Onassis Pimentel, and are barred from commencing any new litigation or arbitration for any

previously submitted bills that were denied; that Plaintiff's denial of Wellness Plaza Acupuncture P.C., Parkside Chiropractic, P.C., Welcome Chiropractic, P.C., and Active Range P.T. P.C bills were proper; and that Plaintiff's denial of such bills were based on Onassis Pimentel's failure to cooperate and provide necessary documents.

4/23/2019
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE