

Country-Wide Ins. Co. v Escalona

2019 NY Slip Op 33021(U)

September 16, 2019

Supreme Court, New York County

Docket Number: 652359/2018

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

JOSE ESCALONA, LAXMIDHAR DIWAN M.D., ENGLINTON MEDICAL, P.C., ALL COUNTY, LLC, APPLE ACUPUNCTURE P.C., LENCO DIAGNOSTIC LABORATORIES, INC., CITIMEDICAL I, PLLC, VALUECARE PHARMACY INC., HEALTH BALANCE MEDICAL, P.C., MIISUPPLY LLC, CUSTOM RX PHARMACY LLC, MOUNT SINAI MEDICAL SUPPLY INC, COMPLETE WELLNESS CHIROPRACTIC, P.C.

Defendant.

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INDEX NO. 652359/2018

MOTION DATE 06/18/2019, 06/25/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for JUDGMENT - SUMMARY

In this declaratory judgment action brought pursuant to article 51 of the Insurance Law, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Jose Luis Escalona (the individual defendant) and Laxmidhar Diwan, M.D., Englinton Medical, P.C., All County, LLC, Apple Acupuncture, P.C., Lenco Diagnostitc Laboratories, Inc., Citimedical I, PLLC, Miisupply LLC, and Mount Sinai Medical Supply, Inc., (the non-answering health-care defendants), declaring that it is not obligated to pay no-fault benefits to the individual defendant or the health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on July 31, 2017. The plaintiff moves separately for summary judgment pursuant to CPLR 3212 against answering defendants Valucare Pharmacy, Inc., and Custom RX Pharmacy, LLC, on the grounds that Escalona failed to appear for duly scheduled Examinations Under Oath (EUOs). The plaintiff's motions are denied.

In the application for no-fault benefits, the individual defendant alleged, inter alia, that he was injured in a motor vehicle accident on July 31, 2017, and that he thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment under claim number 000330028 001, as assignees of the individual defendant, for no-fault benefits under insurance policy number 17CW1009025. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff started to receive claims for the individual defendant's care on or about October 23, 2017 and continued to receive claims through November 7, 2017. The plaintiff mailed its first notice for EUO to the individual defendant on November 14, 2017. The individual defendant did not attend either the first or second rescheduled EUO, and the plaintiff now seeks default judgment and summary judgment stating that it is not required to pay the no-fault benefits as the individual defendant's coverage is vitiated.

The plaintiff's motion is denied, without prejudice, against the individual defendant and the non-answering medical defendants. 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 [1st Dept 2015]), timely move for relief (see, CPLR 308[2]; 320[a]; 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st 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." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd 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 (1st Dept 2006). The proof submitted must establish a prima facie case. See id.; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept 1983).

The plaintiff's submissions fail to demonstrate that the initial notice for the EUO was timely mailed to the individual defendant within 15 days of its receipt of all the applicable NF-3 forms, as required by 11 NYCRR 65-3.5(b), at least with respect to the billings on or before October 26, 2017. As such, the plaintiff has failed to establish its prima facie case with regard to each of the defendants and their respective claims. Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (see 11 NYCRR 65-1.1; see also Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 [1st Dept 2015]; Allstate Ins. Co. v Pierre, 123 AD3d 618 [1st Dept 2014]), in this case the plaintiff failed to supply sufficient evidence to establish compliance with the timeliness requirements of 11 NYCRR 65-3.5(b) with respect to each of the claims. The plaintiff claims to have received at least eight NF-3 forms from October 23, 2017 to November 7, 2017 and did not mail the first notice requesting an EUO until November 14, 2017. As such, there are several claims that possibly appear to fall outside of the 15-day requirement under 11 NYCRR 65-3.5(b). Therefore, the court is not persuaded that the plaintiff has established a prima facie case regarding all the claims or non-answering parties, and the motion for default judgment against all the non-answering parties must be denied.

Additionally, with respect to the two claims from Valucare Pharmacy, Inc., and Custom RX Pharmacy, LLC, the court finds that the plaintiff failed to provide sufficient evidence such that they are entitled to summary judgment on the claims.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

With regard to the two claims by the answering defendants, the plaintiff's submissions do not establish that it adhered to the 15-day requirement under 11 NYCRR 65-3.5(b), and did not

establish conclusively that any failure to adhere to the requirement did not ultimately affect the timeliness of their denial of coverage within the 30-day limit prescribed within 11 NYCRR 65-3.5. Plaintiff received defendant Custom RX Pharmacy's applicable NF-3 form on October 23, 2017, requested the first EUO on November 14, 2017, and did not deny coverage until January 10, 2018.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against defendants Jose Luis Escalona (the individual defendant) and Laxmidhar Diwan, M.D., Englinton Medical, P.C., All County, LLC, Apple Acupuncture, P.C., Lenco Diagnostc Laboratories, Inc., Citimedical I, PLLC, Miisupply LLC, and Mount Sinai Medical Supply, Inc., (the non-answering health-care defendants) is denied without prejudice, and;

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment against the answering defendants Valucare Pharmacy, Inc., and Custom RX Pharmacy, LLC is denied.

This constitutes the Decision, Order, and Judgment of the court.

9/16/2019
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
SEQ 001	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/>	OTHER
SEQ 002	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE