

**Kemper Independence Ins. Co. v Caban Massage  
Therapy, P.C.**

2019 NY Slip Op 33478(U)

November 27, 2019

Supreme Court, New York County

Docket Number: 154128/2019

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

INDEX NO. 154128/2019
MOTION SEQ. NO. 001

KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

- v -

CABAN MASSAGE THERAPY P.C., DARCY
CHIROPRACTIC P.C., EZ RELIEF MEDICAL, P.C., JAMES
J. KIM, L.A.C., P.C., JULES PARISIEN, MARTIN L.
PLUNTO, D.C., QUALITY MEDICAL SURGICAL
SUPPLIES, LLC, SOUTHWEST MEDICAL IMAGING P.C.
and VICTOR VANEGAS,

DECISION, ORDER AND
JUDGMENT

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19,
20, 21, 22, 23, 24, 25, 26

were read on this motion to/for JUDGMENT - DEFAULT

In this action seeking, inter alia, a declaratory judgment, plaintiff Kemper Independence
Insurance Company ("Kemper") moves for an order, pursuant to CPLR 3215, granting it a
default judgment as against defendants Caban Massage Therapy P.C., Darcy Chiropractic P.C.,
EZ Relief Medical, P.C., James J. Kim, L.A.C., P.C., Martin L. Plunto, D.C., Quality Medical
Surgical Supplies, LLC, Southwest Medical Imaging P.C. ("the medical provider defendants")
and Victor Vanegas ("the claimant") (collectively "the defaulting defendants") due to their
failure to answer the complaint or otherwise appear in this action (Doc. 15-24). After a review
of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is
granted.

**FACTUAL AND PROCEDURAL HISTORY:**

On March 17, 2018, a vehicle owned by the claimant and insured by Kemper was rear-ended by another automobile on Woofcleft Avenue in Freeport, New York, causing the claimant to collide with a third vehicle in front of him (Docs. 1, 16).<sup>1</sup> On April 11, 2018, the claimant filed an application for no-fault benefits for injuries he allegedly sustained during the collision (Doc. 18). Kemper assigned claim number C013758NY18 to all no-fault claims relating to the incident and received claims from the medical provider defendants (Doc. 18). It then sought to conduct an examination under oath (“EUO”) of the claimant pursuant to the no-fault regulations to confirm the legitimacy of his claims (Doc. 19). The claimant appeared for an EUO on August 21, 2018 (Doc. 19).

In April 2019, Kemper commenced the instant action by filing a summons and complaint (Doc. 1). As relevant here, Kemper alleged in its second cause of action that it had a founded belief that the claimant’s alleged injuries and any subsequent no-fault claims for treatment submitted by the medical provider defendants were not causally related to the March 17, 2018 incident and/or did not arise from the insured accident (Doc. 1 at 10). Kemper served defendants with the summons and complaint on May 2, 2019 (Docs. 2-10). All defendants, except for Parisien, failed to answer and/or appear in this action (Doc. 12). In September 2019, Kemper served the defaulting defendants with a notice of default, indicating that service of the summons and verified complaint had been made on defendants via the Secretary of State on May 2, 2019; that a copy of the summons and verified complaint was being mailed, together with the notice of

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<sup>1</sup> The claimant was allegedly inside the parked vehicle on the side of the road at the time of the incident (Doc. 19 at 17).

default, to their last known address and that a default judgment motion had been filed against them (Doc. 23).

In the instant motion, Kemper moves for a default judgment as against the defaulting defendants only with respect to its second cause of action that it had a founded belief that the alleged claims did not arise from the accident (Doc. 15).<sup>2</sup> In support of its motion, Kemper submits, *inter alia*, the claimant's EUO testimony (Doc. 19). According to his EUO testimony, the claimant informed the police at the scene of the accident that he had "a little pain in [his] neck" (Doc. 19 at 25). Notwithstanding his alleged neck injuries following the collision, he did not call an ambulance, and he failed to provide any reason for refusing medical attention at the scene of the accident (Doc. 19 at 26). The claimant went to work immediately following the accident, and he worked the whole day on March 17, 2018 (Doc. 19 at 29). The following day, the claimant went to the hospital complaining of immobility in his neck, spine, right shoulder, right elbow and left knee (Doc. 19 at 26, 29-30). However, the claimant did not seek medical attention again for another two weeks, when he visited Darcy Chiropractic P.C. at the express direction of his attorney (Doc. 19 at 31). Testimony was also elicited that, although the claimant had MRIs taken at Southwest Medical Imaging P.C., his treatment did not change after the procedures (Doc. 19 at 41-43).

Kemper also provides the affidavit of no-fault claim representative Denise Winant, who has personal knowledge of the facts in this action (Doc. 16 at 9-15). Winant avers, *inter alia*, that, based on the police report and the claimant's EUO testimony, Kemper has a founded belief that the claimant's treatments were not causally related to the collision and/or did not arise from

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<sup>2</sup> Kemper indicates in its motion papers that it will discontinue the first and third causes of action as against the defaulting defendants if the instant motion is granted (Doc. 16 at 2 n 2).

the insured accident (Doc. 16). With respect to her review of the police report, Winant indicates that the airbags of the vehicles did not deploy during the collision; that said vehicles suffered minimal damage and were driven from the scene, and that no one involved in the collision, including the claimant, was treated for injuries at the scene of the accident (Doc. 16 at 12-13). She affirmed that the claimant reported significant bodily injuries in April 2018 and that the defaulting medical providers submitted tens of thousands of dollars in no-fault claims as alleged assignees of the claimant (Doc. 16 at 13).

Winant also asserts that the claimant's EUO testimony raised additional concerns about the legitimacy and medical necessity of his medical treatment (Doc. 16 at 13-14). As discussed above, Winant cites the claimant's testimony, *inter alia*, that his attorney referred him to the clinic where he received medical treatment; that the claimant was recommended by an unknown friend; that he only reported slight neck pain following the incident; that he worked all day after the collision and that, despite testifying that he was in severe pain the next day and could not get out of bed, the claimant waited until two weeks after the collision to seek medical attention (Doc. 16 at 13-15). Moreover, the claimant points to testimony that, although he "underwent multiple MRIs . . . his treatment regimen has not changed in any way from before the MRIs were done" (Doc. 16 at 14).

#### LEGAL CONCLUSIONS:

CPLR 3215 (a) provides, in pertinent part, that when "a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her]." To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the

default (*see Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). Here, Kemper has established service of process on all defendants against which/whom it seeks a default judgment (Docs. 21, 23). Moreover, the attorney avers, in an affirmation submitted in support of the instant motion, that, except for Jules Parisien, all defendants failed to answer or otherwise appear in this action (Doc. 16 at 5).

Kemper has also established the facts constituting the claim. “An insurer may disclaim coverage based upon ‘the fact or founded belief that the alleged injury does not arise out of an insured incident’” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 NY Slip Op 33306 [U], 2019 WL 5788060, \*3 [Sup Ct, NY County 2019], quoting *Central Gen. Hosp. v Chubb Group of Ins. Co.*, 90 NY2d 195, 199 [1997]). To establish its entitlement to a default judgment based on a founded belief, a no-fault insurer need not “establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 WL 5788060 at \*3 [internal quotation marks and citations omitted]; *see V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 25 Misc 3d 39, 40 [App Term. 2d Dept 2009]). “Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 WL 5788060 at \*3), and “[c]ircumstantial evidence is sufficient if a defendant's conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence” (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2d Dept 2005] [internal quotation marks and citation omitted]; *see American Alternative Insurance Corporation v Washington*, 60 Misc 3d 1222[A], 2018 NY Slip Op 51210[U], 2018 WL 3963545, \*3 [Sup Ct, NY County 2018]).

Here, it can be reasonably inferred, based on Winant's investigation, which included a review of the police report and the claimant's EUO testimony, that Kemper had, as alleged in its second cause of action, a founded belief that the injuries were not causally related to the March 17, 2018 incident and/or did not arise from the accident (*see American Alternative Insurance Corporation v Washington*, 2018 WL 3963545 at \*3; *Unitrin Advantage Ins. Co. v Auto RX*, 2018 NY Slip Op 32272 [U], 2018 WL 4407543, \*3-4 [Sup Ct, NY County 2018]; *compare Unitrin Advantage Ins. Co. v Advanced Orthopedics and Joint Preserv. P.C.*, 2018 NY Slip Op 33296 [U], 2018 WL 6718863, \*3-4 [Sup Ct, NY County 2018] [default judgment denied where claims of founded belief was conclusory due, *inter alia*, to insurer's failure to cite specific basis for its claim]). Moreover, by failing to oppose the instant application, defendants have not proffered any arguments to warrant the denial thereof. Thus, Kemper is entitled to a default judgment against the non-appearing defendants.

Since the motion is granted, this Court deems the first and third causes of action discontinued as against the defaulting defendants (Doc. 16 at 2 n 2).

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

**ORDERED** that plaintiff's motion for leave to enter a default judgment against defendants CANAN MASSAGE THERAPY P.C., DARCY CHIROPRACTIC P.C., EZ RELIEF MEDICAL, P.C., JAMES J. KIM, L.A.C., P.C., MARTIN L. PLUNTO, D.C., QUALITY MEDICAL SURGICAL SUPPLIES, LLC, SOUTHWEST MEDICAL IMAGING P.C. and VICTOR VANEGAS is granted, and the Clerk is directed to enter judgment accordingly; and it is further

**ADJUDGED and DECLARED** that plaintiff KEMPER INDEPENDENCE INSURANCE COMPANY is not obligated to pay no-fault or other insurance benefits under policy number VF958910, claim number C015802NY18, to defendants CANAN MASSAGE THERAPY P.C., DARCY CHIROPRACTIC P.C., EZ RELIEF MEDICAL, P.C., JAMES J. KIM, L.A.C., P.C., MARTIN L. PLUNTO, D.C., QUALITY MEDICAL SURGICAL SUPPLIES, LLC, SOUTHWEST MEDICAL IMAGING P.C. and VICTOR VANEGAS in connection with a motor vehicle accident that allegedly occurred on March 17, 2018; and it is further

**ADJUDGED and DECLARED** that plaintiff KEMPER INDEPENDENCE INSURANCE COMPANY is not obligated to reimburse the defendants CANAN MASSAGE THERAPY P.C., DARCY CHIROPRACTIC P.C., EZ RELIEF MEDICAL, P.C., JAMES J. KIM, L.A.C., P.C., MARTIN L. PLUNTO, D.C., QUALITY MEDICAL SURGICAL SUPPLIES, LLC, SOUTHWEST MEDICAL IMAGING P.C. for medical and health-related services, treatment, and equipment that these defendants allegedly rendered to defendant Victor Vanegas in connection with a motor vehicle accident that allegedly occurred on March 17, 2018 (Kemper Independence Insurance Company, policy number VF958910, Claim Number C015802NY18); and it is further

**ORDERED** that the first and third causes of action are dismissed as against defendants CANAN MASSAGE THERAPY P.C., DARCY CHIROPRACTIC P.C., EZ RELIEF MEDICAL, P.C., JAMES J. KIM, L.A.C., P.C., MARTIN L. PLUNTO, D.C., QUALITY

MEDICAL SURGICAL SUPPLIES, LLC, SOUTHWEST MEDICAL IMAGING P.C.; and it is further

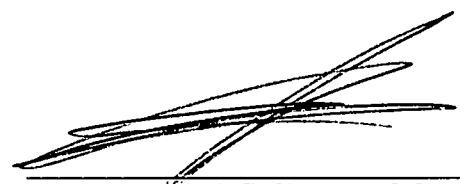
ORDERED that plaintiff KEMPER INDEPENDENCE INSURANCE COMPANY shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141 B) and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are thereupon directed to amend their records accordingly; and it is further

ORDERED that plaintiff KEMPER INDEPENDENCE INSURANCE COMPANY and defendant JULES PARISIEN are to appear for a preliminary conference on March 3, 2020 at 80 Centre Street, Room 280, at 2:15 P.M.; and it is further

ORDERED that this constitutes the Decision, Order, and Judgment of the court.

11/27/2019

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