

**Country-Wide Ins. Co. v Rodriguez**

2020 NY Slip Op 30704(U)

February 28, 2020

Supreme Court, New York County

Docket Number: 655263/2018

Judge: Nancy M. Bannon

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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**

<b>PRESENT:</b>	<u>HON. NANCY M. BANNON</u>	<b>PART</b>	<b>IAS MOTION 42EFM</b>
	<i>Justice</i>		
-----X		<b>INDEX NO.</b>	<u>655263/2018</u>
COUNTRY-WIDE INSURANCE COMPANY,		<b>MOTION DATE</b>	<u>12/18/2019</u>
Plaintiff,		<b>MOTION SEQ. NO.</b>	<u>001</u>

- v -

ADELAIDA RODRIGUEZ, UNIVERSITY DIAGNOSTIC  
MEDICAL IMAGING, P.C., LENOX HILL RADIOLOGY AND  
MEDICAL IMAGING ASSOCIATES, P.C., THROGS NECK  
MULTICARE, P.C., RAMAPO ANESTHESIOLOGISTS, P.  
C., PHYSICAL MEDICINE & REHABILITATION OF NEW  
YORK, P.C., ST. JOSEPH'S HOSPITAL, DOWNTOWN  
BRONX MEDICAL ASSOCIATES, P.C.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 were read on this motion to/for JUDGMENT - DEFAULT.

In this action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Adelaida Rodriguez (the individual defendant), University Diagnostic Medical Imaging PC, Ramapo Anesthesiologists PC, Physical Medicine & Rehabilitation of New York PC, and Downtown Bronx Medical Associates PC (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 April 24, 2018 on the grounds that the eligible injured party defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). Defendants Adelaida Rodriguez and Physical Medicine & Rehabilitation of New York PC cross-move pursuant to CPLR 3012(d) and 2004 to extend the time to answer the complaint and thereafter compel acceptance of their answer. By the parties' stipulation dated December 18, 2019, the plaintiff accepted the answer of Adelaida Rodriguez and Physical Medicine & Rehabilitation of New York PC as timely and withdrew its motion for default judgment as against those

defendants. The plaintiff's motion is granted as modified, and the action is severed as against the remaining parties. The cross-motion is denied as moot upon the parties' stipulation.

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 [1<sup>st</sup> Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1<sup>st</sup> 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 (1<sup>st</sup> Dept 1987) (internal citations omitted); see Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> 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 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a *prima facie* case. See id.; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that she was injured in a motor vehicle accident on April 24, 2018, and that she 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 336085-001, as assignees of the individual defendant, for no-fault benefits under insurance policy number RS815173818. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff received a series of at least four claims from June 13, 2018 through July 5, 2018. The plaintiff mailed its first notice for an EUO to be held on August 1, 2018 to the individual defendant on July 10, 2018. The individual defendant did not attend either the first EUO or the second rescheduled EUO on August 22, 2018. The plaintiff denied the insurance claims on August 23, 2018. The plaintiff now seeks default judgment stating that it is not required to pay the no-fault benefits as the individual defendant's coverage is vitiated.

The plaintiff's submissions demonstrate that the initial notice for an examination under oath (EUO) on July 10, 2018 was timely mailed to the individual defendant within 15 business days of its receipt of the health-care defendants' applicable NF-3 forms, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1<sup>st</sup> Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1<sup>st</sup> Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1<sup>st</sup> Dept. 2015). They also show that the individual defendant did not appear for the initially scheduled EUO, and was provided timely notice of a rescheduled EUO, but failed to appear for that as well. The plaintiff consequently provided *prima facie* evidence that, by failing to appear, the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., *supra*; Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1<sup>st</sup> Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1<sup>st</sup> Dept. 2014).

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Woodson v Mendon Leasing Corp., 259 AD2d 304 (1<sup>st</sup> Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2<sup>nd</sup> Dept. 2003); Holt v Holt, 262 AD2d 530 (2<sup>nd</sup> Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3<sup>rd</sup> Dept. 1978). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., *supra*; Frolish v Ryder Truck Rental, *supra*.

Accordingly, it is,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants University Diagnostic Medical Imaging PC, Ramapo Anesthesiologists PC, and Downtown Bronx Medical Associates PC is granted; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendants University Diagnostic Medical Imaging PC, Ramapo Anesthesiologists PC, and Downtown Bronx Medical Associates PC, to reimburse them for treatment they rendered or

medical equipment they provided to the individual defendant for injuries that she allegedly sustained in the motor vehicle accident of April 24, 2018; and it is further,

ORDERED that the action is severed and continued as against the remaining defendants, Adelaida Rodriguez, Physical Medicine & Rehabilitation of New York PC, and Throgs Neck Multicare PC; and it is further,

ORDERED that the cross-motion of Adelaida Rodriguez and Physical Medicine & Rehabilitation of New York PC pursuant to CPLR 3012(d) and 2004 to extend the time to answer the complaint and thereafter compel acceptance of their answer is denied as moot upon the parties' stipulation December 18, 2019; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order; and it is further,

ORDERED that the parties shall appear for the compliance conference previously scheduled for May 7, 2020 at 9:30 a.m.

This constitutes the Decision and Order of the court.

2/28/2020  
DATE

  
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NANCY M. BANNON, 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

**HON. NANCY M. BANNON**