

State Farm Fire & Cas. Co. v Allmed Mdse. & Trading, Inc.

2020 NY Slip Op 30802(U)

March 16, 2020

Supreme Court, New York County

Docket Number: 156753/2019

Judge: John J. Kelley

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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. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 156753/2019

STATE FARM FIRE AND CASUALTY COMPANY,

MOTION DATE 03/04/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALLMED MERCHANDISE AND TRADING, INC.,
COMFORT PHYSICAL THERAPY, PLLC, DYNAMIC
MEDICAL IMAGING, P.C., ELMWOOD PARK MEDICAL
GROUP, P.C., ENS MEDICAL, P.C., HANDY PHYSICAL
THERAPY, P.C., KINGS CHIROPRACTIC WELLNESS,
P.C., LIFE EQUIPMENT, INC., MASPETH RX, INC.,
MASPETH RX PHARMACY, INC., METRO PAIN
SPECIALIST, P.C., MOUNT SINAI MEDICAL SUPPLY,
INC., MT PHYSICAL THERAPY, P.C., SATYA DRUG
CORPORATION, d/b/a FARMACIA CENTRAL, SJM
ACUPUNCTURE, P.C., and KEMONTE MOSLEY,

**DECISION, ORDER, and
JUDGMENT**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for

JUDGMENT - DEFAULT

In this declaratory judgment action, the plaintiff insurer moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Kemonte Mosely, as well as the defendants Allmed Merchandise and Trading, Inc., Comfort Physical Therapy, PLLC, Dynamic Medical Imaging, P.C., Elmwood Park Medical Group, P.C. Handy Physical Therapy, P.C., Kings Chiropractic Wellness, P.C., Maspeth RX, Inc., Maspeth RX Pharmacy, Inc., Metro Pain Specialist, P.C., Mount Sinai Medical Supply, Inc., MT Physical Therapy, P.C., and SJM Acupuncture, P.C. (collectively the non-answering medical defendants), declaring that it is not obligated to pay no-fault benefits to or on behalf of Mosely in connection with injuries that he sustained in a motor vehicle accident, or to reimburse the non-answering medical defendants

for treatment they rendered or equipment and supplies they provided to him for those injuries.

No opposition is submitted. The motion is granted.

Mosely claimed that he was injured in a motor vehicle accident on September 5, 2018, and that he thereafter obtained medical treatment or medical supplies from the non-answering medical defendants, among others. As Mosely's assignees, the non-answering medical defendants sought payment for no-fault benefits under insurance policy number 270-5809-52, as issued by the plaintiff to vehicle owner Tamika Cargill under claim number 5201K580W (see Insurance Law 5106[a]; 11 NYCRR 65-1.1). Mosely timely appeared for and submitted to an examination under oath (EUO). The plaintiffs timely denied the numerous claims for benefits (see 11 NYCRR 65-3.8[a][1]), concluding that, based on his testimony at the EUO and its own investigation, Cargill made material misrepresentations in her initial application for the issuance of the subject insurance policy with respect to where the insured vehicle was usually garaged and maintained in order to lower the cost of obtaining the policy, and that coverage was thus vitiated. Specifically, as set forth in the affidavit of the plaintiff's underwriting representative, Lee Bottari, either Cargill or Mosely, when applying for insurance, represented to the plaintiff that the subject vehicle was primarily garaged at 71 Middleburgh Street, Troy, New York, but that Mosely admitted at his EUO that it was in fact garaged at Mosely's residence at 1426 Loring Avenue, Brooklyn, New York. Moreover, the plaintiff's submissions indicate that Cargill, who was the registered owner of the vehicle and the named policyholder, resides at 40-01 12th Street, Long Island City, New York.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of the facts constituting the claim, and proof of the defendant's default (see CPLR 3215[f]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]). The plaintiffs submit the affidavits of service referable to service of the summons and complaint upon Mosely and the non-answering medical defendants, and an attorney's affirmation. As proof of the facts constituting its claims, the plaintiffs submit both Bottari's affidavit and the affidavit of no-fault claim specialist

Anthony Carvalho, along with the claims invoices submitted to it by Mosely's medical providers, the transcript of Mosely's EUO testimony, the relevant police and MV-104 accident reports, and the denials of claim that it issued. The affidavits of service establish that Mosely and the non-answering medical defendants were served with process, and the attorney's affirmation establishes that these defendants did not answer or appear.

Where an insured makes material misrepresentations on his or her application for insurance as to where he or she regularly garages a vehicle sought to be insured, coverage is defeated (see *Remedial Med. Care, P.C. v Infinity Prop. & Cas. Co.*, 2017 NY Slip Op 50391[U], 55 Misc 3d 130[A] (App Term, 2d, 11th & 13th Jud Dists, Mar. 31, 2017); *Jamaica Dedicated Med. Care, P.C. v Praetorian Ins. Co.*, 2015 NY Slip Op 50756[U], 47 Misc 3d 147(A) [App Term, 2d, 11th & 13th Jud Dists, May 6, 2015]). The plaintiff's prima facie proof establishes the facts underpinning its contentions, namely, that when either Mosely or Cargill first applied for insurance coverage, he or she represented that one of them resided in Troy, New York, and that the insured vehicle was regularly garaged there, but that they actually lived almost all of the time in Brooklyn or Long Island City, New York, and kept the vehicle garaged in Brooklyn, where premium rates are substantially higher than for vehicles garaged in Troy. The denial-of-claim statements show that the relevant denials of coverage were expressly based on the ground that the applicant for insurance made material misrepresentations in connection with the application for insurance with respect to the where the vehicle was regularly garaged in order to reduce insurance premium rates.

Accordingly, it is

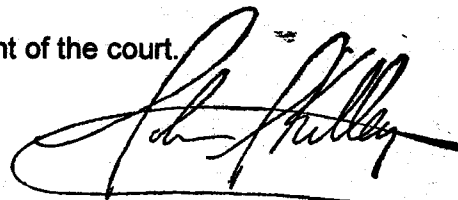
ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants, Kemonte Mosely, Allmed Merchandise and Trading, Inc., Comfort Physical Therapy, PLLC, Dynamic Medical Imaging, P.C., Elmwood Park Medical Group, P.C. Handy Physical Therapy, P.C., Kings Chiropractic Wellness, P.C., Maspeth RX, Inc., Maspeth RX

Pharmacy, Inc., Metro Pain Specialist, P.C., Mount Sinai Medical Supply, Inc., MT Physical Therapy, P.C., and SJM Acupuncture, P.C. is granted, without opposition; and it is further,

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the to the defendant, Kemonte Mosely, in connection with injuries that he sustained in a motor vehicle accident on September 5, 2018, or to reimburse the defendants, Kemonte Mosely, as well as the defendants, Allmed Merchandise and Trading, Inc., Comfort Physical Therapy, PLLC, Dynamic Medical Imaging, P.C., Elmwood Park Medical Group, P.C. Handy Physical Therapy, P.C., Kings Chiropractic Wellness, P.C., Maspeth RX, Inc., Maspeth RX Pharmacy, Inc., Metro Pain Specialist, P.C., Mount Sinai Medical Supply, Inc., MT Physical Therapy, P.C., or SJM Acupuncture, P.C., for treatment they rendered or equipment and supplies they provided to him for those injuries; and it is further,

ORDERED that the action is severed against the defendants, ENS Medical, P.C., Life Equipment, Inc., and Satya Drug Corporation, doing business as Farmacia Central, and the action shall proceed against those defendants under Index No. 156753/2019.

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



JOHN J. KELLEY, J.S.C.

3/16/2020
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: