

PV Holding Corp. v Parisien

2020 NY Slip Op 30993(U)

April 23, 2020

Supreme Court, New York County

Docket Number: 151339/2019

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 151339/2019

PV HOLDING CORP. INCLUDING ALL OF ITS
SUBSIDIARIES AND AFFILIATES, INCLUDING BUT NOT
LIMITED TO AVIS BUDGET, LLC, AVIS CAR RENTAL,
LLC, BUDGET CAR RENTAL, LLC, BUDGET TRUCK
RENTAL, LLC, PAYLESS CAR RENTAL, INC. AND
ZIPCAR, INC.,

MOTION DATE 02/28/2020

MOTION SEQ. NO. 001

Plaintiff,

- v -

JULES FRANCOIS PARISIEN, M.D., RKD RX CORP.,
ROCK ACUPUNCTURE, P.C., NEW YORK WELLNESS PT,
P.C., MILL MEDICAL, P.C., INTEGRATED CHIROPRACTIC
OF NY, P.C., ADVANCED ORTHOPAEDICS, P.L.L.C.,
DAMADIAN MRI IN CANARSIE, P.C., HAMZA PHYSICAL
THERAPY, P.L.L.C., NEW YORK CORE CHIROPRACTIC,
P.C., DR. BRUCE JACOBSON, DC, P.C., MASTER CHENG
ACUPUNCTURE, P.C., NEW SENSE ACUPUNCTURE,
P.C., GIL GAL PHYSICAL THERAPY, P.C., NEW YORK
MEDICAL & DIAGNOSTIC CARE, P.C., RVS SUPPLY
CORP., RALPH INNOVATIVE MEDICAL, P.C., BRONX
CHIROPRACTIC REHABILITATION, P.C., HEALTHPLUS
SURGERY CENTER, L.L.C., CITIMED SERVICES, P.A.,
DYNAMIC SURGERY CENTER, L.L.C., CENTRAL PARK
PHYSICAL MEDICINE, P.C., REHAB CARE PHYSICAL
THERAPY, P.C., JOINT PHYSICAL THERAPY,
P.C., COMFORT PHYSICAL THERAPY, P.L.L.C., SORREL
ACUPUNCTURE, P.C., ULTIMATE MASSAGE THERAPY,
P.C., SPINE CARE OF NJ, P.C., ANDREW DOWD, M.D.,
PATRICK HOLNESS, DANNIEL JONES, TAHVIA BROWN

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40,
41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - DEFAULT.

In this declaratory judgment action, plaintiff PV HOLDING CORP.,
INCLUDING ALL OF ITS SUBSIDIARIES AND AFFILIATES, INCLUDING

BUT NOT LIMITED TO AVIS BUDGET, LLC, AVIS CAR RENTAL, LLC, BUDGET CAR RENTAL, LLC, BUDGET TRUCK RENTAL, LLC, PAYLESS CAR RENTAL, INC. and ZIPCAR, INC., moves, pursuant to CPLR 3215, for a default judgment against defendants JULES FRANCOIS PARISIEN, M.D., RKD RX CORP., ROCK ACUPUNCTURE, P.C., NEW YORK WELLNESS PT, P.C., MILL MEDICAL, P.C., INTEGRATED CHIROPRACTIC OF NY, P.C., ADVANCED ORTHOPAEDICS, P.L.L.C., DAMADIAN MRI IN CANARSIE, P.C., HAMZA PHYSICAL THERAPY, P.L.L.C., NEW YORK CORE CHIROPRACTIC, P.C., DR. BRUCE JACOBSON, DC, P.C., MASTER CHENG ACUPUNCTURE, P.C., GIL GAL PHYSICAL THERAPY, P.C., NEW YORK MEDICAL & DIAGNOSTIC CARE, P.C., RVS SUPPLY CORP., RALPH INNOVATIVE MEDICAL, P.C., BRONX CHIROPRACTIC REHABILITATION, P.C., HEALTHPLUS SURGERY CENTER, L.L.C., CITIMED SERVICES, P.A., DYNAMIC SURGERY CENTER, L.L.C., CENTRAL PARK PHYSICAL MEDICINE, P.C., REHAB CARE PHYSICAL THERAPY, P.C., JOINT PHYSICAL THERAPY, P.C., COMFORT PHYSICAL THERAPY, P.L.L.C., SORREL ACUPUNCTURE, P.C., ULTIMATE MASSAGE THERAPY, P.C., SPINE CARE OF NJ, P.C., ANDREW DOWD, M.D. (collectively “the medical provider defendants”), as well as DANNIEL JONES (“Jones”) and TAHVIA BROWN (“Brown”). The claims against defendant NEW

SENSE ACUPUNCTURE, P.C. (“New Sense”) have been voluntarily discontinued and defendant PATRICK G. HOLNESS (“Holness”) has not been served with process. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a motor vehicle collision (“the collision” or “the incident”) on May 13, 2018 in which defendants Jones, Brown, and Holness (collectively “claimants”) were allegedly injured when another vehicle struck the vehicle in which they were riding, which was insured pursuant to a policy issued by plaintiff (“the policy”). The police report reflects that none of the claimants were injured, that no air bag was deployed, and that neither vehicle involved needed to be towed.

Subsequent to the date of the incident, claimants underwent substantial treatment for injuries allegedly arising from the collision and plaintiff assigned claim number 188021493-10 to this matter. The treatment was rendered by the medical provider defendants, claimants’ assignees.

Plaintiff thereafter requested that each claimant appear for an examination under oath (“EUO”). Despite plaintiff’s requests, Jones and Holness did not appear for EUOs. However, Brown appeared for an EUO in August 2018.

On February 7, 2019, plaintiff commenced the captioned action against claimants and the medical provider defendants. As a first cause of action, plaintiff claimed that it was entitled to a judgment declaring that it owed no coverage under the policy given that Jones and Holness breached a condition precedent to coverage under the policy by failing to appear for EUOs. As a second cause of action, plaintiff alleged that it was entitled to a declaration that it owed no coverage under the policy given that the medical provider defendants breached a condition precedent to coverage by failing to appear for EUOs. As a third cause of action, plaintiff claimed that it was entitled to a judgment declaring that it owed no coverage under the policy based on its founded belief that claimants' injuries did not arise from an "insured incident" as defined by the policy. As a fourth cause of action, plaintiff claimed that it was entitled to a judgment declaring that it is not obligated to make any payments pursuant to the policy since claimants' injuries were not caused by the collision. As a fifth and final cause of action, plaintiff sought a permanent stay of all arbitrations, lawsuits and/or other claims arising from the incident.

Plaintiff thereafter served all claimants with process except Holness, who could not be located. Additionally, plaintiff served all medical provider defendants with process, although it has since discontinued its claims as against New Sense.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the defaulting claimants and medical provider defendants. In support of the motion, plaintiff submits, inter alia, the summons and complaint; affidavits of service; attorney affirmations establishing that defendants failed to answer and failed to appear for EUOs; the affidavit of Michelle Turner, a claims representative for Sedgwick Claims Management Services, Inc., which administers claims for plaintiff; and EUO scheduling letters.

In their affirmations, counsel establish, inter alia, that claimants and the medical provider defendants were served with process but failed to answer or otherwise appear in this matter. They also attest to the fact that Holness, Jones, and the medical provider defendants failed to appear for duly scheduled EUOs.

In her affidavit, Turner also asserts that Holness, Jones and the medical provider defendants failed to appear for properly scheduled EUOs. She further claims that Brown's testimony gave rise to a "founded belief" that claimants' injuries were not caused by the alleged incident.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in relevant part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a default motion, the movant must demonstrate proof of service

of the complaint, the defaulting party's failure to answer or appear, as well as proof of the underlying facts supporting the claim. *see Katz v Blau*, 173 AD3d 987, 988, 103 N.Y.S.3d 131 (2d Dept 2019); *Gantt v North Shore-LIJ Health System*, 140 AD3d 418 (1st Dept 2016). Here, although plaintiff has demonstrated proof of service of process on the defaulting defendants, as well as proof of their failure to appear, it has failed to establish the facts constituting the claim.

As the First Department has explained . . . for a no-fault insurer to establish its prima facie entitlement to judgment as a matter of law in a declaratory judgment action on the ground that a claimant failed to appear for an IME or Examination Under Oath (EUO), it must show that it mailed its initial request for verification to the claimant or his/her health care providers within 10 days of receipt of the NF-2 benefits claim form submitted by the claimant (*see* 11 NYCRR 65-3.5[a]), and mailed an additional request for verification, such as a request for an IME or EUO, within 15 days of receipt of the patient's response to the initial request for verification (*see* 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v Significant Care. PT, P.C.*, 157 AD3d 600 [1st Dept 2018] *see also* 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing follow up notice within 10 days of claimant's nonappearance]).

The demand for an IME [or an EUO] constitutes a request for an additional verification (*see* 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient's or provider's initial response to the verification request (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Maptie Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]; *American Tr. Ins. Co. v Jaga Med. Servs. P.C.*, 128 AD3d 441 [1st Dept 2015]).

PV Holding Corp. v Hank Ross Med, P.C., 2019 N.Y. Misc. LEXIS 5113, 2019 NY Slip Op 32789(U), *3-4 (Sup Ct, NY County 2019).

Here, Turner does not state whether, or on what date, plaintiff received an NF-2. Plaintiff would have had 10 days from the date on which it received an NF-2 to send out verification forms pursuant to 11 NYCRR 65-3.5(a). However, given Turner's failure to state when plaintiff received an NF-2, or even whether it received one, this Court cannot determine whether plaintiff complied with 11 NYCRR 65-3.5(a).

Further, since Turner does not state when plaintiff received completed prescribed verification forms, if ever, there is no basis upon which this Court can determine the timeliness of plaintiff's requests for EUOs. *See* 11 NYCRR 65-3.5(d); *See American Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *Bronx Acupuncture Therapy, P.C. v Hereford Ins. Co.*, 53 Misc.3d 137(A), 2016 NY Slip Op 51479(U) (App Term 1st Dept 2016).

Nor does this Court find that Turner's affidavit establishes a founded belief that the collision was not an insured incident pursuant to the policy. In support of this contention, Turner represents, without providing any detail, that Brown was involved in four motor vehicle accidents in 2016 and 2017. She also states, without any elaboration, that Brown "testified [at her EUO] to receiving boilerplate No-Fault treatment for her alleged injuries."

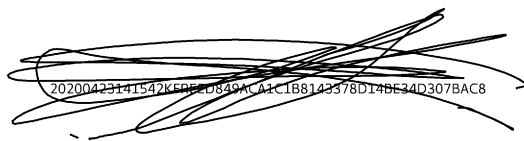
Finally, Turner's affidavit, which was executed in Montana, does not contain a certificate of conformity as required by CPLR 2309 (c).

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

ORDERED that plaintiff's motion is denied with leave to renew upon proper papers, should plaintiff be so advised, within 30 days after entry of this order, upon penalty of dismissal; and it is further

ORDERED that this constitutes the decision and order of the court.

4/23/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: