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| Hereford Ins. Co. v Ng |
| 2020 NY Slip Op 31380(U) |
| May 13, 2020 |
| Supreme Court, New York County |
| Docket Number: 162564/2019 |
| 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

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INDEX NO. 162564/2019

HEREFORD INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALAN NG, ALLEN ROTHPEARL, MD PC, ANJANI SINHA
MEDICAL P.C., ATLAS RADIOLOGY P.C., BRONX
MEDICAL HEALTH PROVIDER P.C., CLIFTON BURT PAIN
PHYSICIAN PC, CVS RX, INC., ELIM ORIENTAL MEDICINE,
EVERGREEN PHYSICAL THERAPY REHABILITATION,
P.C., GOOD TIME ACUPUNCTURE P.C., HEALING TOUCH
PHYSICAL THERAPY P.C., HILLSIDE CHIROPRACTIC
P.C., INNOVATIVE PAIN MEDICINE, PC, KNIGHT
CHIROPRACTIC, P.C., LONG ISLAND NEUROLOGICAL,
PC, M & D ELITE PHARMACY, LLC, MAIN STREET
RADIOLOGY BAYSIDE, MSJR OF QUEENS, PC, NASSAU
CHIROPRACTIC SERVICES P.C., NASSAU QUEENS
MEDICAL P.C., NEXTSTEP HEALING, INC, NYEEQASC,
LLC, NYRX PHARMACY, INC., ORTHOMOTION REHAB
DME LLC, PRC SUPPLIES INC, PROGRESSIVE- HUDSON
ANESTHESIA, LLC, PROTECHMED INC, QUALITY
MEDICAL SURGICAL SUPPLIES LLC, RAPAPUNCTURE
MEDICAL P.C., SEDATION VACATION PERIOPERATIVE
MEDICINE PLLC, SINHA ORTHOPEDICS PC, SKY
RADIOLOGY P.C., SURGICORE SURGICAL CENTER,
LLC, TRUE HEALTH PHARMACY INC., WJW MEDICAL
PRODUCTS (DME), YOUSSEF PT. P.C., CHAD HAMM,
MARIVS HINDS, JUNIOR NICOLAS

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

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

In this declaratory judgment action, plaintiff HEREFORD INSURANCE COMPANY moves, pursuant to CPLR 3215, for a default judgment: 1) on its

second, third, and fourth causes of action against defendants ALAN NG, ALLEN ROTHPEARL, MD PC a/k/a ALLEN ROTHPEARL IMAGING M.D., P.C., ANJANI SINHA MEDICAL P.C., ATLAS RADIOLOGY P.C., BRONX MEDICAL HEALTH PROVIDER P.C., CLIFTON BURT PAIN PHYSICIAN PC, CVS RX, INC., ELIM ORIENTAL MEDICINE, EVERGREEN PHYSICAL THERAPY REHABILITATION, P.C., GOOD TIME ACUPUNCTURE P.C., HEALING TOUCH PHYSICAL THERAPY, P.C., HILLSIDE CHIROPRACTIC P.C., INNOVATIVE PAIN MEDICINE, PC, KNIGHT CHIROPRACTIC, P.C., LONG ISLAND NEUROLOGICAL, PC, M & D ELITE PHARMACY, LLC, MAIN STREET RADIOLOGY BAYSIDE a/k/a MAIN STREET RADIOLOGY AT BAYSIDE, LLC, MSJR OF QUEENS, PC, NASSAU CHIROPRACTIC SERVICES P.C., NASSAU QUEENS MEDICAL P.C., NYEEQASC, LLC, PRC SUPPLIES INC, PROGRESSIVE-HUDSON ANESTHESIA, LLC, PROTECHMED INC, QUALITY MEDICAL SURGICAL SUPPLIES LLC a/k/a QUALITY MEDICAL & SURGICAL SUPPLIES, L.L.C., RAPAPUNCTURE MEDICAL P.C., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC a/k/a SEDATION VACATION PERIOP MED PLLC, SINHA ORTHOPEDICS PC, SKY RADIOLOGY P.C., SURGICORE SURGICAL CENTER, LLC, TRUE HEALTH PHARMACY INC., WJW MEDICAL PRODUCTS (DME) a/k/a W.J.W. MEDICAL PRODUCTS INC., YOUSSEF PT, P.C., MARVIS HINDS

("HINDS"), and JUNIOR NICOLAS ("NICOLAS") (collectively the "defaulting defendants"). The motion is unopposed. After a review of the motion papers, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a motor vehicle collision ("the incident" or "the collision") which allegedly occurred on April 23, 2019. At the time of the incident, HINDS, NICOLAS, and CHAD HAMM ("HAMM") (collectively "claimants") were passengers in a livery vehicle insured under a no-fault policy issued by plaintiff ("the insured vehicle") and driven by non-party Ra Lemus-Ostorga ("Lemus-Ostorga"). Doc. 1. The police report reflects that a car rear-ended the insured vehicle and then fled the scene; that the collision was minor in nature since the air bags of the insured vehicle did not deploy; and that the insured vehicle was driven from the scene. Doc. 48. The police report further indicates that HAMM and Lemus-Ostorga were not injured and refused medical attention, but that HINDS and NICOLAS complained of injuries and were taken to Franklin General Hospital. Doc. 48.

Claimants later alleged to have sustained significant bodily injuries as a result of the collision, and plaintiff assigned claim number 83755 to all no-fault claims relating to the collision. Doc. 49. Claimants then allegedly began receiving

no-fault treatment from ALAN NG, ALLEN ROTHPEARL, MD PC a/k/a ALLEN ROTHPEARL IMAGING M.D., P.C., ANJANI SINHA MEDICAL P.C., ATLAS RADIOLOGY P.C., BRONX MEDICAL HEALTH PROVIDER P.C., CLIFTON BURT PAIN PHYSICIAN PC, CVS RX, INC., ELIM ORIENTAL MEDICINE, EVERGREEN PHYSICAL THERAPY REHABILITATION, P.C., GOOD TIME ACUPUNCTURE P.C., HEALING TOUCH PHYSICAL THERAPY, P.C., HILLSIDE CHIROPRACTIC P.C., INNOVATIVE PAIN MEDICINE, PC, KNIGHT CHIROPRACTIC, P.C., LONG ISLAND NEUROLOGICAL, PC, M & D ELITE PHARMACY, LLC, MAIN STREET RADIOLOGY BAYSIDE a/k/a MAIN STREET RADIOLOGY AT BAYSIDE, LLC, MSJR OF QUEENS, PC, NASSAU CHIROPRACTIC SERVICES P.C., NASSAU QUEENS MEDICAL P.C., NEXTSTEP HEALING, INC, NYEEQASC, LLC, NYRX PHARMACY, INC., ORTHOMOTION REHAB DME LLC a/k/a ORTHOMOTION REHAB DME, INC., PRC SUPPLIES INC, PROGRESSIVE-HUDSON ANESTHESIA, LLC, PROTECHMED INC, QUALITY MEDICAL SURGICAL SUPPLIES LLC a/k/a QUALITY MEDICAL & SURGICAL SUPPLIES, L.L.C., RAPAPUNCTURE MEDICAL P.C., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC a/k/a SEDATION VACATION PERIOP MED PLLC, SINHA ORTHOPEDICS PC, SKY RADIOLOGY P.C., SURGICORE SURGICAL CENTER, LLC, TRUE HEALTH PHARMACY INC.,

WJW MEDICAL PRODUCTS (DME) a/k/a W.J.W. MEDICAL PRODUCTS INC., YOUSSEF PT, P.C. (collectively “the medical provider defendants”).

On December 30, 2019, plaintiff commenced this action against the medical care provider defendants and the claimants. After the filing of the summons and complaint, all defendants except ORTHOMOTION REHAB DME LLC a/k/a ORTHOMOTION REHAB DME, INC. and HAMM, which/who could not be located, were served with process.

As a first cause of action, plaintiff alleged that it was entitled to a judgment declaring that it did not have a duty to pay no-fault benefits for any treatment rendered to HAMM since he failed to appear for a duly noticed examination under oath (“EUO”). Doc. 1.

As a second cause of action, plaintiff alleged that it was entitled to a judgment declaring that it did not have a duty to pay no-fault benefits for any treatment rendered to HAMM since he twice failed to appear for a duly noticed independent medical examination (“IME”). Doc. 1.

As a third cause of action, plaintiff alleged that it had no duty to pay any no-fault benefits to any of the defendants herein since it had a founded belief that the claimants’ injuries did not arise from an “insured event.” Doc. 1.

As a fourth cause of action, plaintiff alleged that it had no duty to pay any no-fault benefits to any of the defendants herein since NICOLAS and HINDS made material misrepresentations at their EUOs. Doc. 1.

Plaintiff further claimed that the medical provider defendants have submitted tens of thousands of dollars in no-fault claims for treatment allegedly provided to the claimants. Doc. 1.

Only defendants NEXTSTEP HEALING, INC and NYRX PHARMACY, INC. have answered the complaint.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the defaulting defendants. Doc. 46. In support of the motion, plaintiff argues that it is entitled to default judgment on its second cause of action because HAMM failed to appear for a duly scheduled IME on two occasions, thereby violating a condition precedent to coverage under the no-fault policy it issued; that it is entitled to a default judgment on the third cause of action because it maintains a founded belief that the injuries alleged by the defendants/claimants were not causally related to the underlying collision and/or did not arise from an insured event; and that it is entitled to a default judgment on the fourth cause of action because it maintains a founded belief that HINDS and NICOLAS materially misrepresented the circumstances of the collision and their injuries at their EUOs.

Plaintiff does not seek a default judgment on its first cause of action, but represents that it will discontinue that claim in the event this motion is granted.

LEGAL CONCLUSIONS:

Where, as here, a no-fault insurer seeks a declaration that it is not required to provide coverage on the ground that an accident was staged, it must establish as a "fact or founded belief that the alleged injury does not arise out of an insured incident." *Central Gen. Hosp. v Chubb Grp. of Ins. Cos.*, 90 NY2d 195, 199 (1997). Here, plaintiff attempts to fulfill this burden by submitting the affidavit of Stephen Englert of its Special Investigative Unit. Doc. 47. However, Englert's affidavit is insufficient for this purpose insofar as the account of the incident as set forth therein is based, in principal part, on inadmissible evidence, including a police report and the unsigned affidavit of HINDS. Docs. 47, 48, 50. *See American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, 2020 N.Y. Misc. LEXIS 1874, *1-5, 2020 NY Slip Op 50532(U), 1-2 (Sup Ct New York County [Lebovits, J.] 2020).

"A police accident report is admissible as a business record if, when prepared, it was based on the preparing officer's personal observations at the scene, or if the information in the report came from an eyewitness with a business duty to report to the officer. *See Pena v. Slater*, 100 AD3d 488, 489 (1st Dept 2012); *State*

Farm Mut. Auto Ins. Co. v Langan, 18 AD3d 860, 862 (2d Dept 2005).” *American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, *supra*. Here, however, the police report does not reflect that the officer who prepared it witnessed the alleged collision. Doc. 48. Additionally, the section describing the incident indicates that the report is for “documentation and insurance purposes only.” Doc. 48. “Nor does [plaintiff] attempt to establish that the occupants of the vehicle (the presumptive sources of the information in the report) were under a business duty to report to the investigating officer. The police report here is thus inadmissible for the hearsay purpose for which [plaintiff] seeks to use it: establishing as fact the circumstances under which the alleged collision occurred. *See Jupa v Zaidi*, 309 AD2d 606, 607 (1st Dept 2003); *accord Langan*, 18 AD3d at 862.” *American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, *supra*.

Englert also relies heavily on HINDS’ EUO transcript, which is neither signed nor notarized, and there is no indication that it was mailed to HINDS in accordance with CPLR 3116(a). Thus, the said transcript is inadmissible hearsay and cannot be considered herein. *see American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, *supra* citing *Martinez v Reiner*, 104 AD3d 477, 478 (1st Dept 2013); *Ramirez v Willow Ridge Country Club*, 84 AD3d 452, 453 (1st Dept 2011); *Santos v. Intown Assocs.*, 17 AD3d 564, 565 (2d Dept 2005); *Zelnik v Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 (1st Dept 1997).

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

ORDERED that the motion by plaintiff Hereford Insurance Company seeking a default judgment against defendants ALAN NG, ALLEN ROTHPEARL, MD PC a/k/a ALLEN ROTHPEARL IMAGING M.D., P.C., ANJANI SINHA MEDICAL P.C., ATLAS RADIOLOGY P.C., BRONX MEDICAL HEALTH PROVIDER P.C., CLIFTON BURT PAIN PHYSICIAN PC, CVS RX, INC., ELIM ORIENTAL MEDICINE, EVERGREEN PHYSICAL THERAPY REHABILITATION, P.C., GOOD TIME ACUPUNCTURE P.C., HEALING TOUCH PHYSICAL THERAPY, P.C., HILLSIDE CHIROPRACTIC P.C., INNOVATIVE PAIN MEDICINE, PC, KNIGHT CHIROPRACTIC, P.C., LONG ISLAND NEUROLOGICAL, PC, M & D ELITE PHARMACY, LLC, MAIN STREET RADIOLOGY BAYSIDE a/k/a MAIN STREET RADIOLOGY AT BAYSIDE, LLC, MSJR OF QUEENS, PC, NASSAU CHIROPRACTIC SERVICES P.C., NASSAU QUEENS MEDICAL P.C., NYEEQASC, LLC, PRC SUPPLIES INC, PROGRESSIVE-HUDSON ANESTHESIA, LLC, PROTECHMED INC, QUALITY MEDICAL SURGICAL SUPPLIES LLC a/k/a QUALITY MEDICAL & SURGICAL SUPPLIES, L.L.C., RAPAPUNCTURE MEDICAL P.C., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC a/k/a SEDATION VACATION PERIOP MED PLLC, SINHA ORTHOPEDICS

PC, SKY RADIOLOGY P.C., SURGICORE SURGICAL CENTER, LLC, TRUE HEALTH PHARMACY INC., WJW MEDICAL PRODUCTS (DME) a/k/a W.J.W. MEDICAL PRODUCTS INC., YOUSSEF PT, P.C., MARVIS HINDS, and JUNIOR NICOLAS is denied; and it is further

ORDERED that, within 10 days of entry of this order, plaintiff's counsel is to serve the same upon all appearing parties, with notice of entry; and it is further

ORDERED that plaintiff and the appearing parties shall confer and prepare a joint request for a preliminary conference with this court, as set forth in the Remote Conference Protocol available on this court's website, <http://ww2.nycourts.gov/courts/1jd/supctmanh/index.shtml>; and it is further

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

5/13/2020
DATE



KATHRYN E. FREED, J.S.C.

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APPLICATION:

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