

<b>Country-Wide Ins. Co. v Yip</b>
2020 NY Slip Op 31435(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 654251/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

HELEN YIP, MAR-AND MEDICAL EQUIPMENT, INC.,
PDCN EMERGENCY AMBULANCE, PROHEALTH CARE
ASSOCIATES, L.L.P., NASSAU HEALTH CARE CORP,
MILLENNIUM PHYSICAL THERAPY, P.C., BAHRAM
SAFANI, M.D., WORKER'S COMPENSATION RX
SOLUTIONS, BROOKLYN PAIN MANAGEMENT P.C., BAY
RIDGE SURGI-CENTER, LLC

Defendant.

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INDEX NO. 654251/2019
MOTION DATE 01/22/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

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 Mar-And Medical Equipment Inc., PDCN Emergency Ambulance, Prohealth Care Associates LLP Millennium Physical Therapy PC, Bahram Safani MD, Worker's Compensation Rx Solutions, Brooklyn Pain Management PC, and Bay Ridge Surgi-Center LLC (the non-answering health-care defendants), declaring that it is not obligated to pay no-fault benefits to the non-answering health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to Helen Yip for injuries allegedly sustained in an auto accident on December 15, 2018 on the grounds that the she failed to appear for duly scheduled Examinations Under Oath (EUOs). The plaintiff's motion is granted, and the action is severed as against the remaining parties.

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 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st 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 (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 Helen Yip alleged, *inter alia*, that she was injured in a motor vehicle accident on December 15, 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 341361-001, as assignees of the individual defendant, for no-fault benefits under insurance policy number FCA3509372-18. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff received a series of at least two claims from January 15, 2019 through March 12, 2019. The plaintiff mailed its first notice for an EUO to be held on April 4, 2019 to the individual defendant on March 22, 2019. The individual defendant did not attend either the first EUO or the second rescheduled EUO on May 2, 2019. The plaintiff denied the insurance claims on May 3, 2019. 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 March 22, 2019 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 Mar-And Medical Equipment Inc., PDCN Emergency Ambulance, Prohealth Care Associates LLP Millennium Physical Therapy PC, Bahram Safani MD, Worker's Compensation Rx Solutions, Brooklyn Pain Management PC, and Bay Ridge Surgi-Center LLC is granted; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendants Mar-And Medical Equipment Inc., PDCN Emergency Ambulance, Prohealth Care Associates LLP Millennium Physical Therapy PC, Bahram Safani MD, Worker's Compensation Rx Solutions, Brooklyn Pain Management PC, and Bay Ridge Surgi-Center LLC, to reimburse them for treatment they rendered or medical equipment they provided to Helen Yip for injuries that she allegedly sustained in the motor vehicle accident of December 15, 2018; and it is further,

ORDERED that the action is severed and continued as against the remaining defendants, Helen Yip and Nassau Health Care Corp.; 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 a compliance conference previously scheduled for May 7, 2020 at 9:30 a.m., on August 20, 2020 at 9:30 a.m.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

<u>4/27/2020</u>				<u>NANCY M. BANNON, J.S.C.</u>	
DATE				NANCY M. BANNON, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE