

State Farm Fire & Cas. Co. v Back Pain Chiropractic, P.C.
2020 NY Slip Op 31490(U)
May 22, 2020
Supreme Court, New York County
Docket Number: 160830/2019
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. 160830/2019

STATE FARM FIRE AND CASUALTY COMPANY,

MOTION DATE 05/18/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

BACK PAIN CHIROPRACTIC, P.C., CPM MEDICAL SUPPLY, INC., DYNAMIC SUPPLIERS, INC., EAST SIDE PRIMARY MEDICAL CARE, P.C., EDJ PHYSICAL THERAPY, P.C., EXCELL CLINICAL LABORATORY, FIFTH AVENUE SURGERY CENTER, LLC, HORIZON ANESTHESIA GROUP, P.C., IGOR AMIGUD PHYSICIAN, P.C., ISURPLY, LLC, LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C., LIVING HEALTH MEDICAL CARE, P.C., LONGEVITY MEDICAL SUPPLY, INC., MARK S. MCMAHON, M.D., P.C., NEW HORIZON SURGICAL CENTER, NEW TIMES ACUPUNCTURE, P.C., NEXRAY MEDICAL IMAGING, P.C., PHOENIX MEDICAL SERVICES, P.C., PROTECH MEDICAL, INC., REFUAH PHYSICAL THERAPY, P.C., ROXBURY ANESTHESIA, LLC, STAND UP MRI OF STATEN ISLAND, P.C., SURGICORE OF JERSEY CITY, LLC, SWEETGRASS ACUPUNCTURE, P.C., UNITED PHYSICIANS, PLLC, SHEILA LEE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - DEFAULT

In this declaratory judgment action, plaintiff STATE FARM FIRE AND CASUALTY COMPANY ("STATE FARM") moves, pursuant to CPLR 3215, for a default judgment against defendants BACK PAIN CHIROPRACTIC, P.C.; CPM MEDICAL SUPPLY, INC.; DYNAMIC SUPPLIERS, INC.; EAST SIDE PRIMARY MEDICAL CARE, P.C.; EDJ PHYSICAL THERAPY, P.C.; EXCELL CLINICAL LABORATORY; FIFTH AVENUE SURGERY CENTER, LLC; HORIZON ANESTHESIA GROUP, P.C.; IGOR AMIGUD PHYSICIAN,

P.C.; ISURPLY, LLC; LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C.; LONGEVITY MEDICAL SUPPLY, INC.; MARK S. MCMAHON, M.D., P.C.; NEW HORIZON SURGICAL CENTER; NEW TIMES ACUPUNCTURE, P.C.; NEXRAY MEDICAL IMAGING, P.C.; PHOENIX MEDICAL SERVICES, P.C.; REFUAH PHYSICAL THERAPY, P.C.; ROXBURY ANESTHESIA, LLC; STAND UP MRI OF STATEN ISLAND, P.C.; SURGICORE OF JERSEY CITY, LLC; SWEETGRASS ACUPUNCTURE, P.C., and UNITED PHYSICIANS, PLLC (collectively "the defaulting defendants") (Doc. 31). STATE FARM also moves, pursuant to 3025(b), for an order, after the default judgment is issued, to amend the summons and complaint to add LIVING HEALTHY MEDICAL CARE, P.C.; NEW HORIZON SURGICAL CENTER, LLC; and PROTECH MED, INC. as additional defendants (Doc. 31).

Defendant MARK S. MCMAHON, M.D., P.C., ("MCMAHON") cross-moves, pursuant to CPLR 317, to vacate any alleged default, extend its time to answer the complaint and to compel STATE FARM to accept the attached answer as timely (Doc. 45).¹ After a review of the parties' contentions as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action stems from a motor vehicle collision on May 3, 2018 (Doc. 32 at 4). Sheila Lee ("the claimant") was allegedly standing behind her 2000 Acura when a 2007 Lexis, insured by STATE FARM and operated by non-party Billy Lee (no relation to the claimant), collided with

¹ The cross motion is rendered moot by a stipulation of discontinuance executed by STATE FARM and MCMAHON and filed on March 13, 2020 (Doc. 54), which provides that the action is discontinued as against MCMAHON in consideration of MCMAHON'S withdrawal of its cross motion (Doc. 54).

the Acura, causing the claimant injuries (Doc. 32 at 21). STATE FARM assigned claim number 32-4199-S13 to all no-fault claims arising from this incident and received claims from the defaulting defendants, as assignees of the claimant, totaling over \$50,000 for medical services allegedly rendered (Doc. 32 at 18, 24). STATE FARM conducted an examination under oath ("EUO") of the claimant pursuant to the no-fault regulations to confirm the legitimacy of her claims (Doc. 32 at 24). The claimant appeared for her EUO on August 1, 2018 (Doc. 38).

In November 2019, STATE FARM commenced this action by filing a summons and verified complaint (Doc. 1). In the complaint, STATE FARM alleged that it was entitled to a declaration declaring that defendants had no rights under the insurance policy and thus, were not entitled to payments for no-fault claims relating to the May 3, 2018 incident (Doc. 1). Specifically, STATE FARM claimed that (1) it had a founded belief that the claimant's injuries and any subsequent treatment were not causally related to the May 3, 2018 collision (first cause of action) (Doc. 1 ¶ 43-45); (2) that the claimant was not struck by the insured vehicle and therefore any injuries claimed did not arise from the covered event (second cause of action) (Doc. 1 ¶ 46-48); that claimant made material misrepresentations in the presentment of the claim (third cause of action) (Doc. 1 ¶ 49-51); and (4) that STATE FARM will suffer irreparable harm if a stay of all arbitrations, lawsuits and/or claims by defendants relating to no-fault claims is not issued (fourth cause of action) (Doc. 1 ¶ 52-54). Service of process was made on the defaulting defendants (Docs. 32 at 3; 34).

On February 21, 2020, STATE FARM filed the instant motion seeking a default judgment pursuant to CPLR 3215 (Doc. 31). The motion is unopposed. In support of its motion, STATE FARM submits, *inter alia*, the affidavit of Micki Fraley ("Fraley"), the claim specialist assigned to this matter (Doc. 32 at 15-27). Fraley asserts that several factors raised concerns as to the

validity of the subject claims (Doc. 32 at 24). Specifically, Fraley maintains that the claimant was not struck by the insured vehicle or her own vehicle as evidenced by, among other things, Billy Lee's affidavit; STATE FARM's conversation with the police officer who was at the scene of the accident and who revealed that, based on the police report, the claimant's vehicle "did not move" and that the claimant's vehicle sustained no observable damage; and an attached invoice showing that the damage to claimant's vehicle, excluding labor, totaled only \$200 (Doc. 32 at 24).

Moreover, Fraley submits the claimant's EUO testimony to argue that there were factual inconsistencies in the claimant's testimony regarding how her injuries occurred (Doc. 32 at 25). Following the slight bump to her vehicle, the claimant asserted that she was struck by her own vehicle only on the knee (Doc. 32 at 25). However, Fraley asserts that the claimant later changed her account and testified that the trunk was open and that this also caused injury to her shoulder (Doc. 32 at 25). Moreover, Fraley maintains that the claimant's version of events, especially her account that Billy Lee appeared intoxicated and that he fled the scene by driving on the sidewalk, was not credible given the multiple trees and impediments on the sidewalk and the fact that, when confronted with this information, claimant failed to provide an explanation (Doc. 30 at 25).

LEGAL CONCLUSIONS:

Default Judgment

CPLR 3215 (a) provides, in pertinent part, that when "a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her]." To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default (*see Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). Here,

STATE FARM has established service of process on the defaulting defendants against which it seeks a default judgment, and the attorney affirmation submitted in support of the motion establishes that the defaulting defendants have not answered or otherwise appeared in this action (Docs. 32 at 3; 34).

STATE FARM has also established the facts constituting the claim. “An insurer may disclaim coverage based upon ‘the fact or founded belief that the alleged injury does not arise out of an insured incident’” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 NY Slip Op 33306 [U], 2019 WL 5788060, *3 [Sup Ct, NY County 2019], quoting *Central Gen. Hosp. v Chubb Group. of Ins. Co.*, 90 NY2d 195, 199 [1997]). To establish its entitlement to a default judgment based on a founded belief, a no-fault insurer need not “establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 WL 5788060 at *3 [internal quotation marks and citations omitted]; see *V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 25 Misc 3d 39, 40 [App Term. 2d Dept 2009]). “Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 WL 5788060 at *3), and “[c]ircumstantial evidence is sufficient if a defendant's conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence” (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2d Dept 2005] [internal quotation marks and citation omitted]; see *American Alternative Insurance Corporation v Washington*, 60 Misc 3d 1222[A], 2018 NY Slip Op 51210[U], 2018 WL 3963545, *3 [Sup Ct, NY County 2018]).

As an initial matter, this Court acknowledges that the EUO transcript was neither signed by the claimant nor notarized, and there is no indication whether STATE FARM provided the

claimant with the EUO transcript so as to comply with the requirements set forth in CPLR 3116 (a) (*see Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452, 453 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]; *Liberty Mutual Insurance Company v Martin*, 2020 NY Slip Op 50511[U], 2020 NY Misc LEXIS 1702, * 5-6 [Sup Ct, NY County 2019]). Moreover, the police report reflects that the police officer was not a witness to the accident, and it is unclear whether the observable condition of the vehicle was based on personal knowledge so as to satisfy the requirements of a business record (*see Hereford Ins. Co. v Ng*, 2020 NY Slip Op 31380[U], 2020 NY Misc LEXIS 2078, *6-8 [Sup Ct, NY County 2020]; *Am. Tr. Ins. Co. v 21st Century Pharm. Inc.*, 2020 NY Slip Op 50532[U], 2020 NY Misc LEXIS 1874, *2-4 [Sup Ct, NY County 2020]). However, since Fraley's affidavit draws heavily from the affidavit of Billy Lee, this Court nevertheless finds that STATE FARM has establish the facts constituting the claim (Docs. 32 at 7; 40).

Billy Lee affirmed in his affidavit that he was attempting to leave a parking space when he tapped the front bumper of the claimant's Acura (Doc. 40 ¶ 4-5). However, he maintains that, at the time of the collision, the claimant was sitting on a bench and said, "you hit my car" (Doc. 40 ¶ 6). He further represents that there was no damage to either vehicle (Doc. 40 ¶ 7). After the incident, the claimant allegedly said that she was standing in front of the Acura when the Lexis backed up into her, which Billy Lee disputed given the limited space between the two vehicles (Doc. 40 ¶ 8). The claimant allegedly asked Billy Lee for money but, given that there was no damage or injury, he refused and, instead, offered to make an insurance claim (Doc. 40 ¶ 9). The claimant refused, and Billy Lee left the scene (Doc. 40 ¶ 11). Billy Lee further represents that the trunk of the Acura was not open at any point during the incident and that he did not flee the scene by driving on the sidewalk (Doc. 40 ¶ 12-13). Given the forgoing, this Court finds that STATE

FARM has established prima facie the fact or founded belief that the alleged injury did not arise out of the insured accident and, thus, that the claimant was not entitled to no-fault benefits. "As assignees of the allegedly fraudulent claims, the defaulting defendants would likewise not be entitled to receive any payments for services allegedly provided as the result of the accident" (*Am. Alternative Ins. Corp. v Washington*, 60 Misc 3d 1222[A], 2018 NY Slip Op 51210[U], 2018 NY Misc LEXIS 3474, *7 [Sup Ct, NY County 2018]).

Leave to Amend the Summons and Complaint

That branch of STATE FARM's motion seeking to amend the summons and complaint to add LIVING HEALTHY MEDICAL CARE, P.C., NEW HORIZON SURGICAL CENTER, LLC and PROTECH MED, INC. is granted. STATE FARM mistakenly named LIVING HEALTH MEDICAL CARE, P.C. and PROTECH MEDICAL, INC in the summons and complaint and wishes to discontinue the action as against these named defendants (Doc. 32 ¶ 34). Since leave to amend should be freely given absent significant prejudice or surprise directly resulting from the delay (*see CPLR 3025[b]*; *Messinger v Mount Sinai Med. Ctr.*, 279 AD2d 344, 345 [1st Dept 2001]), this Court finds that STATE FARM has met that burden (*see Mollette v 111 John Realty Corp.*, 2015 NY Misc LEXIS 7001, *1-2 [Sup Ct, NY County 2015]) and, by failing to oppose the motion, defendants have raised no basis upon which to deny it. Moreover, this Court finds that, through Fraley's affidavit (Doc. 32), STATE FARM has established a prima facie basis for the claims asserted against the proposed defendants.

Therefore, in accordance with the foregoing it is hereby:

ORDERED that, pursuant to the stipulation filed on March 13, 2020 (Doc. 54), this action is discontinued as against MARK S. MCMAHON, M.D., P.C., and MARK S. MCMAHON, M.D., P.C.'s cross motion is rendered moot; it is further

ORDERED that this action is discontinued as against LIVING HEALTH MEDICAL CARE, P.C. and PROTECH MEDICAL, INC as provided in the moving papers (Doc. 32 ¶ 34); it is further

ORDERED that plaintiff's motion for leave to enter a default judgment against defendants BACK PAIN CHIROPRACTIC, P.C.; CPM MEDICAL SUPPLY, INC.; DYNAMIC SUPPLIERS, INC.; EAST SIDE PRIMARY MEDICAL CARE, P.C.; EDJ PHYSICAL THERAPY, P.C.; EXCELL CLINICAL LABORATORY; FIFTH AVENUE SURGERY CENTER, LLC; HORIZON ANESTHESIA GROUP, P.C.; IGNOR AMIGUD PHYSICIAN, P.C.; ISURPLY, LLC; LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C.; LONGEVITY MEDICAL SUPPLY, INC.; NEW HORIZON SURGICAL CENTER; NEW TIMES ACUPUNCTURE, P.C.; NEXRAY MEDICAL IMAGING, P.C.; PHOENIX MEDICAL SERVICES, P.C.; REFUAH PHYSICAL THERAPY, P.C.; ROXBURY ANESTHESIA, LLC; STAND UP MRI OF STATEN ISLAND, P.C.; SURGICORE OF JERSEY CITY, LLC; SWEETGRASS ACUPUNCTURE, P.C., and UNITED PHYSICIANS, PLLC is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ADJUDGED and DECLARED that plaintiff STATE FARM FIRE AND CASUALTY COMPANY is not obligated to pay no-fault or other insurance benefits under claim number 32-4199-S13, to defendants BACK PAIN CHIROPRACTIC, P.C.; CPM MEDICAL SUPPLY, INC.; DYNAMIC SUPPLIERS, INC.; EAST SIDE PRIMARY MEDICAL CARE, P.C.; EDJ PHYSICAL THERAPY, P.C.; EXCELL CLINICAL LABORATORY; FIFTH AVENUE SURGERY CENTER, LLC; HORIZON ANESTHESIA GROUP, P.C.; IGNOR AMIGUD PHYSICIAN, P.C.; ISURPLY, LLC; LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C.; LONGEVITY MEDICAL SUPPLY, INC.; NEW HORIZON SURGICAL CENTER; NEW TIMES ACUPUNCTURE, P.C.; NEXRAY MEDICAL IMAGING, P.C.; PHOENIX MEDICAL SERVICES, P.C.; REFUAH PHYSICAL THERAPY, P.C.; ROXBURY ANESTHESIA, LLC; STAND UP MRI OF STATEN ISLAND, P.C.; SURGICORE OF JERSEY CITY, LLC; SWEETGRASS ACUPUNCTURE, P.C., and UNITED PHYSICIANS, PLLC in connection with a motor vehicle accident that allegedly occurred on May 3, 2018; and it is further

ORDERED that that branch of plaintiff's motion seeking to amend the summons and complaint to add LIVING HEALTHY MEDICAL CARE, P.C., NEW HORIZON SURGICAL CENTER, LLC and PROTECH MED, INC. is granted and; it is further

ORDERED that, within 20 days after entry of this order, plaintiff shall serve newly added defendants LIVING HEALTHY MEDICAL CARE, P.C., NEW HORIZON SURGICAL CENTER, LLC and PROTECH MED, INC. with an amended summons and complaint in the proposed form annexed to plaintiff's moving papers (Doc. 41); and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, plaintiff STATE FARM FIRE AND CASUALTY COMPANY shall serve a copy of this order, with notice of entry, upon all defendants, as well as on the County Clerk (60 Centre Street, Room 141 B) and the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are thereupon directed to amend the caption accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.govisupctmanh)]; and it is further

ORDERED that this constitutes the Decision, Order, and Judgment of the court.

5/22/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE