

Liberty Mut. Ins. Co. v Johnson
2020 NY Slip Op 31539(U)
May 18, 2020
Supreme Court, New York County
Docket Number: 655283/2019
Judge: Arthur F. Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

LIBERTY MUTUAL INSURANCE COMPANY, LM
INSURANCE CORPORATION,

Plaintiff,

INDEX NO. 655283/2019

MOTION DATE 12/09/2019

MOTION SEQ. NO. 001

- v -

TAMECO JOHNSON, NATEJA DAVIS-HAMPTON, JARIO
PLASENCIA, COMFORT PHYSICAL THERAPY, PLLC ,
DR. OFFENBACHER MEDICAL IMAGING, PLLC,
DYNAMIC SURGERY CENTER, CONEY ISLAND
PSYCHOLOGY P.C., ELMWOOD PARK MEDICAL GROUP
PC, GRAIG GRANOVSKY CHIROPRACTIC, P.C.,
HAWTHORNE PAIN AND SPINE CENTER, HEALTHPLUS
SURGERY CENTER LLC, HORIZON REHABILITATION
P.T., P.C., M&D ELITE PHARMACY, LLC, NJMHMC, LLC,
PREMIER ANESTHESIA ASSOCIATES, PA, RF
CHIROPRACTIC IMAGING, P.C., VVX INC., NEW YORK
PAIN MANAGEMENT ASSOCIATES, NU AGE MED
SOLUTIONS INC., REHAB CARE PHYSICAL THERAPY
P.C., PATRIOT CHIROPRACTIC, P.C., CARESOFT
LEASING CORP., CONRAD CLEAN MD, MCDONALD AVE
CHIROPRACTIC P.C., SP ONE SERVICES, INC.,

Defendants.

-----X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion for JUDGMENT - DEFAULT

Upon the foregoing documents, plaintiffs' motion for a declaratory judgment on default is granted in part and denied in part, and the Cross-Motion of the answering medical provider defendants Coney Island Psychology, P.C.; Graig Granovsky Chiropractic, P.C.; and Horizon Rehabilitation P.T. P.C is granted for the reasons stated hereinbelow.

Background

On August 13, 2018, Tameco Johnson; Nateja Davis-Hampton; and Jario Plasencia (the "individual defendants") allegedly suffered injuries arising out of a motor vehicle accident at the intersection of Flatbush Avenue and Avenue L in Brooklyn, New York. They assert that they sought medical treatment for injuries arising out of the subject accident.

Subsequently, the medical provider defendants, Caresoft Leasing Corp; Comfort Physical Therapy, PLLC; Coney Island Psychology P.C.; Conrad Cean MD; Dr. Offenbacher Medical

Imaging, PLLC; Dynamic Surgery Center; Elmwood Park Medical Group, PC; Graig Granovsky Chiropractic P.C.; Hawthorne Pain And Spine Center; Healthplus Surgery Center LLC; Horizon Rehabilitation P.T., P.C.; M & D Elite Pharmacy, LLC; McDonald Ave Chiropractic P.C.; New York Pain Management Associates; NJMHMC, LLC; Nu Age Med Solutions Inc.; Patriot Chiropractic, P.C.; Premier Anesthesia Associates, PA; Rehab Care Physical Therapy P.C.; RF Chiropractic Imaging, P.C.; SP One Services, Inc.; and VVX Inc., submitted bills on assignment from the individual defendants to plaintiffs, Liberty Mutual Insurance Company (“Liberty”) and LM Insurance Corporation (“LM”). The medical provider defendants thereby sought reimbursement for the treatment that they allegedly provided to the individual defendants after the subject accident.

The instant Summons and Complaint details the subject medical bills: \$35,640.57 for Tameco Johnson’s claim; \$29,392.81 for Nateja Davis-Hampton’s claim; and \$19,680.67 for Jario Plasencia’s claim, totaling \$84,714.05 to date.

Tameco Johnson failed to appear for his four scheduled and rescheduled Examinations Under Oath (“EUO”), and plaintiffs subsequently denied all bills that the medical provider defendants submitted. Nateja Davis-Hampton failed to appear for her three scheduled and rescheduled EUOs, and plaintiffs subsequently denied all bills that the medical provider defendants submitted. On November 7, 2018, Jario Plasencia appeared for his EUO, and he testified with information inconsistent with that that provided by the owner of one of the subject vehicles; pursuant to said inconsistent testimony, plaintiffs denied all bills that the medical provider defendants submitted.

On September 11, 2019, pursuant to CPLR 3017(b), plaintiffs commenced the instant action as against all defendants. Plaintiffs requested a Judgment declaring essentially that (1) Liberty Mutual has no duty to provide coverage for claims for No-Fault benefits that the individual defendants submit or that their assignees submit; (2) Liberty Mutual is entitled to a stay and ultimately a dismissal of all pending litigation and arbitration arising out of the No-Fault billing submitted “under the fraudulent policy and claims between the parties;” (3) the medical provider defendants are barred from (a) submitting any new bills to plaintiffs arising out of treatment of the individual defendants and (b) commencing any new litigation or arbitration for any previously submitted bills that plaintiffs had denied; (4) Liberty Mutual properly issued denials of the individual defendant’s bills pursuant to Tameco Johnson and Nateja Davis-Hampton’s failures to satisfy a condition precedent to coverage and pursuant to Jario Plasencia’s “fraudulent statements.”

Between September 25 and October 9, 2019, plaintiff served defendants with the Summons and Complaints and with CPLR 3215(g) Notices.

On October 10, 2019, medical provider defendant Elmwood Park Medical Group, P.C. answered plaintiff’s Complaint with various admissions, denials, and nine Affirmative Defenses, requesting that this Court dismiss plaintiff’s declaratory judgment action in its entirety and award attorney’s fees to said answering medical provider defendant. (NYSCEF Doc. No. 1.)

On December 6, 2019, plaintiffs notified defendants that, on January 8, 2020, it would move (1) for a declaratory judgment on default against Tameco Johnson; Nateja Davis-Hampton; Jario Plasencia; Caresoft Leasing Corp; Comfort Physical Therapy, PLLC; Coney Island Psychology P.C.; Conrad Cean MD; Dr. Offenbacher Medical Imaging, PLLC; Dynamic Surgery Center; Graig Granovsky Chiropractic P.C.; Hawthorne Pain And Spine Center; Healthplus Surgery Center LLC; Horizon Rehabilitation P.T., P.C.; M & D Elite Pharmacy, LLC; McDonald Ave Chiropractic P.C.; New York Pain Management Associates; NJMHMC, LLC; Nu Age Med Solutions Inc.; Patriot Chiropractic, P.C.; Premier Anesthesia Associates, PA; Rehab Care Physical Therapy P.C.; RF Chiropractic Imaging, P.C.; SP One Services, Inc.; and VVX Inc.; (2) permanently to enjoin any arbitration or court hearing brought by the non-answering defendants for No-Fault benefits arising out of the subject accident; and (3) to affirm plaintiffs' denials of all claims for No-Fault benefits by the non-answering defendants arising out of the subject accident as valid.

On January 2, 2020, plaintiff discontinued the instant action as against medical provider defendants Caresoft Leasing Corp. and Elmwood Park Medical Group, P.C., only, with prejudice. (NYSCEF Doc. No. 24 and 26.)

In a January 7, 2020 Stipulation, the parties agreed to adjourn the instant motion to February 4, 2020. (NYSCEF Doc. No. 25.)

On January 27, 2020, medical provider defendants Coney Island Psychology, P.C.; Graig Granovsky Chiropractic, P.C.; and Horizon Rehabilitation P.T. P.C (the "answering medical provider defendants") notified plaintiffs that, on February 28, 2020, they would cross-move for an Order, [1] pursuant to CPLR 5015(a)(1) vacating their default in the instant matter; and [2] pursuant to CPLR 3012, extending the time in which said defendants can appear and plead in the instant matter. (NYSCEF Doc. No 28.)

On February 4, 2020, the answering medical provider defendants requested an adjournment to file and serve their Cross-Motion to compel acceptance of their Answer and Opposition to the instant motion. They sought a new return date of March 11, 2020 and asserted that "contact with opposing counsel proved unsuccessful." (NYSCEF Doc. No. 27.)

On February 21, 2020, the answering medical provider defendants served their Cross-Motion and corresponding Affirmation upon plaintiffs via the U.S. Postal Service. (NYSCEF Doc. No. 31.)

Discussion

Plaintiffs have established that they are entitled to a declaratory judgment on default as against the remaining defendants by complying with CPLR 3215(f) by submitting the following, inter alia: the subject Examination Under Oath correspondence, transcripts, and "statements on the record;" the pleadings; the Affidavits of Service and proof of CPLR 3215(g) Notices; the November 26, 2019 Affidavit of Karen Kuitwaard, an investigator in Liberty Mutual Insurance Company's Special Investigations Unit; the December 3, 2019 Affidavit of Dawn Smith, a Claims Department Team Manager who heads Liberty Mutual Insurance Company's Special Investigations Unit Liaison Team for the New York State Personal Markets No-Fault Office; and the December 6, 2019 Affirmation of Michelle Dunleavy, Esq.

Tameco Johnson; Nateja Davis-Hampton; Jario Plasencia; Comfort Physical Therapy, PLLC; Conrad Cean MD; Dr. Offenbacher Medical Imaging, PLLC; Dynamic Surgery Center; Hawthorne Pain And Spine Center; Healthplus Surgery Center LLC; M & D Elite Pharmacy, LLC; McDonald Ave Chiropractic P.C.; New York Pain Management Associates; NJMHMC, LLC; Nu Age Med Solutions Inc.; Patriot Chiropractic, P.C.; Premier Anesthesia Associates, PA; Rehab Care Physical Therapy P.C.; RF Chiropractic Imaging, P.C.; SP One Services, Inc.; and VVX Inc. have failed to oppose or otherwise respond to the instant motion, and their time to do so has expired.

On January 27, 2020, the answering medical provider defendants jointly submitted an Affirmation in Opposition to plaintiffs' motion for a declaratory judgment on default and in support of their own Cross-Motion (NYSCEF Doc. No. 29). The answering medical provider defendants allege that their delay in appearing in the instant action "was not willful or intended to prejudice the Plaintiff but rather was inadvertently caused by late receipt of the Summons and Complaint" and by "limited resources of Defendants' law firm."

The answering medical provider defendants supported their Cross-Motion, by submitting the following: the February 21, 2020 Affidavit of Dolores McGovern, Paralegal of The Rybak Firm, PLLC; the February 21, 2020 Affidavit of Graig Granovsky, the Principal of Graig Granovsky Chiropractic, P.C.; and the February 21, 2020 Affidavit of Robert Morrison, the Principal of Coney Island Psychology, P.C.

On February 28, 2020, plaintiffs opposed the answering medical provider defendants' Cross-Motion and requested that this Court deny said Cross-Motion and reject the February 21, 2020 Answer (NYSCEF Doc. No. 32). In response to the answering medical provider defendants' allegation that the Secretary of State notified them tardily of plaintiffs' Summons and Complaint, plaintiffs assert and demonstrate that plaintiffs also mailed, pursuant to CPLR 3215(g), the pleadings to all defendants at the addresses that defendants themselves provided.

The answering medical provider defendants' delay in responding to the instant Summons and Complaint though significant was not egregious and does not appear to have prejudiced plaintiffs.

Conclusion

Thus, for the reasons stated herein, the motion of plaintiffs, Liberty Mutual Insurance Company and LM Insurance Corporation, for a declaratory judgment on default is hereby granted, on default and on the merits, as against Tameco Johnson; Nateja Davis-Hampton; Jario Plasencia; Comfort Physical Therapy, PLLC; Conrad Cean MD; Dr. Offenbacher Medical Imaging, PLLC; Dynamic Surgery Center; Hawthorne Pain And Spine Center; Healthplus Surgery Center LLC; M & D Elite Pharmacy, LLC; McDonald Ave Chiropractic P.C.; New York Pain Management Associates; NJMHMC, LLC; Nu Age Med Solutions Inc.; Patriot Chiropractic, P.C.; Premier Anesthesia Associates, PA; Rehab Care Physical Therapy P.C.; RF Chiropractic Imaging, P.C.; SP One Services, Inc.; and VVX Inc. Plaintiffs' motion for a declaratory judgment on default is hereby denied against Coney Island Psychology, P.C.; Graig Granovsky Chiropractic, P.C.; and Horizon Rehabilitation P.T. P.C. (the "defaulting defendants"). The Cross-Motion of the

answering medical provider defendants Coney Island Psychology, P.C.; Graig Granovsky Chiropractic, P.C.; and Horizon Rehabilitation P.T. P.C. is hereby granted. The Clerk is hereby directed to enter judgment against the defaulting defendants (1) permanently enjoining any arbitration or court proceeding brought by the non-answering defendants for No-Fault benefits arising out of the alleged August 13, 2018 accident; (2) affirming plaintiffs' denials of all claims for No-Fault by the non-answering defendants arising out of the subject accident as valid; (3) declaring that Liberty Mutual has no duty to provide coverage for claims for No-Fault benefits that the individual defendants submit or that their assignees submit; (4) declaring that Liberty Mutual is entitled to a stay and ultimately a dismissal of all pending litigation and arbitration arising out of the No-Fault billing submitted "under the fraudulent policy and claims between the parties;" (5) declaring that the defaulting medical provider defendants are barred from (a) submitting any new bills to plaintiffs arising out of treatment of the individual defendants and (b) commencing any new litigation or arbitration for any previously submitted bills that plaintiffs had denied; and (6) declaring that Liberty Mutual properly issued denials of the individual defendant's bills pursuant to Tameco Johnson and Nateja Davis-Hampton's failures to satisfy a condition precedent to coverage and pursuant to Jario Plasencia's "fraudulent statements."

5/18/2020

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE