

Liberty Mut. Ins. Co. v Stewart
2020 NY Slip Op 31569(U)
April 28, 2020
Supreme Court, New York County
Docket Number: 656776/2019
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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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 656776/2019

MOTION DATE 03/09/2020

MOTION SEQ. NO. 001

- v -

NICOLE C. STEWART, EARL STEWART, ARKEESA
BARBOUR, CORRECTALIGN CHIROPRACTIC P.C. EAST
MIDWOOD VOLUNTEER AMBULANCE CORPS,
INCORPORATED LINDEN WEST MEDICAL, P.C. NOVA
MEDICAL DIAGNOSTIC PC NEW YORK-
PRESBYTERIAN/BROOKLYN METHODIST WEI DAO
ACUPUNCTURE, P.C.

**DECISION + ORDER ON
MOTION**

Defendant.

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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

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

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave to enter a default judgment against the individual defendants, Nicole Stewart, Earl Stewart and Areesa Barbour (the individual defendants), as well as healthcare provider defendants Correctalign Chiropractic PC, East Midwood Volunteer Ambulance Corps, Inc., Linden West Medical PC, New York-Presbyterian/Brooklyn Methodist, Wei Dao Acupuncture PC (collectively the non-answering defendants) declaring that they are not obligated to pay no-fault benefits to the individual defendants in connection with injuries they sustained in a motor vehicle accident on March 26, 2019, or to reimburse the non-answering medical defendants for treatment they rendered or equipment and supplies they provided to them for those injuries, as the individual defendants failed to appear for duly scheduled Examinations Under Oath (EUOs). No opposition is submitted. The motion is granted.

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 [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27].” Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd 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 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In the application for no-fault benefits, the individual defendants alleged, *inter alia*, that they were injured in a multi-car motor vehicle accident on March 26, 2019, and that they thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiffs, the health-care defendants sought payment under claim number 0395575370004, as assignees of the individual defendants, for no-fault benefits under insurance policy number AOS22114229570. See Insurance Law 5106(a); 11 NYCRR 65-1.1. In support of their motion, the plaintiffs submit, *inter alia*, record of the NF-2 application forms for no-fault benefits, record of the approximately 90 NF-3 forms submitted by the health-care defendants from April 2, 2019 through June 25, 2019, the scheduling letters, proof of mailing, and proof of no-show for two EUOs on May 28, 2019 and June 17, 2019 for individual defendants Earl Stewart and Nicole Stewart the first of which was mailed on May 8, 2019, the scheduling letters, proof of mailing, and proof of no-show for two EUOs on July 25, 2019 and August 13, 2019 for individual defendant Arkeesa Barbour, the first of which was sent on July 15, 2019, and approximately 90 denial of claims forms mailed from June 25, 2019 to August 15, 2019. These submissions demonstrate that the initial EUO notices on May 8, 2019 and July 15, 2019 were timely mailed to the individual defendants within 15 business days of the plaintiffs’ receipt of an applicable NF-3 form, as required by 11 NYCRR 65-3.5(b), and that the individual defendants each failed to appear for their duly scheduled EUOs. See Kemper Independence

Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1st Dept. 2015). The plaintiffs consequently provided *prima facie* evidence that, by failing to appear, the individual defendants 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 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st 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 (1st Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003); Holt v Holt, 262 AD2d 530 (2nd Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3rd 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 motion of the plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company for leave to enter a default judgment against Nicole Stewart, Earl Stewart and Areesa Barbour (the individual defendants), as well as provider defendants Correctalign Chiropractic PC, East Midwood Volunteer Ambulance Corps, Inc., Linden West Medical PC, New York-Presbyterian/Brooklyn Methodist, Wei Dao Acupuncture PC (collectively the non-answering defendants) is granted; and it is further,

ADJUDGED AND DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the defendants Nicole Stewart, Earl Stewart and Areesa Barbour for injuries that they allegedly sustained in a motor vehicle accident on March 26, 2019, or to defendants Correctalign Chiropractic PC, East Midwood Volunteer Ambulance Corps, Inc., Linden West Medical PC, New York-Presbyterian/Brooklyn Methodist, Wei Dao Acupuncture PC, to reimburse them for treatment they rendered or medical equipment they provided to Nicole

Stewart, Earl Stewart and Areesa Barbour for injuries that they allegedly sustained in the motor vehicle accident on March 26, 2019; and it is further,

ORDERED that the action is severed and continued as against the remaining defendant, Nova Medical Diagnostic PC; and it is further,

ORDERED that the plaintiffs 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 remaining parties shall appear for a preliminary/settlement conference on August 27, 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>4/28/2020</u>				<u>NANCY M. BANNON, J.S.C.</u>	
	DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE