

**PV Holding Corp. v Big Apple Med Equip., Inc.**

2020 NY Slip Op 31604(U)

May 26, 2020

Supreme Court, New York County

Docket Number: 159236/2019

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SHAWN T. KELLY** PART IAS MOTION 27

*Justice*

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INDEX NO. 159236/2019  
MOTION DATE 03/11/2020  
MOTION SEQ. NO. 001

PV HOLDING CORP. INCLUDING ALL OF ITS  
SUBSIDIARIES AND AFFILIATES, INCLUDING BUT NOT  
LIMITED TO AVIS BUDGET, LLC, AVIS CAR RENTAL,  
LLC, BUDGET CAR RENTAL, LLC, BUDGET TRUCK  
RENTAL, LLC, PAYLESS CAR RENTAL, INC. AND  
ZIPCAR, INC.,

Plaintiff,

- v -

BIG APPLE MED EQUIPMENT, INC., CITYWORKS  
PHYSICAL THERAPY, P.C., DYNAMIC MEDICAL IMAGING,  
P.C., KINGS CHIROPRACTIC WELLNESS, P.C., JA  
PHYSICAL THERAPY, P.C., LK ACUPUNCTURE,  
P.C., METRO PAIN SPECIALISTS, P.C., NORTHERN  
MEDICAL CARE, P.C., UNION DME CORP., VAN LOON  
DME USA, INC., MACCABI PHARMACY RX, INC., MS ST.  
LUKES & ROOSEVELT, WELLNESS PHYSICAL THERAPY  
REHABILITATION PLLC, STEVEN S. WEINSTEIN, M.D.,  
P.C., ARTHRITIS & PAIN, R.C., JOSEPH WEINSTEIN DO,  
P.C., SMS THERAPY SUPPLY, INC., DAVID FULTON, AJA  
SIMON, DONNA SERRANO, ROBERT THOMPSON

Defendant.

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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43,  
44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered.

This action arises from a motor vehicle collision that occurred on April 20, 2019.

Defendant Thompson was operating a Kia automobile leased from Plaintiff PV Holding Corp.,  
including all of its subsidiaries and affiliates, including but not limited to, Avis Budget, LLC,  
Avis Car Rental, LLC, Budget Car Rental, Inc., and Zipcar Inc., (herein "Avis" or "Plaintiff"),  
who owned and self-insured the vehicle. This leased automobile was involved in an accident

with a taxicab on Ninth Avenue and West 52nd Street, New York. Defendants Aja Simon, David Fulton and Donna Serrano were passengers in the vehicle.

Plaintiff Avis moves for a default judgment against Defendants Cityworks Physical Therapy, P.C., Dynamic Medical Imaging, P.C., Kings Chiropractic Wellness, P.C., JA Physical Therapy, P.C., LK Acupuncturist, P.C., Northern Medical Care, P.C., Van Loon DME USA, Inc., Maccabi Pharmacy Rx, Inc., MS St. Lukes & Roosevelt, Wellness Physical Therapy Rehabilitation PLLC, Steven S. Weinstein, M.D., P.C., Arthritis & Pain, R.C., Joseph Weinstein DO, P.C., and SMS Therapy Supply, Inc. (collectively herein “Defaulting Defendants”).

Similarly, Avis moves for a default judgment against Defendant Robert Thompson’s (herein “Defendant Thompson”) as Plaintiff rejected Defendant Thompson’s answer as untimely. Further Avis moves for a declaratory judgment providing that Avis is not under a duty to defend Defendant Thompson against future claims, arising out of this action.

Additionally, Avis moves for a declaration, stating that it owes no duty for any no-fault claims brought by Defendants Aja Simon, David Fulton and Donna Serrano, who allege that they sustained injuries, in the automobile accident, which occurred on April 20, 2019.

Lastly, Avis moves for a declaratory judgment seeking a permanent stay of all arbitrations, lawsuits, claims, costs and disbursements brought by all named defendants in this action- Defendants Big Apple Med Equipment, Inc., Cityworks Physical Therapy, P.C., Dynamic Medical Imaging, P.C., Kings Chiropractic Wellness, P.C., JA Physical Therapy, P.C., LK Acupuncture, P.C., Metro Pain Specialists, P.C., Northern Medical Care, P.C., Union DME Corp., Van Loon DME USA, Inc., Maccabi Pharmacy Rx, Inc., MS St. Lukes & Roosevelt, Wellness Physical Therapy Rehabilitation PLLC, Steven S. Weinstein, M.D., P.C., Arthritis &

Pain, R.C., Joseph Weinstein DO, P.C., SMS Therapy Supply, Inc., David Fulton, Aja Simon, Donna Serrano, Robert Thompson.

**Default Judgment is Granted as to Defaulting Defendants and Defendant Thompson**

Pursuant to CPLR §3215(a), a plaintiff may seek a default judgment against a defendant who has failed to appear, plead, or proceed to trial. An application for a default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the merits of the claim; and (3) proof of the default (*see* CPLR §3215[f]). Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim and proof of Defendants' failure to answer or appear in this action (*see* §CPLR 3215; *see also*, *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649 [2nd Dept. 2011]). The Defaulting Defendants in this action have not answered or appeared and did not oppose Plaintiff's default motion. Accordingly, Plaintiff's motion for a default judgment is granted against Defendants Cityworks Physical Therapy, P.C., Dynamic Medical Imaging, P.C., Kings Chiropractic Wellness, P.C., JA Physical Therapy, P.C., LK Acupuncturist, P.C., Northern Medical Care, P.C., Van Loon DME USA, Inc., Maccabi Pharmacy Rx, Inc., MS St. Lukes & Roosevelt, Wellness Physical Therapy Rehabilitation PLLC, Steven S. Weinstein, M.D., P.C., Arthritis & Pain, R.C., Joseph Weinstein DO, P.C., and SMS Therapy Supply, Inc<sup>1</sup>.

The second issue relates to Defendant Thompson, who failed to submit an answer until February 20, 2020. Plaintiff filed the Complaint and Summons on September 23, 2019, and Defendant Thompson was personally served on October 15, 2019. Accordingly, the Answer was due within 30 days of service. CPLR §3012(d) provides, "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely

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<sup>1</sup> METRO PAIN SPECIALISTS, P.C., UNION DME CORP., DAVID FULTON, AJA SIMON, and DONNA SERRANO answered the Summons & Verified Complaint.

served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Plaintiff has demonstrated that they have met all three criteria under CPLR §3215(a), therefore are entitled to a default judgment against Defendant Thompson. This default judgment extinguishes any future claims that Defendant Thompson may have had against Plaintiff.

### **Declaratory Judgment is Denied**

Plaintiff Avis seeks a declaratory judgment seeking both a No-Fault and liability disclaimer against Defendants Simon, Fulton and Serrano. Specifically, Avis contends that the No-Fault regulations have been violated in that Defendants Simon, Fulton and Serrano and Defendant Robert Thompson intentionally caused the collision, that their injuries did not arise from an insured incident, that their injuries were not causally related to the alleged collision, and that the loss was intentionally caused and therefore Avis has no duty to indemnify. Further, Defendants Simon, Fulton and Serrano reported to have sustained injuries and have been treated by Big Apple Med Equipment, Inc., Union DME Corp., and Metro Pain Specialists, P.C. (collectively herein "Defendant Medical Providers"). Avis also seeks a declaratory judgment precluding No-Fault recovery to Defendant Medical Providers.

In support, Avis has submitted partial transcripts from the EUO's conducted with Defendants Simon, Fulton and Serrano and the police report to demonstrate that the damages requested by the Defendant Medical Providers appears unwarranted. The police report stated the damage from the collision was minor, the airbags in the car did not deploy and neither driver, nor passengers was seriously injured (*see* Plaintiff's Ex. C). Avis also argues that it is suspicious that Defendants were all referred to the same attorney.

Avis contends that the inconsistent statements made by Defendants during their EUO's show that the accident was staged or deliberate. Defendants had several inconsistent statements

regarding the events surrounding the accident and how the accident occurred. Further, the statements of Defendants Simon, Fulton and Serrano differed in regards to their interactions post-collision. Defendant Simon stated that Defendants Thompson, Serrano, Fulton and herself left the hospital together and went to a diner (Plaintiff's Ex. G). Defendants Fulton (Plaintiff's Ex. F) and Serrano (Plaintiff's Ex. H) refute the statements made by Defendant Simon concerning leaving the hospital together. Defendant Fulton alleges that he left the hospital and did not interact with the other Defendants until the following day when he saw Defendant Simon. Defendant Serrano alleges that she went straight home upon leaving the hospital and has not had any contact with any of the Defendants involved in the accident. Defendant Simon alleges that she has interacted with Defendant Serrano on several occasions (Plaintiff's Ex. G).

Further, Avis argues that Defendant Thompson made statements to Avis which he later contradicted in the Answer he submitted. However, Plaintiff does not provide sufficient context or documentation as to what statements were made that were allegedly inconsistent.

Even accepting all the facts asserted by Plaintiff Avis as true, at best they provide some circumstantial evidence that a fraud might have occurred. Accordingly, Plaintiff's motion seeking declaratory judgment against Defendants Simon, Fulton, Serrano and Thompson must be denied (*see Lancer Ins. Co. v Saravia*, 40 Misc. 3d 171, 175, 967 NYS2d 593, 597 Sup. Ct [2013]). It follows that declaratory judgment against Defendant Medical Providers is also denied.

### **Permanent Stay is Denied**

Lastly, Avis is seeking a permanent stay of all arbitration, lawsuits, costs and disbursements associated with the above action. Plaintiff alleges that it properly served Defendant medical providers with notice of the EUO's. However, Defendant medical providers allege that service was not proper under 11 NYCRR § 65-3.5. Defendant medical providers are

also alleging that Plaintiff did not act within a timely manner to deny the no-fault payment claim (*see* 11 NYCRR § 65-3.8).

Plaintiff has not demonstrated that they have complied with the time restrictions; they have failed to submit supporting documents to credit their assertion of timeliness (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 46 NYS3d 579 [1st Dept 2017]). Accordingly, Avis's motion for a permanent stay of all arbitrations, lawsuits, costs and disbursements must be denied (*see also Hertz Vehs., LLC v Westchester Radiology*, 2018 NY Slip Op 30112(U) [N.Y. Sup. Ct. January 19, 2018]).

It is hereby,

ORDERED that Plaintiff's motion for default judgment against Defendants Cityworks Physical Therapy, P.C., Dynamic Medical Imaging, P.C., Kings Chiropractic Wellness, P.C., JA Physical Therapy, P.C., LK Acupuncturist, P.C., Northern Medical Care, P.C., Van Loon DME USA, Inc., Maccabi Pharmacy Rx, Inc., MS St. Lukes & Roosevelt, Wellness Physical Therapy Rehabilitation PLLC, Steven S. Weinstein, M.D., P.C., Arthritis & Pain, R.C., Joseph Weinstein DO, P.C., and SMS Therapy Supply, Inc. and a stay of all arbitrations, lawsuits, claims, costs and disbursements is granted without opposition and it is further;

ADJUDGED and DECLARED that Plaintiff owes no duty to pay No-Fault claims for Defendants Cityworks Physical Therapy, P.C., Dynamic Medical Imaging, P.C., Kings Chiropractic Wellness, P.C., JA Physical Therapy, P.C., LK Acupuncturist, P.C., Northern Medical Care, P.C., Van Loon DME USA, Inc., Maccabi Pharmacy Rx, Inc., MS St. Lukes & Roosevelt, Wellness Physical Therapy Rehabilitation PLLC, Steven S. Weinstein, M.D., P.C.,

Arthritis & Pain, R.C., Joseph Weinstein DO, P.C., and SMS Therapy Supply, Inc. with respect to the April 20, 2019, collision referenced in the complaint;

ORDERED that Plaintiff's motion for default judgment against Defendant Robert Thompson is granted without opposition; and a stay of all arbitrations, lawsuits, claims, costs and disbursements is granted against Defendant Robert Thompson without opposition; and it is further

ADJUDGED and DECLARED that Plaintiff owes no duty to pay No-Fault claims for Defendant Robert Thompson with respect to the April 20, 2019, collision referenced in the complaint; and it is further

ORDERED that Plaintiff's motion for declaratory judgment against Defendants Aja Simon, David Fulton and Donna Serrano is denied.

5/26/2020  
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: