

Liberty Mut. Ins. Co. v Nunez
2020 NY Slip Op 31774(U)
June 2, 2020
Supreme Court, New York County
Docket Number: 656531/2019
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 and
LM GENERAL INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 656531/2019

MOTION DATE 3/30/2020

MOTION SEQ. NO. 001

- v -

MIGUEL NUNEZ, ANTONIO ARAUJO, AT BAY
CHIROPRACTIC PC, BEST HANDS-ON PHYSICAL
THERAPY, CENTRAL SUPPLIES OF NY CORP, CITY ONE
MEDICAL PC, COMPLETE NEUROPHYSIOLOGY
PC, CONFIDENT MEDICAL SERVICES PC, CUSTOM RX
PHARMACY LLC, FAST CARE MEDICAL DIAGNOSTIC
PLLC, GARA MEDICAL CARE PC, GOOD TIME
ACUPUNCTURE PC, HAMID LALANI MD, IPARK
PODIATRY PC, KNIGHT CHIROPRACTIC PC, LIFE
EQUIPMENT INC., MEDSOURCE SOLUTIONS INC., MT
PHYSICAL THERAPY PC, NEW YORK MEDICAL &
DIAGNOSTIC CARE PC, NYRX PHARMACY
INC., PREFERRED MEDICAL PC, QUALITY MEDICAL
SURGICAL, RIDGEWOOD ACUPUNCTURE PC, VINCENT
J NUNZINTA DC PC DBA VJN DC PC, WELCOME
PHYSICAL THERAPY PC, YOUSSEF PT PC,

Defendants.

DECISION + ORDER ON
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13,
14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - DEFAULT

In this declaratory judgment action, the only defendant who timely answered the
complaint was Custom Rx Pharmacy, LLC. The plaintiffs, Liberty Mutual Insurance Company
and LM General Insurance Company ("plaintiff") discontinued the action as against that
defendant by stipulation dated February 6, 2020. The plaintiff now moves pursuant to CPLR
3215 for leave to enter a default judgment against the remaining, non-answering, defendants,
Miguel Nunez, Antonio Araujo, At Bay Chiropractic PC, Best Hands-On Physical Therapy, Central
Supplies of NY Corp., City One Medical P.C., Complete Neuropsychology P.C., Confident Medical
Services P.C., Fast Care Medical Diagnostic PLLC, Gara Medical Care P.C., Good Time Acupuncture

P.C., Hamid Lalani, M.D., IPark Podiatry, P.C., Knight Chiropractic, P.C., Life Equipment, Inc., Medsource Solutions, Inc., MT Physical Therapy, P.C., New York Medical & Diagnostic Care P.C., NYRX Pharmacy, Inc. Preferred Medical P.C., Quality Medical Surgical, Ridgewood Acupuncture P.C., Vincent J. Nunzinta DC, P.C., Welcome Physical Therapy, P.C., and Youssef PT, P.C.. No opposition is submitted.

The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the individual defendants or the health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendants for injuries allegedly sustained in a motor vehicle accident alleged to have occurred on November 14, 2018, on the Grand Central Parkway in Queens, New York. According to the plaintiff, the health-care defendants sought payment, as assignees of the individual defendants, for no-fault benefits under an insurance policy issued to non-party Glennys Nunez, policy number AOS22113583070, under claim number 038780299-0002. See Insurance Law § 5106(a); 11 NYCRR 65-1.1. The plaintiff claims that there was no coverage since the individual defendants, Miguel Nunez and Antonio Araujo, were not occupants of the insured vehicle involved in the accident, and they failed to appear for examinations under oath.

The plaintiff's motion is granted inasmuch as the plaintiff has provided proof of timely service of the summons and complaint upon the defendants, proof of the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely moved for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st Dept 2015]), and satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

The plaintiff's submissions include the complaint, verified by Kelly Malone Geard, a Claim Department Claims Manager for the plaintiff, and an affidavit of Brian McCamley, an investigator in the Special Investigations Unit for the plaintiff. McCamley's investigation revealed that the driver of the insured vehicle was Jose Maceas, that the individual defendants were not passengers in the vehicle and no injuries were reported. To determine if Nunez and Araujo submitted fraudulent claims, the plaintiff requested that they appear for EUOs. The EUOs were scheduled for Araujo for February 14, 2019, and March 18, 2019, and for Nunez on February 14, 2019, and March 12, 2019. Letters scheduling the EUO's were sent to the defendants. Neither defendant appeared on either date. Based on the failures to appear, the plaintiff denied

all bills submitted by the medical provider defendants. The plaintiff also submits in support of the motion the EUO scheduling letters, the statements on the record of the individual defendants' failure to appear, the denial of claim forms and the affidavit of Dawn Smith, the Claims Department Team Manager, who explains the plaintiff's claims mailing process and alleges that the plaintiff's mailing of the verification requests in this case were timely made.

The plaintiff's submissions demonstrate that the initial notice for an examination under oath (EUO) was timely mailed to the individual defendants within 15 days of its receipt of the individual defendant's NF-3 form, as required by 11 NYCRR 65-3.5(b). 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, 851 (1st Dept 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441, 441 (1st Dept 2015). They also show that the individual defendants did not appear for the initially scheduled EUO, and were 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 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014).

The court rejects and denies the belated cross-motion of defendant At Bay Chiropractic, P.C. for leave to file a late answer.

Accordingly, it is

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice, as against defendant Custom Rx Pharmacy LLC pursuant to the parties' Stipulation of Discontinuance dated February 6, 2020, and it is further

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 as against the non-answering defendants is granted, without opposition; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the individual defendants, Miguel Nunez and Antonio Araujo, and the health-care defendants, At Bay Chiropractic PC, Best Hands-On Physical Therapy, Central Supplies of NY Corp., City One Medical P.C., Complete Neuropsychology P.C., Confident Medical Services P.C., Fast Care Medical Diagnostic PLLC, Gara Medical Care P.C., Good Time Acupuncture P.C., Hamid Lalani, M.D., IPark Podiatry, P.C., Knight Chiropractic, P.C., Life Equipment, Inc., Medsource Solutions, Inc., MT Physical Therapy, P.C., New York Medical & Diagnostic Care P.C., NYRX Pharmacy, Inc. Preferred Medical P.C., Quality Medical Surgical, Ridgewood Acupuncture P.C., Vincent J. Nunzinta DC, P.C., Welcome Physical Therapy, P.C., and Youssef PT, P.C., or to reimburse them for treatment they rendered or medical equipment they provided to defendants Miguel Nunez and Antonio Araujo for injuries that those defendants allegedly sustained in a motor vehicle accident on November 14, 2018, which claims were submitted under insurance policy number AOS22113583070, claim number 038780299-0002, and it is further,

ORDERED that the purported cross-motion of defendant At Bay Chiropractic, P.C. for leave to file a late answer is denied as untimely, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court

6/2/2020
DATE


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

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