

Liberty Mut. Ins. Co. v Richmond
2020 NY Slip Op 32716(U)
August 19, 2020
Supreme Court, New York County
Docket Number: 656746/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 656746/2019

MOTION DATE 08/05/2020

MOTION SEQ. NO. 001

- v -

KIMBREYA RICHMOND, JASMIN DEY, NICHOLAS
STEWART, ALFORD A. SMITH MD PC, AVIANNE WAITHE
DC, CONRAD F. CEAN MD, CUSTOM RX PHARMACY
LLC, DOS MANOS CHIROPRACTIC PC, FLORID LEISURE
ACUPUNCTURE PC, FRANK ZHAN BEST PHYSICAL
THERAPY PC, JA PHYSICAL THERAPY PC, JOEUN
CHIROPRACTIC CARE PC, NEXRAY MEDICAL IMAGING
PC, PARACLETE CHIROPRACTIC PC, SEAPORT
CHIROPRACTIC PC, STAND UP MRI OF BENSONHURST
OC, THE BROOKLYN HOSPITAL CENTER, UTR
CHIROPRACTIC SERVICES PC, WELLNESS PHYSICAL
THERAPY REHABILITATION PLLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/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 medical provider defendants Alford A. Smith MD PC, and Joeun Chiropractic Care PC, is granted, for the reasons stated hereinbelow.

Background

On April 13, 2019, the individual defendants, Kimbreyia Richmond ("Richmond"); Jasmin Dey ("Dey"); and Nicholas Stewart ("Stewart"), were allegedly injured in a motor vehicle accident on East 89th Street at the intersection of Bedell Lane, Kings County, NY. The individual defendants subsequently sought treatment for injuries allegedly arising out of the subject alleged accident from the medical provider defendants, Alford A. Smith MD PC; Avianne Waithe DC; Conrad F Cean MD; Custom Rx Pharmacy LLC; Dos Manos Chiropractic PC; Florid Leisure Acupuncture PC; Frank Zhan Best Physical Therapy PC; JA Physical Therapy PC; Joeun Chiropractic Care PC; Nexray Medical Imaging PC; Paraclete Chiropractic PC; Seaport Chiropractic PC; Stand Up MRI Of Bensonhurst PC; The Brooklyn Hospital Center; UTR Chiropractic Services PC; and

Wellness Physical Therapy Rehabilitation PLLC. The individual defendants assigned to the medical provider defendants the right to collect no-fault insurance benefits under an insurance policy that plaintiffs, Liberty Mutual Insurance Company, and LM General Insurance Company, had issued that covered the subject vehicle. The medical provider defendants, in their capacities as the individual defendants' assignees under the subject insurance policy, then submitted claims to plaintiffs.

On June 11 and July 2, 2019, Dey failed to appear for a scheduled and rescheduled Examination Under Oath ("EUO").

On June 24 and July 15, 2019, Richmond failed to appear for a scheduled and rescheduled EUO.

On June 11 and July 2, 2019, Stewart failed to appear for a scheduled and rescheduled EUO.

Consequently, plaintiffs disclaimed any obligation to cover any losses and denied all coverage.

On November 8, 2019, plaintiffs commenced the instant action against the claimant-defendant and the medical provider defendants, seeking a judgment (1) declaring that plaintiffs have no duty to provide coverage or pay claims for no-fault benefits "made by or on assignment of the Individual Defendants" and are entitled to a permanent injunction barring any and all suits between the parties from continuing; (2) declaring that plaintiffs are entitled to a stay and ultimate dismissal of all pending litigation and arbitration arising out of the no-fault billing submitted under the policy and claims between the parties; (3) barring the medical provider defendants from submitting any new bills to plaintiffs for treatment provided to the individual defendants; (4) barring the medical provider defendants from commencing any new litigation or arbitration for any previously submitted bills that were denied; and (5) declaring that plaintiffs properly issued any and all denials of the individual defendants' claims pursuant to the individual defendants' failures to satisfy a condition precedent to insurance coverage by their failing to appear for their duly scheduled and rescheduled EUOs (NYSCEF Doc. 1, at 16).

Plaintiffs now move (1) pursuant to CPLR 3215, for a default judgment against the individual defendants and the medical provider defendants; (2) for a judgment permanently staying each and every part of any arbitration or court hearing or case brought by the non-answering defendants for no-fault benefits arising out of the subject alleged accident; (3) for a permanent injunction "barring any arbitration or court hearing brought by the non-answering defendants for no-fault benefits" arising out of the subject alleged accident; and (4) for a judgment declaring that plaintiffs' denials of all claims for no-fault benefits that the non-answering defendants submitted, arising out of the subject alleged accident, are valid (NYSCEF Doc. 3).

Pursuant to a February 13, 2020 stipulation, plaintiff discontinued the instant action as against medical provider defendant Custom Rx Pharmacy LLC, only (NYSCEF Doc. 20).

On May 27, 2020, medical provider defendants Alford A. Smith MD PC; and Joeun Chiropractic Care PC (the "answering defendants") jointly answered the complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 23).

On June 4, 2020, the answering defendants opposed plaintiffs' motion and jointly cross-moved, pursuant to CPLR 5015(a)(1), to vacate their default in this matter and, upon vacatur, for an order, pursuant to CPLR 3012, extending their time to appear and plead in this matter (NYSCEF Doc. 24)

Plaintiffs rejected the answering defendants' answer, asserting that said answer became due on December 22, 2019 or January 12, 2020 at the latest (NYSCEF Doc. 34). Plaintiffs also request that this Court reject the answering defendants' joint June 4, 2020 cross-motion as untimely and improperly filed, as the answering defendants indicated a return date of June 8, 2020 (after correction from the original June 6, 2020 return date).

In a July 9, 2020 letter to this Court, the answering defendants asserted that, pursuant to CPLR 2214(c), the discretion to reject their cross-motion is reserved to the Court. They also assert that plaintiffs' arguments for the answering defendants' untimeliness fail on the merits, as plaintiffs' notice of motion was returnable on July 16, 2020 (NYSCEF Doc. 35).

On July 24, 2020, plaintiffs opposed the answering defendants' cross-motion (NYSCEF Doc. 36).

Discussion

Plaintiffs' Motion for a Default Judgment

Plaintiffs have established that they are entitled to a declaratory judgment on default as against the individual defendants and the medical provider defendants except for Custom Rx Pharmacy LLC, and the answering defendants, by complying with CPLR 3215(f) by submitting, inter alia, the following: a copy of the summons and complaint; copies of the subject affidavits of service and CPLR 3215(g) notice; and the February 4, 2020 affirmation of Michelle Dunleavy, Esq., plaintiffs' attorney.

To date, the individual defendants and the non-discontinued medical provider defendants, except for the answering defendants, have failed to oppose or otherwise respond to the instant complaint and/or instant motion, and their time to do so has expired.

Thus, plaintiffs are entitled to a declaratory judgment on default as against the individual defendants and the medical provider defendants except for Custom Rx Pharmacy LLC, and the answering defendants.

The Answering Defendants' Answer and Cross-Motion

As plaintiffs served both answering defendants on December 12, 2019 pursuant to BCL § 306, the answering defendants' answer was due by January 11, 2020 (thirty days after service upon the New York secretary of state). This date fell prior to this Court's e-filing suspensions due to the COVID-19 pandemic.

However, the answering defendants have met their burden to establish a reasonable excuse and meritorious defense for their untimely answer. See Zino v Joab Taxi, Inc., 20 AD3d 521 (2nd Dept, 2005). They assert that the secretary of state failed to serve the answering defendants immediately upon receipt of the summons and complaint, which rendered the answering

defendants unable to submit a timely answer (NYSCEF Doc. 25, at 3-4). This Court finds this explanation to be satisfactory. Therefore, this Court finds that the answering defendants' joint May 27, 2020 answer is timely, and they are not in default.

E-Courts marked the instant matter as "fully submitted" as of August 5, 2020, following adjournments on March 9, April 6, and July 16, 2020. Therefore, this Court finds that the answering defendants' joint cross-motion is timely (despite the potential typo in the specified return date). CPLR 2001.

Conclusion

Thus, the request of plaintiffs, Liberty Mutual Insurance Company, and LM General Insurance Company, for a declaratory judgment on default is hereby granted as against the individual defendants, Kimbrey Richmond; Jasmin Dey; and Nicholas Stewart; and medical provider defendants Avianne Waithe DC; Conrad F Cean MD; Dos Manos Chiropractic PC; Florid Leisure Acupuncture PC; Frank Zhan Best Physical Therapy PC; JA Physical Therapy PC; Nexray Medical Imaging PC; Paraclete Chiropractic PC; Seaport Chiropractic PC; Stand Up MRI Of Bensonhurst PC; The Brooklyn Hospital Center; UTR Chiropractic Services PC; and Wellness Physical Therapy Rehabilitation PLLC, only. This Court hereby denies, solely as moot, plaintiffs' request for a declaratory judgment on default as against medical provider defendant Custom Rx Pharmacy LLC, pursuant to the February 13, 2020 stipulation of discontinuance. This Court hereby denies plaintiffs' request for a declaratory judgment on default as against the answering medical provider defendants, Alford A. Smith MD PC; and Joeun Chiropractic Care PC, for the reasons stated in the "Discussion" section of this Decision and Order.

The joint cross-motion of medical provider defendants Alford A. Smith MD PC; and Joeun Chiropractic Care PC, is hereby granted. Accordingly, the default of medical provider defendants Alford A. Smith MD PC; and Joeun Chiropractic Care PC, is hereby vacated, and their time to appear and plead is hereby extended by thirty-five days from the date hereof.

Accordingly, the Clerk is hereby directed to enter judgment (1) permanently staying, enjoining, and barring each and every part of any arbitration or court hearing or case brought by the non-answering and non-discontinued defendants for no-fault benefits arising out of the subject alleged accident; and (2) declaring that plaintiffs' denials of all claims for no-fault benefits that the non-answering and non-discontinued defendants submitted, arising out of the subject alleged accident, are valid.

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8/19/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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<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: