

Liberty Mut. Ins. Co. v Babalola
2020 NY Slip Op 33410(U)
October 15, 2020
Supreme Court, New York County
Docket Number: 656130/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK

PART

IAS MOTION 38EFM

Justice

-----X

INDEX NO. 656130/2019

LIBERTY MUTUAL INSURANCE CO., et al.,

MOTION DATE 01/22/2020

Plaintiffs,

MOTION SEQ. NO. 001

- v -

GABRIEL BABALOLA, *et al.*,

**DECISION + ORDER ON
MOTION**

Defendants.

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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

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, the motion of plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company (together, “Plaintiffs”) for entry of a default judgment against defendants Gabriel Babalola, AR Personal Medical Care PC, Atlas PT, PC, Azcare Inc., Englewood Orthopedics Group PC, Far Rockaway Medical PC, Heal-Rite PT PC, Integrated Chiropractic of NY P.C., NYS Acupuncture P.C., Radwa Physical Therapy P.C., Wellstream Acupuncture, P.C. (together, “Defendants”) is granted on default and without opposition, in accord with the following memorandum decision.

Background

Plaintiffs are the issuers of an insurance policy issued to non-parties Matthew Babalola and Christinah Babalola (the “Policy”) under which defendant Gabriel Babalola (“Babalola”) made claims for no-fault benefits in connection with an alleged motor vehicle collision on February 15, 2019 (the “collision”). The Defendants are medical providers who have made claims to Plaintiffs as assignees of Babalola. Plaintiffs commenced this action seeking declaratory and injunctive relief against Defendants declaring that they are not entitled to no-

fault insurance benefits in connection with the collision on the basis of a founded belief that the alleged injuries were not sustained as a result of a covered event. Plaintiffs now move for entry of a default judgment against the Defendants, who have failed to answer the complaint or otherwise appear in this action. The motion is unopposed.

Discussion

Plaintiff has demonstrated its entitlement to the entry of a default judgment against Defendants by submission of the affirmation of its counsel, Michelle Dunleavy, Esq., with exhibits thereto, which demonstrate proof of service of the summons and complaint upon Defendants and proof of Defendants' defaults, and the affidavits of David J. DeGeorge, an investigator in the Special Investigations Unit for plaintiff Liberty Mutual Insurance Company ("Liberty Mutual"), and Dawn Smith, a Claims Department Teams Manager for Liberty Mutual, with exhibits thereto, which demonstrate proof of the facts constituting the claim (CPLR 3215[f]). Plaintiffs have also timely moved for relief within one year of the default as required by CPLR 3215 (c) and satisfied the additional notice requirements set forth in CPLR 3215 (g). Having failed to answer, Defendants are "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

An insurer "[m]ay assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]). To establish its entitlement to a default judgment based on a founded belief, a no-fault insurer is "not required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence" (*V.S. Med. Servs. P.C. v All State Ins. Co.*,

25 Misc 3d 39, 41 [App Term, 2d Dept 2009]; *see also Kemper Independence Ins. Co. v Caban Massage Therapy P.C.*, 2019 NY Slip OP 33478[U] [Sup Ct, NY County 2019]). Rather, the insurer must demonstrate the facts elicited during an investigation that make up the founded belief. “Circumstantial evidence may be used to prove such facts if a party’s conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence” (*Unitrin Advantage Ins. Co. v Advanced Orthopedics and Joint Preservation, P.C.*, 2018 N.Y. Slip Op. 33296 [U], *quoting Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2d Dept 2005] [internal quotations omitted]). Here, the affidavits of David J. DeGeorge and Dawn Smith, and the exhibits annexed thereto including, *inter alia*, transcripts of Examination Under Oaths of insured Christianah Babalola and claimant Gabriel Babalola, a report of Jacqueline M. Lewis, Ph.D., a Biomechanical Engineer engaged by Plaintiffs to conduct a review of the circumstances of the collision, and a report of Gerard A. Catanese, M.D., a board-certified forensic pathologist engaged by Plaintiffs to conduct a review of the circumstances of the collision, set forth facts sufficient to demonstrate that Plaintiffs have a founded belief that Gabriel Babalola did not sustain the purported injuries in the subject collision and is, therefore, not entitled to coverage under the Policy. Accordingly, Plaintiffs are entitled to entry of a default judgment and declaration that they are not required to pay the subject claims.

Accordingly, it is

ORDERED that the motion of the plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company for entry of a default judgment against defendants Gabriel Babalola, AR Personal Medical Care PC, Atlas PT, PC, Azcare Inc., Englewood Orthopedics Group PC, Far Rockaway Medical PC, Heal-Rite PT PC, Integrated Chiropractic of NY P.C., NYS

Acupuncture P.C., Radwa Physical Therapy P.C., Wellstream Acupuncture, P.C. is granted and the Clerk of the Court is directed to enter judgment accordingly, and it is further

ADJUDGED and DECLARED that each and every part of any arbitration or court hearing brought by the defendants for no-fault benefits stemming from the alleged incident of February 15, 2019 is hereby permanently stayed; and it is further

ADJUGED and DECLARED that each of the defendants is hereby permanently enjoined from commencing or participating in any arbitration or court hearing for No-Fault benefits stemming from the alleged incident of February 15, 2019; and it is further

ADJUDGED and DECLARED that plaintiffs' denials of all claims for No-Fault benefits made by the defendants stemming from the alleged incident of February 15, 2019 are deemed valid.

Louis L. Nock

<u>10/15/2020</u>		<u>LOUIS L. NOCK, J.S.C.</u>	
DATE			
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