

PV Holding Corp. v AB Quality Health Supply Corp.
2021 NY Slip Op 31764(U)
May 24, 2021
Supreme Court, New York County
Docket Number: 160260/2017
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN PART IAS MOTION 33EFM

Justice

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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.,

INDEX NO. 160260/2017

MOTION DATE 03/17/2021

MOTION SEQ. NO. (MS) 004

Plaintiff,

- v -

AB QUALITY HEALTH SUPPLY CORP., ACH
CHIROPRACTIC, P.C., ATLAS RADIOLOGY, P.C., ENERGY
CHIROPRACTIC, P.C., JFL MEDICAL CARE, P.C., HANK
ROSS MEDICAL, P.C., JULES FRANCOIS PARISIEN, M.D.,
KINGS REHAB ACUPUNCTURE, P.C., MARIA SHEILA
MASIGLA, P.T., QUALITY CUSTOM MEDICAL SUPPLY,
INC., KENNETH COLE, SIMONE BOX, ROBIN GILLES

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

In this no-fault insurance matter, plaintiff PV Holding Corp. moves pursuant to CPLR 2221(d) and (e) for leave to reargue and/or renew this court's December 24, 2019 Decision and Order (December 2019 Order) which denied plaintiff's motion for default judgment against defendants AB Quality Health Supply Corp., ACH Chiropractic, Energy Chiropractic, P.C., JFL Medical Care, Jules Francois Parisien, M.D., Kings Rehab Acupuncture, Maria Shiela Masigla, P.T., Simone Box, and Robin Gilles (collectively, appearing defendants), and upon reargument/renewal, grant default judgment. The appearing defendants oppose the motion. The Decision and Order is as follows:

BACKGROUND

By way of background, plaintiff previously moved in MS 1 for a default judgment against non-appearing defendants Atlas Radiology, P.C., Hank Ross Medical, P.C., Quality Custom Medical Supply, Inc., and Kenneth Cole. These parties never answered or appeared in this matter.

Plaintiff's first motion was denied on November 15, 2018 (November 2018 Order), for failure to "set forth the date on which it received claimant's application for benefits forms", thus failing to establish compliance with 11 NYCRR 65-3.5[a] (NYSCEF # 79). The November 2018 Order also denied plaintiff's motion for failure to demonstrate that it received any completed verification forms before requesting claimants' examinations under oath, thus failing to comply with 11 NYCRR 65-3.5(d) (*id.*). Plaintiff was ordered to renew its motion or discontinue the action within sixty (60) days of the order. If plaintiff failed to take any such action, plaintiff's complaint was to be dismissed (*id.*). Plaintiff took no action but this action continued with the appearing parties.

Nevertheless, following the appearing parties' substantial non-compliance with discovery orders, this court struck the appearing parties' answers, affirmative defenses, and counterclaims, and directed plaintiff to file its Note of Issue by September 6, 2019. Plaintiff did so on August 30, 2019 (NYSCEF # 131).

Subsequently, plaintiff filed a motion for entry of default judgment against the appearing defendants on September 30, 2020 (MS 2) that was substantially the same as its first attempt for entry of default judgment against the non-appearing defendants. Indeed, plaintiff's moving papers were nearly identical to the first motion.

As such, this court denied plaintiff's second default judgment attempt on December 24, 2019, on the same grounds as the first default judgment motion (NYSCEF # 166). The December 2019 Order held as follows:

"plaintiff's... motion is defective for the same reasons as its first attempt at default judgment. Thus, plaintiff's motion is denied for failure to comply with CPLR 3215(f)'s proof of claim requirement. There is no evidence as to the date plaintiff received claimant's application for benefits forms (11 NYCRR 65-3.5[a]) or any completed verification forms before requesting claimants' examinations under oath (11 NYCRR 65-3.5[b]), which necessitates a denial of plaintiff's instant motion (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017])."

(*Id.* at 2.)

Plaintiff then moved in MS 3 to reargue this court's December 2019 Order. The motion was denied by this court's October 15, 2020 Decision and Order (NYSCEF # 160).

This time, in MS 4, plaintiff seeks to reargue/renew armed with the First Department's decision in *PV Holding Corp. v AB Quality Health Supply Corp.*, 189

AD3d 645, 646 (1st Dept 2020) which reversed the November 2018 Order on the basis that the examinations under oath (EUO) were properly noticed (NYSCEF # 164).

DISCUSSION

At the outset, the branch of plaintiff's motion that seeks reargument is denied as untimely since plaintiff's motion is beyond the thirty-day reargument period (*see* CPLR 2221[d][3]). The branch of plaintiff's motion that seeks renewal and modification of this court's December 2019 Order is granted.

A motion for CPLR 2221(e) renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination". CPLR 2221(e)(3) states that the motion "shall contain reasonable justification for the failure to present such facts on the prior motion". A motion for renewal "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]).

As the December 2019 Order is predicated on the same legal basis as the November 2018 Order, the First Department's determination is dispositive here. The EUOs were properly noticed and the failure to appear for the EUOs "constitutes a breach of a condition precedent to coverage under a no-fault policy" (*Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014] *citing* *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). As such, renewal and modification of the December 2019 Order is proper here.

CONCLUSION

Based on the foregoing, it is

ORDERED that the branch of plaintiff's motion for leave to renew this court's Order dated December 24, 2019, and upon renewal, grant plaintiff's motion for default judgment against AB Quality Health Supply Corp., ACH Chiropractic, Energy Chiropractic, P.C., JFL Medical Care, Jules Francois Parisien, M.D., Kings Rehab Acupuncture, Maria Shiela Masigla, P.T., Simone Box, and Robin Gilles is granted; it is further

ORDERED, DECLARED, and ADJUDGED that plaintiff is not obligated to provide no-fault coverage to AB Quality Health Supply Corp., ACH Chiropractic, Energy Chiropractic, P.C., JFL Medical Care, Jules Francois Parisien, M.D., Kings


Rehab Acupuncture, Maria Shiela Masigla, P.T., Simone Box, and Robin Gilles for the no-fault claims submitted to plaintiff under claim number 178022720 in connection with the alleged May 22, 2017 accident; it is further

ORDERED that the branch of plaintiff's motion for reargument is denied as untimely; it is further

ORDERED that plaintiff is to serve a copy of this order with notice of entry upon all parties at their last known addresses and the County Clerk's Office and the Clerk of the Trial Support Office within fifteen (15) days of the issuance of this Order; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment as written.

This constitutes the Decision and Order of the court.

<u>5/24/2021</u> DATE			 <u>MARGARET A. CHAN, J.S.C.</u> MARGARET CHAN, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE