

<b>Kemper Independence Ins. Co. v Gutterman</b>
2022 NY Slip Op 30001(U)
January 3, 2022
Supreme Court, New York County
Docket Number: Index No. 156845/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

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KEMPER INDEPENDENCE INSURANCE COMPANY,
Plaintiff,

- v -

AHARON GUTTERMAN, MD, PLLC, ATB SERVICES, INC., AVERROES PHYSICAL THERAPY, PC, AZ CARE, INC., BERGENFIELD SURGICAL CENTER, BJ569 ACUPUNCTURE, P.C., COMPREHENSIVE MEDICAL ASSIST, P.C., DIANON SYSTEMS, INC., ENGLINGTON MEDICAL, P.C., FAST RECOVERY CPM & EQUIPMENT CORP., FJ ORTHOPAEDICS & PAIN MANAGEMENT, P.L.L.C., HAIHU MEDICAL, P.C., JONATHAN LEWIN, MD, P.C., KOLB RADIOLOGY, P.C., LAXMIDHAR DIWAN, M.D., LENCO DIAGNOSTIC LABORATORY, LENOX HILL RADIOLOGY MEDICAL IMAGING, NEW MILLENNIUM MEDICAL IMAGING, P.C., NEWKIRK AVE OFFICE BASED SURGERY, NYEEQASC, LLC, PMR MEDICAL, P.C., PROTECHMED, INC., SEDATION VACATION PERIOP MED PLLC, SHERMAN ABRAMS LABORATORY, TITAN PHARMACY LEVRON, INC., UNICAST INC., VVX, INC., JAHEEM GRAYTON

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 57, 59, 72

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for ACCEPT LATE ANSWER

Upon the foregoing documents, plaintiff's motion seeking to enter a default judgment against the non-answering defendants and Averroes Physical Therapy, PC and NYEEQASC, LLC's motion seeking leave to interpose a late answer are decided as follows:

DECISION + ORDER ON MOTION

Averroes Physical Therapy, PC and NYEEQASC, LLC's motion is permitted to be withdrawn and their answer interposed pursuant to the stipulation e-filed as NYSCEF Document No. 72

Plaintiff commenced the instant action by filing a summons and complaint on August 7, 2020. As described in the complaint, on June 12, 2019, defendant Jaheem Grayton exited a Kemper Insured vehicle, which struck him when said Kemper insured vehicle was struck in the rear. Said claimant allegedly sustained injuries and sought treatment from the defendant medical providers. Plaintiff seeks a declaratory judgment that it is not obligated to pay no-fault claims arising out of said accident based upon Jaheem Grayton's testimony at his Examination Under Oath, leading to a founded belief that Grayton's alleged injuries did not arise from the subject accident or that same made material misrepresentations concerning the accident to plaintiff. On August 29, 2020, Jaheem Grayton was served pursuant to CPLR 308(2). The corporate defendant movants were served pursuant to BCL Section 306, LLC Law Section 303 or CPLR 311. On September 7, 2021, the defaulting defendants were served with an additional copy of the summons and complaint pursuant to CPLR 3215(g). Plaintiff now moves for a default judgment and Averroes Physical Therapy, PC and NYEEQASC, LLC move for leave to submit a late answer.

Answers have been interposed by Laxmidhar Diwan MD, Fast Recovery CPM & Equipment Corp, Haihu Medical, PC, Averroes Physical Therapy, PC, NYEEQASC, LLC, Comprhensive Medical Assist PC, Englinton Medical P.C, and Jaheem Grayton. This action has been discontinued against Dianon Systems, Inc., Lenox Hill Radiology Medical Imaging, BJ569 Acupuncture, P.C. Protechmed Inc, Unicast Inc, Aharon Gutterman, MD, PLLC and PMR Medical, P.C.. ATB Services, Inc., AZ Care, Inc., Bergenfield Surgical Center, FJ Orthopaedics & Pain Management, PLLC, Jonathan Lewin, MD, PC, Kolb Radiology, PC, Lenco Diagnostic

Laboratory, New Millenium Medical Imaging, PC, Newkirk Ave Office Based Surgical, Sedation Vacation Periop Med, PLLC, Sherman Abrams Laboratory, Titan Pharmacy Levron, Inc. and VVX, Inc. (the “Defaulting Defendants”) are now in default.

In support of plaintiff’s motion, plaintiff submits the affidavit of Denise Winant, a No-Fault claim representative employed by Merastar Insurance Company, the police report, photographs and the transcript of Jaheem Grayton’s EUO, which establish as follows: On June 12, 2019, Jaheem Grayton exited a Kemper Insured vehicle, which struck him when said Kemper insured vehicle was struck in the rear. Claimant alleged to have sustained significant bodily injuries as a result of the collision, and Kemper assigned claim number C033782NY19 to all No-Fault claims relating to the June 12, 2019 collision. The circumstances surrounding the collision raised a strong possibility that the Claimants’ alleged injuries and any subsequent treatment by the Medical Provider Defendants were not causally related to the accident. Plaintiff alleges that Grayton gave suspect answers at his EUO. Based upon same, plaintiff maintains a founded belief that the Claimants’ alleged injuries and any subsequent No-Fault treatment submitted by the Medical Provider Defendants were not causally related to the June 12, 2019 collision and/or did not arise from an insured event.

An insurer may disclaim coverage based upon “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. Co.*, 90 N.Y.2d 195, 199 (1997). In meeting its burden, an 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. Services, P.C. v. Allstate Ins. Co.*, 25 Misc. 3d 39, 39 (N.Y. App. Term, 2d Dep’t 2009). Rather, the insurer must put forth facts that

suggest it maintains a founded belief that the injuries or treatments are unrelated to the collision. Plaintiff has done so here.

ORDERED that Kemper Independence Insurance Company is not obligated to honor or pay claims for reimbursement submitted by the Defaulting Defendants (ATB Services, Inc., AZ Care, Inc., Bergenfield Surgical Center, FJ Orthopaedics & Pain Management, PLLC, Jonathan Lewin, MD, PC, Kolb Radiology, PC, Lenco Diagnostic Laboratory, New Millenium Medical Imaging, PC, Newkirk Ave Office Based Surgical, Sedation Vacation Periop Med, PLLC, Sherman Abrams Laboratory, Titan Pharmacy Levron, Inc. and VVX, Inc.), as assignees of Jaheem Grayton, under the Kemper insurance policy, Claim No.: C033782NY19, nor is Kemper Independence Insurance Company required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits filed by the Defaulting Defendants from the alleged accident of June 12, 2019, involving Grayton; and it is further

ORDERED that Kemper is not required to provide, pay, or honor any current or future claim for no-fault benefits submitted by the defaulting medical providers under the Mandatory Personal Injury Protection endorsement under the Kemper insurance policy, Claim No.: C033782NY19.

ORDERED that Averroes Physical Therapy, PC and NYEEQASC, LLC's motion seeking leave to interpose a late answer is GRANTED in its entirety.

1/3/2022  
DATE

  
LAURENCE LOVE, J.S.C.

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