

Liberty Mut. Ins. Co. v Maurent
2022 NY Slip Op 30285(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 654475/2020
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

Justice

LIBERTY MUTUAL INSURANCE COMPANY and
LM GENERAL INSURANCE COMPANY,
Plaintiffs,
INDEX NO. 654475/2020
MOTION SEQ. NO. 001

- v -

GARY MAURENT,
KESSEVA ESTIME,
ANDALELLA CHIROPRACTIC PC,
ARIEL CHIROPRACTIC PC,
ATLAS PHARMACY LLC,
BAY MEDICAL PC, BELAM ACUPUNCTURE PC,
BRIDGES PSYCHOLOGICAL SERVICES PC,
COMPREHENISVE MEDICAL ASSIST PC,
CYRUS CHIROPRACTIC PC,
ECLIPSE MEDICAL IMAGING PC,
EXON MEDICAL EQUIPMENT INC.,
HANK ROSS MEDICAL PC,
INSPIRED CHIROPRACTIC PC,
JOINT PHYSICAL THERAPY PC,
KH LEE ACUPUNCTURE PC,
NEXTSTEP HEALING INC.,
NU AGE MED SOLUTIONS INC.,
NYEEQASC LLC, PROTECHMED INC.,
SABAS NY SERVICES INC.,
SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC,
SUPPORTIVE PRODUCTS CORP.,
THOMPSON MEDICAL PC, UNICAST INC.
Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31 were read on this motion to/for

DEFAULT JUDGMENT

In this declaratory judgment action, plaintiff seeks to deny no-fault benefits relating to a motor vehicle accident on May 14, 2019 involving claimant defendant GARY MAURENT for failure to appear for a properly scheduled EUO and claimant defendant KESSEVA ESTIME for failure to provide post-EUO documents (NYSCEF Doc. No. 1, summons and complaint).

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the following defendants: GARY MAURENT, KESSEVA ESTIME, ANDALELLA CHIROPRACTIC PC., BAY MEDICAL PC., BELAM ACUPUNCTURE PC., BRIDGES PSYCHOLOGICAL SERVICES PC., CYRUS CHIROPRACTIC PC., ECLIPSE MEDICAL IMAGING PC., EXON MEDICAL EQUIPMENT INC., HANK ROSS MEDICAL PC.,

INSPIRED CHIROPRACTIC PC., JOINT PHYSICAL THERAPY PC., KH LEE ACUPUNCTURE PC., NYEEQASC LLC., SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC., and SUPPORTIVE PRODUCTS CORP (“the defaulting defendants”)¹ for their failure to answer or otherwise appear in this action. (NYSCEF Doc. No. 11, *Notice of Motion*).

Despite service of the motion, the defaulting defendants have failed to appear or oppose the motion. (NYSCEF Doc. No. 31, *affidavit of service*).

CPLR 3215(a) provides, in pertinent part, that when “a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her].” To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (See *PV Holding Corp. v AB Quality Health Supply Corp.*, 2020 NY Slip Op 07725, *1 [1st Dept 2020]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim. (See *Zelnick v Biderman Industries U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422, 422 [2d Dept 1996].)

“Pursuant to the Insurance Regulations, an insurer may request that an eligible injured party appear for an EUO to verify the no-fault claim, and may deny no-fault benefits if the eligible injured party fails to appear for the EUO” since “[c]ompliance with an EUO request is a condition precedent to no-fault coverage.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U], *7 [Sup Ct, NY County 2019] [citations omitted].) “To establish the failure of the party to appear for duly scheduled EUOs, the insurer must establish as a matter of law that it twice duly demanded an examination under oath, that the party twice failed to appear and that the insurer issued a timely denial.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U] at *8; see *Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014].) “It is also incumbent upon the insurer to submit proof by someone with personal knowledge of the non-appearance.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U] at *8.)

Here, the default is established by the affirmation of Michelle Dunleavy (NYSCEF Doc. No. 12, *Affirmation in Support*). Plaintiff submits affidavits of service demonstrating that the claimant defendants were duly served with the summons and complaint in accordance with CPLR 308(2). (NYSCEF Doc. No. 15). There is also an affidavit of non-military service for each claimant defendant. (NYSCEF Doc. No. 17, *affidavits of non-military service*). Affidavits of service submitted in support of the motion also reflect that the remaining defaulting defendants were served with the summons and complaint via the Secretary of State. (NYSCEF Doc. No. 15, *affidavits of service*). Plaintiffs also submit proof that it complied with the additional mailing requirements of CPLR 3215(g)(4)(i) and (ii). (NYSCEF Doc. No. 16, *notice of additional mailing*). Moreover, plaintiff’s establish the facts constituting the claim by

¹ Although plaintiff also seeks relief against NU AGE MED SOLUTIONS INC, plaintiff later stipulated to discontinue the action as to said defendant. (NYSCEF Doc. Nos. 32).

submitting, *inter alia*, the affidavit of Karen A. Kuitwaard, an investigator in the special investigations unit for plaintiffs, who affirms that MAURENT failed to appear for three scheduled EUOs and ESTIME failed to produce the requested post-EUO documents; (NYSCEF Doc. No. 20, *affidavit*); the affidavit of Dawn Smith, Claims Department Team Manager (NYSCEF Doc. No. 25, *affidavit*); scheduling letters (NYSCEF Doc. Nos. 21); Post EUO document requests (NYSCEF Doc. No. 23); and denials. (NYSCEF Doc. No. 24, *denials*). Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion seeking a default judgment against GARY MAURENT, KESSEVA ESTIME, ANDALELLA CHIROPRACTIC PC., BAY MEDICAL PC., BELAM ACUPUNCTURE PC., BRIDGES PSYCHOLOGICAL SERVICES PC., CYRUS CHIROPRACTIC PC., ECLIPSE MEDICAL IMAGING PC., EXON MEDICAL EQUIPMENT INC., HANK ROSS MEDICAL PC., INSPIRED CHIROPRACTIC PC., JOINT PHYSICAL THERAPY PC., KH LEE ACUPUNCTURE PC., NYEEQASC LLC., SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC., and SUPPORTIVE PRODUCTS CORP is granted; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff has no duty to pay any no-fault benefits in the form of sums, monies, damages, awards or benefits to GARY MAURENT, KESSEVA ESTIME, ANDALELLA CHIROPRACTIC PC., BAY MEDICAL PC., BELAM ACUPUNCTURE PC., BRIDGES PSYCHOLOGICAL SERVICES PC., CYRUS CHIROPRACTIC PC., ECLIPSE MEDICAL IMAGING PC., EXON MEDICAL EQUIPMENT INC., HANK ROSS MEDICAL PC., INSPIRED CHIROPRACTIC PC., JOINT PHYSICAL THERAPY PC., KH LEE ACUPUNCTURE PC., NYEEQASC LLC., SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC., and SUPPORTIVE PRODUCTS CORP their agents, employees, assignees or heirs arising out of any current or future proceeding, including without limitation, arbitrations and lawsuits seeking to recover no-fault benefits with respect to the collision that occurred on May 14, 2019, referenced in the complaint; and it is further

ORDERED, ADJUDGED and DECLARED that all no-fault lawsuits, arbitrations, including uninsured motorist, awards, and claims filed by GARY MAURENT, KESSEVA ESTIME, ANDALELLA CHIROPRACTIC PC., BAY MEDICAL PC., BELAM ACUPUNCTURE PC., BRIDGES PSYCHOLOGICAL SERVICES PC., CYRUS CHIROPRACTIC PC., ECLIPSE MEDICAL IMAGING PC., EXON MEDICAL EQUIPMENT INC., HANK ROSS MEDICAL PC., INSPIRED CHIROPRACTIC PC., JOINT PHYSICAL THERAPY PC., KH LEE ACUPUNCTURE PC., NYEEQASC LLC., SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC., and SUPPORTIVE PRODUCTS CORP., arising from or related to the collision that occurred on May 14, 2019, referenced in the complaint; and it is further

ORDERED that this judgment shall have no effect as to the appearing defendants; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry,

upon defendants, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

January 19, 2022



HON. VERNA L. SAUNDERS, JSC

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