

State Farm Mut. Auto. Ins. Co. v Pace

2022 NY Slip Op 30391(U)

January 10, 2022

Supreme Court, Kings County

Docket Number: Index No. 524055/2017

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 524055/2017

SEQ # 002

Part 91

DECISION/ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

against

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits	<u> </u>
Replying Affidavits	<u> </u>
Exhibits	<u> </u>
Other	<u> </u>

INDIVIDUAL DEFENDANTS

RASHEED PACE,
JEAN BRUTUS,
RONNIE BARIMAH,
GRETA CHANDLER,
JALISSA CONWAY,
STEPHEN PENNY,

HEALTHCARE DEFENDANTS

ATLAS RADIOLOGY P.C.,
BENNETT MEDICAL P.C.,
BRONX CHIROPRACTIC REHABILITATION P.C.,
CITIMED SERVICES PA,
DYNAMIC SURGERY CENTER LLC,
DAMADIAN MRI IN CANARSIE, P.C.,
ELEGANCE REHAB PT P.C.,
HAMZA PHYSICAL THERAPY PLLC,
IMPULSE IMAGING P.C.,
INTERVENTIONAL PAIN CONSULTANTS OF NEW JERSEY, P.A.,
JOANNA KUSHETSKY, P.T.,
KINGS REHAB ACUPUNCTURE P.C.,
LONGEVITY MEDICAL SUPPLY, INC.,
MARIA SHEILA MASIGLA, P.T.,
MASTER CHENG ACUPUNCTURE P.C.,
QUALITY CUSTOM MEDICAL SUPPLY, INC.,
HANK ROSS MEDICAL P.C.,
RENAISSANCE SURGERY CENTER LLC,
RALPH INNOVATIVE MEDICAL P.C.,
RX FOR YOU CORP, AND
SPINE CARE OF NJ PC,

Defendants.

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Upon review of the foregoing documents, plaintiff State Farm Mutual Automobile Insurance Company's ("State Farm") motion for default judgment (Seq. 002) against defendants Rasheed Pace, Jean Brutus, Greta Chandler, Stephen Penny, Atlas Radiology, P.C., Bronx Chiropractic Rehabilitation P.C., Citimed Services, PA, Dynamic Surgery Center LLC, Damadian MRI in Canarsie, P.C., Elegance Rehab PT P.C., Hamza Physical Therapy PLLC, Impluse Imaging P.C. Joanna Kushetsky, P.T., Master Cheng Aucupuncture P.C., Quality Custom Medical Supply, Inc., Hank Ross Medical P.C., Renaissance Surgery Center, LLC, Ralph Innovative Medical P.C. and Rx for You Corp.,¹ is decided as follows:

State Farm's Allegations

State Farm commenced this action seeking judgment declaring that it was not responsible for paying the medical expenses of certain individual defendants, who have sought treatment from certain defendant medical providers. State Farm alleges that defendant Rasheed Pace took out an insurance policy on his 2006 Nissan Maxima with State Farm in December 2016 (summons and complaint at ¶ 52). State Farm further alleges that, on January 17, 2017, defendants Greta Chandler, Jalissa Conway, Jean Brutus, and Ronnie Barimah were involved in a collision with defendant Stephen Penny while driving Mr. Pace's car (summons and complaint at ¶¶ 50–51). State Farm asserts: that the collision was not an accident as defined in the insurance policy; that it is not obligated to pay any claims for no-fault benefits made by or on behalf of the

¹ Defendants Ronnie Barimah, Jalissa Conway, Bennett Medical P.C., Kings Rehab Acupuncture P.C., Longevity Medical Supply, Inc., Mariah Sheila Masigla, P.T., and Spine Care of NJ PC answered the complaint. Plaintiff subsequently discontinued its claims against defendants Stephen Penny, Bennett Medical P.C., Interventional Pain Consultants of New Jersey, P.A., Kings Rehab Acupuncture P.C., Mariah Sheila Masigla, P.T., and Spine Care of NJ PC. Additionally, following plaintiff's motion for default, defendant Bronx Chiropractic Rehabilitation P.C. filed an answer. Plaintiff filed a rejection of that answer, and Bronx Chiropractic Rehabilitation did not oppose this motion or cross-move to vacate its default.

individual defendants; and that it is not required to pay any no-fault claims submitted by the healthcare provider defendants or to indemnify any of the defendants in connection with the underlying collision (complaint at ¶¶ 84–95).

Analysis

To obtain default judgment, State Farm is required to establish that defendants were properly served with process, that defendants failed to appear or answer the complaint, and that plaintiff has a viable cause of action (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]). In order to establish that it has a viable cause of action, State Farm must submit prima facie proof of its claim by someone with personal knowledge of the facts underlying that claim (*Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 843 [2d Dept 2015]; *Triangle Properties 2*, 73 AD3d at 1032). For the defaulting defendants that are people, State Farm must also prove that the defaulting defendant was not on active military status (NY Military Law §§ 303[1], 306; *Bergani v Desena*, 50 AD3d 716, 717 [2d Dept 2008]).

Plaintiff submits a copy of the affidavits of service of process upon the defaulting defendants. Additionally, plaintiff's counsel states in his affirmation that the time for the defaulting defendants to appear, answer, or move with respect to the complaint has expired and the defaulting defendants have not yet done so. As appropriate, plaintiff has also established the follow-up mailing of the summons pursuant to CPLR 3215(g) and the non-military status of the individual defendants.

With regard to the merits of its claims, State Farm asserts four causes of action. The first, second, and third causes of action essentially seek judgment declaring that State Farm is not required to pay benefits regarding the subject accident because the accident was staged. The fourth cause of action also seeks judgment declaring that State Farm is not required to pay

benefits regarding the subject accident, but on the basis that Mr. Pace failed to appear for an examination under oath (“EUO”).

With regard to the fourth cause of action, failure to comply with an insurance policy provision requiring disclosure by way of an examination under oath is a material breach of the policy and precludes recovery (*Nationwide Affinity Ins. Co. of Am. v George*, 183 AD3d 755, 756 [2d Dept 2020]; *Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014]). In accordance with 11 NYCRR 65–1.1, all New York motor vehicle insurance policies include a mandatory endorsement which provides, in relevant part, that people seeking benefits pursuant to the policy may be required to submit to an examination under oath (*see eg Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721 [2d Dept 2006]).

In order to prove that it is not required to pay no-fault benefits based on a failure to appear for an EUO, Empire must prove that “the letters scheduling the EUOs were timely and properly mailed, that the insured failed to appear at two scheduled EUOs, and that the insurer issued a timely and proper denial of the claims” (*George*, 183 AD3d at 756; *see also Sure Way NY, Inc. v Travelers Ins. Co.*, 56 Misc 3d 289, 291 [Civ Ct, Kings County 2016]).

State Farm Claims Specialist Michelle Riviera states in her affidavit that, upon receiving notice of the claim, State Farm opened an investigation of the claim (Riviera affidavit at ¶¶ 14–15). As part of its investigation, State Farm sought to examine under oath defendant Pace and the four occupants of the vehicle, defendants Brutus, Barimah, Chandler, and Conway (*id.* at ¶ 18).

Kevin W. O’Leary, a partner with plaintiff’s counsel, Bruno, Gerbino & Soriano, states in his affidavit that he scheduled an EUO for defendant Pace (O’Leary affirmation at ¶ 3) who, after multiple attempts, failed to appear (*id.* at ¶¶ 4–8). Counsel also scheduled the EUO of

defendants Brutus and Barimah, each of whom also failed to appear (*id.* at ¶¶ 9–18).

Additionally, he and additional counsel from the Bruno firm state in their affirmations that they were present for the EUOs of defendants Pace, Brutus, and Barimah, and that those EUOs would have gone forward had the defendants appeared (*see* O’Leary, Aitken, Grogan, and Callinan affirmations).

Although State Farm submits the letters scheduling the EUOs, it has not proven that they were mailed, not has it proven that the mailing was timely following receipt of the claim. State Farm contends that it requested “additional verification” and so it was never required to deny the claims. The additional verification to which State Farm refers is merely the same EUO requests, and not any subsequent requests for information. A denial based on a failure to appear for an EUO must be timely, despite the fact that policies require an insured to cooperate with requests for information (*Sure Way NY*, 56 Misc 3d at 291 [noting an EUO’s “hybrid” status between a condition precedent to coverage and verification]). Because State Farm has not shown timely EUO requests or a timely denial, State Farm has not established the facts of its fourth cause of action.

With regard to State Farm’s first, second, and third causes of action, parties generally are not entitled to recover no-fault benefits for damages resulting from intentional events (*Matter of Allstate Ins. Co. v Massre*, 14 AD3d 610, 611 [2d Dept 2005], citing *State Farm Mut. Auto. Ins. Co. v Laguerre*, 305 AD2d 490, 490-91 [2d Dept 2003]). When determining if a collision was intentional, the court looks to circumstantial factors. Common considerations include the age of the policy at the time of the loss, the value and age of the car involved, cancellation of the policy shortly thereafter, interrelationships among the parties involved, inconsistencies in testimony regarding the circumstances of the subject collision, and inconsistencies in the identities of the


individuals involved (*PDG Psychological, P.C. v State Farm Ins. Co.*, 12 Misc 3d 1183[A], 2006 NY Slip Op 51398[U] *6 [Civ Ct, Kings County 2006]; *V.S. Med. Services, P.C. v Allstate Ins. Co.*, 11 Misc 3d 334, 343 [Civ Ct, Kings County 2006]; *Matter of Progressive County Mut. Ins. Co. by McNeil*, 4 Misc 3d 1022[A], 2004 NY Slip Op 50998[U], *2 [Sup Ct, Nassau County 2004]).

Ms. Rivera states in her affidavit that the policy was thirty-three days old, and provides a copy of the subject policy (Rivera affirmation at ¶ 16). Ms. Rivera also notes in her affidavit the following testimony from the EUOs of Ms. Conway and Ms. Chandler: Ms. Conway claims to have known all occupants of the vehicle for several years prior to the accident (Conway EUO at 32). Conversely, Ms. Chandler denies having known any of them until the day of the crash (Chandler EUO at 13). Ms. Conway claims the group had planned to go to the theater on Court Street that night, but they had not picked a movie, did not know the show times, and did not know that the theater would be closed by the time they arrived (Conway EUO at 18–20). Ms. Conway claims the group had not seen or spoken to each other for three months prior to the day of the crash (Conway EUO at 32). Ms. Conway claims the accident occurred in the roundabout on Grand Army Plaza (Conway EUO at 21). Ms. Chandler, however, denies the accident occurred in the roundabout (Chandler EUO at 22). Ms. Conway claims the car was moved to a service lane immediately following the collision (Conway EUO at 26). Ms. Chandler claims the car remained in the street immediately following the collision (Chandler EUO at 24). Accordingly, State Farm has sufficiently established the facts of its first, second, and third causes of action.

For the foregoing reasons, State Farm's motion for default judgment is granted on its first, second, and third causes of action. The motion is denied as to State Farm's fourth cause of action. State Farm shall settle judgment on notice. This judgment against the defaulting defendants is without prejudice to the action against defendants Barimah, Conway, and Longevity Medical Supply, and any defenses those defendants may assert.

This constitutes the decision and order of the court.

January 10, 2022
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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