

Empire Fire & Mar. Ins. Co. v Charles

2022 NY Slip Op 30429(U)

January 10, 2022

Supreme Court, Kings County

Docket Number: Index No. 512566/2020

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 512566/2020

SEQ # 001 & 002, 003

Part 91

DECISION/ORDER

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

EMPIRE FIRE AND MARINE INSURANCE CO.,

Plaintiff,

against

MELISSA CHARLES AND CASSEY SAINT JACQUES,

(COLLECTIVELY THE "PARTICIPANT DEFENDANTS")

AND

ARIEL CHIROPRACTIC, P.C., BAY MEDICAL, P.C.,
BELAM ACUPUNCTURE, P.C., BRIDGES PSYCHOLOGICAL
SERVICES, P.C., ECLIPSE MEDICAL IMAGING, P.C.,
EXON MEDICAL EQUIPMENT, INC., SUPPORTIVE
PRODUCTS CORP.

(COLLECTIVELY THE "PROVIDER DEFENDANTS"),

Defendants.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1, 2, 3</u>
Order to Show Cause and Affidavits Annexed...	<u>3, 4, 5</u>
Answering Affidavits.....	<u>6, 7</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>
Other	<u> </u>

Upon the foregoing papers, Empire Fire and Marine Insurance Company’s (“Empire”) motion for injunctive relief (Seq. 001), Empire's motion for default judgment (Seq. 002), and defendant Ariel Chiropractic, P.C.'s (“Ariel”) cross-motion for an extension of time to answer (Seq. 003) are decided as follows:

Introduction

Empire commenced this action against defendants for judgment declaring that it is not responsible for paying the medical expenses of certain individual defendants, who have sought treatment from certain defendant medical providers. Empire alleges as follows: It insured a vehicle owned by Car2Go, which the owner used to rent to other drivers (complaint at ¶¶ 4, 17).

On May 7, 2019, defendants Cassey Saint Jacques and Melissa Charles were involved in an incident with the vehicle (*id.* at ¶¶ 2, 3, 5). These individuals sought treatment related to the incident with certain defendant medical providers (*id.* at ¶ 6). These defendant medical providers sought benefits pursuant to the subject policy as compensation for their services (*id.* at ¶ 27). Empire conducted an investigation into the accident and sought certain information from Ms. Saint Jacques and Ms. Charles, who did not provide the requested information (*id.* at ¶¶ 19–22). As a result of the investigation, Empire determined that the incident was not an “accident” as defined by the policy (*id.* at ¶ 19). Because the incident was not an “accident”, and because Ms. Saint Jacques and Ms. Charles did not provide the requested information, Empire claims that it is not required to pay benefits in accordance with the policy (*id.* at ¶¶ 24–58).

Analysis

Motion for Injunction

Empire moves for an order enjoining the defendant medical providers, or any other medical providers, from commencing any proceedings seeking payment of no-fault benefits related to the May 7, 2019 incident pending the ultimate determination of this action, and staying all such current actions.¹ To receive this relief, Empire must prove, by clear and convincing evidence, (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the movant's favor (*Keneally, Lynch & Bak, LLP v Salvi*, 190 AD3d 961 [2d Dept 2021]).

¹ Ariel argues that Empire did not serve this motion as provided in the court's order to show cause, which requires personal service upon Ariel, a corporation. CPLR 311 states that personal service is accomplished by service pursuant to BCL 306 by serving the New York Secretary of State. The filed affidavit of service for this motion states that Ariel was served in this manner.

Empire first claims that it is not required to pay benefits because the subject incident was not an “accident”. 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]).

Empire submits the affidavit of Erin Bracken, a Special Investigations Unit Investigator for the Zurich North America group of insurance companies, which includes Empire (Bracken Affidavit at ¶ 1). Ms. Bracken states that there is video recording of the incident, and that this recording shows that the incident was not accidental. The video is not part of the record, however, and therefore this court is unable to determine if the video shows the incident was not an accident. Ms. Bracken's description of the video footage is inadmissible hearsay.

Empire also argues that it is not it is not required to pay benefits because Ms. Saint Jacques and Ms. Charles did not provide information Empire requested. Failure to comply with

an insurance policy provision requiring disclosure by way of an examination under oath (“EUO”) 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]). All New York motor vehicle insurance policies include a mandatory endorsement as set forth in 11 NYCRR 65-1.1. Section 65-1.1 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]).

Ms. Bracken states that both Ms. Saint Jacques and Ms. Charles appeared for an EUO, but only Ms. Charles testified due to their counsel's scheduling conflict (Bracken Affidavit at ¶ 17). Ms. Saint Jacques did not appear for a subsequent EUO, despite two written requests (*id.* at ¶ 19). Additionally, Ms. Charles did not provide a list of telephone numbers she used, or documents showing the texts and calls she made, during the period May 1, 2019 to May 14, 2019, as requested by Empire's letters (*id.* at ¶ 18). Empire provides copies of the letters.

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]).

Empire does not provide any evidence establishing, among other things, proper mailing, or the proper timing of the EUO notices and denials. Likewise, Empire provides no legal or factual basis for denying all present and future claims for no-fault benefits based on the failure to

provide evidence of telephone calls. Accordingly, Empire has not established, on clear and convincing evidence, a likelihood of success on the merits.

As Empire has not established a likelihood of success on the merits of its claims, the court does not reach the other elements of Empire's request for injunctive relief. Empire's motion for an injunction is denied.

Empire's Motion for Default Judgment and Ariel's Cross-Motion for Time to Answer

Empire moves for default judgment against defendants Cassey Saint Jacques, Melissa Charles, Ariel Chiropractic, P.C., Bay Medical, P.C., Belam Acupuncture, P.C., Bridges Psychological Services, P.C., Eclipse Medical Imaging, P.C., Exon Medical Equipment, Inc., and Supportive Products Corp.

To obtain default judgment, Empire is required to establish that defendants were properly served with process, that defendants failed to appear or answer the complaint, and that Empire 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, Empire 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, Empire must also prove that the defaulting defendants were not on active military status (NY Military Law §§ 303[1], 306; *Bergani v Desena*, 50 AD3d 716, 717 [2d Dept 2008]). As explained above, Empire has not submitted any evidence concerning certain aspects of its claims, such as proper mailing and the proper timing of the EUO notices and denials. Consequently, Empire is not entitled to default judgment.

Ariel cross-moves for additional time to answer the complaint. “A defendant seeking to vacate a default in answering a complaint on the basis of excusable default (*see* CPLR 5015[a][1]) and to compel the Empire to accept an untimely answer (*see* CPLR 3012[d]) must show both a reasonable excuse for the default and the existence of a potentially meritorious defense” (*Deutsche Bank Natl. Trust Co. v Benitez*, 179 AD3d 891, 893 [2d Dept 2020]).

Ariel argues it has meritorious defenses, chief of which are that Empire has not proven staged accident and that Ariel submitted timely bills that have not been paid. Ariel argues that it failed to answer because it thought this complaint was related to its Civil Court action for unpaid bills. While this excuse is not strong, this court has already determined that Empire is not entitled to default judgment. Moreover, public policy favors the resolution of cases on their merits (*Belches v City of New York*, 191 AD3d 754 [2d Dept 2021]).

Conclusion

For the foregoing reasons, Empire's motions for injunctive relief (Seq. 001) and for default (Seq. 002) are denied. Defendant Ariel's cross-motion for an extension of time to answer (Seq. 003) is granted. Defendant shall serve and file its answer on or before February 10, 2022.

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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