

Country-Wide Ins. Co. v Philpot
2022 NY Slip Op 30439(U)
February 8, 2022
Supreme Court, New York County
Docket Number: Index No. 654365/2021
Judge: Sabrina B. Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

ANASTASIA PHILPOT, PROGRESSIVE MEDICAL CARE
P.C., WELL-BEING CHIROPRACTIC, P.C., FRANKLIN
SQUARE MED SERVICES, INC., TOP CHOICE
PHARMACY CORP.

Defendant.

-----X

INDEX NO. 654365/2021
MOTION DATE 02/01/2022
MOTION SEQ. NO. 001

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

were read on this motion to/for JUDGMENT - DEFAULT

BACKGROUND

This action arises from an automobile accident on November 20, 2020 wherein Anastasia Philpot (AP) was allegedly injured while in a vehicle insured by plaintiff. AP filed a claim with plaintiff as a purported injured person under an insurance policy, number RS 8166833 20, issued by plaintiff.

Plaintiff commenced this action on or about July 15, 2021, seeking a declaratory judgment against Progressive Medical Care P.C. (Progressive), Well-Being Chiropractic, P.C., Franklin Square Med Services, Inc. and Top Choice Pharmacy Corp., due to the alleged breach of contract by AP in failing to appear for a properly requested and scheduled Examination Under Oath (EUO). Plaintiff seeks a declaration that AP is not an eligible injured person entitled to no-fault benefits under the policy, and that plaintiff is not obligated to reimburse AP for alleged medical treatment, therapy and/or medical supplies rendered.

PENDING MOTION

In this declaratory judgment action, plaintiff moves, pursuant to CPLR §3215, for a default judgment against defendant Anastasia Philpot (AP) and Progressive Medical Care PC. AP and Progressive have failed to appear or submit opposition.

DISCUSSION

CPLR § 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial... the plaintiff may seek a default judgment against [it].” “On a motion for leave to enter a default judgment pursuant to CPLR §3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

New York No-Fault Regulation, 11 NYCRR 65-1.1 states, in pertinent part, “[n]o action shall lie against [a No-Fault insurer] unless, as a condition precedent thereto, there shall have been compliance with the terms of [the] coverage” and that “[u]pon request by the Company, the eligible injured person or that person's assignee or representative shall... (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.”

The failure to appear for a scheduled EUO is a breach of a condition precedent under a no-fault policy, and a denial of coverage premised on such a breach voids the policy *ab initio* (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]).

The summons and complaint were filed on July 15, 2021. AP was served on September 4, 2021, at her usual place of abode, by substituted service, with a subsequent mailing made on

September 10, 2021, (NYSCEF Doc No. 9). Progressive was served on July 23, 2021, by service on the Secretary of State of the State of New York, (NYSCEF Doc. No. 3). The time within which the defaulting defendants may answer or otherwise move to respond to said complaint has expired and has not been extended.

Plaintiff submits in support of the motion, the affirmation of Carl J. Gedeon, Esq., (NYSCEF Doc. No. 13), as well as the affidavit of Jessica Mena-Sibrian, (NYSCEF Doc. No. 122), who is employed as a No-fault litigation/Arbitration Supervisor and the affidavit of Annie Persaud, (NYSCEF Doc. No. 23), the EUO Clerk at Country-Wide Insurance Company. Plaintiff also submits a copy of the NF-2 form (NYSCEF Doc. No. 17); notice pursuant to CPLR § 3215(g) (NYSCEF Doc. No. 16); initial EUO letter sent to AP (NYSCEF Doc. No. 18); statement on the record of AP's failure to appear (NYSCEF Doc. No. 19); final EUO letter sent to AP (NYSCEF Doc. No. 20); final statement on the record of AP's failure to appear (NYSCEF Doc. No. 21); and the denial of claim form (NYSCEF Doc. No. 24).

Plaintiff has established *prima facie* entitlement to a judgment declaring that AP and Progressive are not entitled to No-Fault coverage for the subject claims due to AP's failure to appear for EUOs, breaching a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. (*Unitrin Advantage Ins. Co. v 21st Century Pharmacy*, 158 AD3d 450 [1st Dept 2018]).

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion seeking a default judgment against defendants Anastasia Philpot and Progressive Medical Care P.C. is granted; and it is further

ORDERED that plaintiff owes no duty to defendants Anastasia Philpot and Progressive Medical Care P.C. to pay No Fault claims submitted in relation to the November 20, 2020 loss, Claim No.: 000352568-002, Policy.: RS 8166833 20, referenced in the complaint involving Anastasia Philpot; it is further


ORDERED, that all arbitrations, lawsuits and enforcement of awards or judgments in connection with the November 20, 2020 loss, Claim No.: 000352568-002, Policy.: RS 8166833 20, referenced in the complaint involving Anastasia Philpot are hereby permanently stayed.

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

ORDERED that service of this order upon the County Clerk and the Clerk of the General Clerk’s Office 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), and it is further

ORDERED that any relief sought not expressly addresses herein has nonetheless been considered and is denied.

This constitutes the decision and order of the court.

202202080927455BKRAUS3595BDCED390439EA02EE495AC27967D


2/8/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: