

Liberty Mut. Ins. Co. v Martelliere
2022 NY Slip Op 30678(U)
March 2, 2022
Supreme Court, New York County
Docket Number: Index No. 651688/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiffs,

- v -

DAMION MARTELLIERE, et al.

Defendants.

-----X

INDEX NO. 651688/2021

MOTION DATE 02/22/2022

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, 28, 29, 30, 31, 32, 33

were read on this motion to/for DEFAULT JUDGMENT.

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave to enter a default judgment against defendants Damion Matelliere (the individual defendant), Amit Khaneja Neurology Practice PLLC, Better Hands Physical Therapy PC, Bronx County Medical Care PC, CitiMedical Services PC, Complete Express Medical PC, Complete Neuropsychology PC, Esmeralda Pharmacy Inc, Physio Care Physical Therapy PC, and Universal Brace Support Inc (collectively, the medical provider defendants). The plaintiffs seek a judgment declaring that they are not obligated to pay no-fault benefits in connection with injuries that the individual defendant allegedly sustained in a motor vehicle accident alleged to have occurred February 27, 2020, or to reimburse the non-answering medical provider defendants for treatment they rendered or equipment and supplies they provided to her for those injuries. No opposition is submitted. The motion is granted.

The individual defendant claimed he was injured in a motor vehicle accident on February 27, 2020. He thereafter submitted an application for no-fault benefits. He obtained medical treatment or medical supplies from the various medical defendants. The medical provider defendants sought payment for no-fault benefits under insurance policy number AOS21213391170, as issued by the plaintiffs to the individual defendant, under claim number 042109630-03. See Insurance Law 5106(a); 11 NYCRR 65-1.1.

David De George, an investigator in the Special Investigative Unit of plaintiff Liberty Mutual Insurance Company, states that he was assigned to the investigation of the claim of the individual defendant. He explains that the plaintiffs conducted an investigation of whether the individual defendant made a material misrepresentation of the address on the insurance policy issued. He states that the investigation revealed that the subject vehicle was not usually garaged in Bridgeport, Connecticut, as represented by the individual defendant in connection with procuring the policy, but rather in Bronx, New York. Indeed, the Bronx address is listed as the individual defendant's address on the NF-2 form he submitted. The individual defendant also sought all medical in the Bronx, NY area. A visit was made to the Connecticut address and it was confirmed that the individual defendant did not reside at that address. These facts, among others, prompted the plaintiffs to request an Examination Under Oath (EUO) of the individual defendant to verify the individual defendant's residency.

The plaintiffs submit the transcript from the individual defendant's EUO at which he stated that he resided at the Bronx address for the past year with "his girl" who pays the rent, and then later testified that he lives at the Bronx address but "his girl" has since moved out and now lives in New Rochelle, New York. It was also revealed that his tax filings and bank statements are sent to his cousin's residence in the Bronx. He stated that his "baby's mother" resided at the Connecticut address and that he resided there for approximately a year prior to living at the Bronx address. He stated that the last time he was at the Connecticut residence was at the end of 2019 or beginning of early 2020, when he went to pay his child support. His responses to questions about the area in which the Connecticut address is indicate that he was totally unfamiliar with the area.

The plaintiffs also submit the affidavit of an underwriter, which properly annexes a certificate of conformity. In the affidavit, the underwriter states that the policy address provided by the individual defendant was the Connecticut address, and based on that, a policy was created and issued to him with a premium of \$6,229.00 and that upon discovery of the true address in the Bronx, the policy was re-rated and the premium was increased to \$10,775.00. The underwriter states that had the plaintiffs known the true address was in the Bronx, the plaintiffs would have written a policy for the individual defendant which would have been approximately \$4,546.00 more for the same vehicle at the inception of the policy.

The plaintiffs denied the defendants' claims for benefits, concluding based on, *inter alia*, the individual defendant's testimony at the EUO and the plaintiffs' own investigation, the individual defendant made a material misrepresentation in his initial application for the subject insurance policy with respect to where the insured vehicle was usually garaged and maintained in order to lower the cost of obtaining the policy, thereby vitiating coverage.

"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 (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011); see Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept. 2016]). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). The plaintiffs met their burden.

It is well settled that an insurer may deny coverage based upon an insured's material misrepresentation in his or her insurance application. See Insurance Law 3105(a);(b); Liang v Progressive Casualty Ins. Co., 172 AD3d 696 (2nd Dept. 2019); Ambac Assurance Corp. v Countrywide Home Loans, Inc., 151 AD3d 83 (1st Dept. 2017); Tower Ins. Co. of N.Y. v Khan, 93 AD3d 618 (1st Dept. 2012); W.H.O Acupuncture, P.C. v Infinity Property & Casualty Co., 36 Misc3d 4 App Term, 2nd 11th & 13th Jud. Dists 2012). In particular, where an insured makes material misrepresentations on his or her application for insurance as to where he or she regularly garages a vehicle sought to be insured, coverage is defeated. See Remedial Med. Care, P.C. v Infinity Prop. & Cas. Co., 55 Misc. 3d 130(A) (App. Term, 2nd, 11th & 13th Jud. Dists., Mar. 31, 2017); Jamaica Dedicated Med. Care, P.C. v Praetorian Ins. Co., 47 Misc. 3d 147(A) (App. Term, 2nd, 11th & 13th Jud. Dists., May 6, 2015). The plaintiffs' proof establishes, *prima facie*, the facts underpinning their contentions, namely, that when the policyholder first applied for insurance coverage, he represented that she resided primarily at the Connecticut address and that the insured vehicle was regularly garaged there. However, according to the proof submitted by the plaintiff, the car was regularly used and garaged at the Bronx address, where premium rates are significantly higher. The denial-of-claim statements show that the relevant denials of coverage were expressly based on the ground that the policyholder made a material misrepresentation in connection with his application for insurance with respect to the where the vehicle was regularly garaged in order to reduce insurance premium rates.

By stipulation filed May 11, 2021, the plaintiffs discontinued this action as against Flawless Quality Care Services Inc and Limelite Recovery Inc. By stipulation filed February 11, 2022, the plaintiffs discontinued this action as against BJ569 Acupuncture PC, Corona Family Chiropractic Care PC, and Gentlecare Medical & Acupuncture PC.

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Woodson v Mendon Leasing Corp., 259 AD2d 304 (1st Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003); Holt v Holt, 262 AD2d 530 (2nd Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3rd Dept. 1978). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., supra; Balanta v Stanline Taxi Corp., supra; Frolish v Ryder Truck Rental, supra.

The remaining appearing parties are encouraged to explore settlement.

Accordingly, it is

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice and without costs, as against defendants Flawless Quality Care Services Inc, Limelite Recovery Inc, BJ569 Acupuncture PC, Corona Family Chiropractic Care PC, and Gentlecare Medical & Acupuncture PC pursuant to the stipulations filed May 11, 2021 and February 11, 2022; and it is further

ORDERED that the plaintiffs' motion for leave to enter a default judgment pursuant to CPLR 3215 is granted, without opposition; and it is further

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to defendant Damion Matelliere in connection with injuries that he sustained in a motor vehicle accident on February 27, 2020, and claimed under policy number AOS21213391170, claim number 042109630-03, or to reimburse defendants Amit Khaneja Neurology Practice PLLC, Better Hands Physical Therapy PC, Bronx County Medical Care PC, CitiMedical Services PC, Complete Express Medical PC, Complete Neuropsychology PC, Esmeralda Pharmacy Inc,

Physio Care Physical Therapy PC, and Universal Brace Support Inc for treatment they rendered or equipment and supplies they provided to her for those injuries; and it is further

ORDERED that the action is severed and shall continue as against the remaining defendants; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision, Order, and Judgment of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

03/02/2022

DATE

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