

<b>Country-Wide Ins. Co. v Johnson-Edwards</b>
2022 NY Slip Op 30701(U)
March 3, 2022
Supreme Court, New York County
Docket Number: Index No. 653529/2021
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

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

JAMIR JOHNSON-EDWARDS, COMPREHENSIVE PSYCHOLOGICAL EVALUATION, P.C., SUESSERMAN CHIROPRACTIC, P.C., D.V. CHIROPRACTIC CARE, P.C. D/B/A 21 CENTURY CHIROPRACTIC CARE, FLORID LEISURE ACUPUNCTURE P.C, INJE PHYSICAL THERAPY, P.C., INEW REHAB PHYSICAL THERAPY, P.C., INSTA DRUGS, INC., MIN PHYSICAL THERAPY, P.C., MASOOD CHIROPRACTIC DIAGNOSTIC, P.C., LZ MEDICAL DIAGNOSTIC, P.C., GRAND MEDICAL SUPPLY CORP.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for SUMMARY JUDGMENT.

In this declaratory judgment action, the plaintiff moves (i) pursuant to CPLR 3215 for leave to enter a default judgment against defendants Jamir Johnson-Edwards (the individual defendant), Comprehensive Psychological Evaluation, P.C., Suesserman Chiropractic P.C., Florid Leisure Acupuncture P.C., Inje Physical Therapy P.C., INew Rehab Physical Therapy, P.C., Insta Drugs Inc., Min Physical Therapy, P.C., Masood Chiropractic Diagnostic, P.C., and LZ Medical Diagnostic P.C. (collectively, the defaulting medical provider defendants), and (ii) pursuant to CPLR 3212 for summary judgment against defendants Grand Medical Supply Corp and D.V. Chiropractic Care, P.C. d/b/a 21 Century Chiropractic Care (collectively, the answering medical provider defendants). The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to the defaulting medical provider defendants and the answering medical provider defendants to reimburse them for treatment they rendered or equipment and supplies they

DECISION + ORDER ON MOTION

provided to the individual defendant in connection with injuries that the individual allegedly sustained in a motor vehicle accident, or to pay no-fault benefits directly to the individual defendant in connection with that accident, on the ground that the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). Neither the individual defendant nor the defaulting medical provider defendants oppose the plaintiff's motion pursuant to CPLR 3215. The answering medical provider defendants oppose the plaintiff's motion pursuant to CPLR 3212. Both motions are granted.

"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 (2<sup>nd</sup> Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

On a motion for summary judgment, the movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id. (citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

The individual defendant alleged in his application for benefits that he was injured in a motor vehicle accident on December 3, 2019, and that he thereafter obtained medical treatment or medical supplies from all of the other defendants. Those other defendants sought payment, as the individual defendant's assignees, for no-fault benefits under insurance policy number 01 ES 7914210 18, claim number 000348293-003. See Insurance Law 5106(a); 11 NYCRR 65-1.1. In support of its motion for leave to enter a default judgment against the individual defendant and the defaulting medical provider defendants, and for summary judgment against the answering medical provider defendants, the plaintiff submits, *inter alia*, the pleadings, an attorney's affirmation, the NF-2 form, dated January 2, 2020, at least five NF-3 claim forms from the medical provider defendants marked received June 15, 2020 through June 26, 2020, its first EUO notice dated July 13, 2020, scheduling an EUO for August 5, 2020 at 9:30am, a

subsequent EUO notice dated August 6, 2020, scheduling an EUO for August 26, 2020 at 11:00am, as well as statements on the record made on the dates and times the individual defendant was scheduled to appear, which indicate that the individual defendant failed to appear. The plaintiff additionally submits the affidavits of Kyaw Nyein and Annie Persaud, employees of the plaintiff, and the NF-10 denial form, which indicates that the entire claim was denied due to the violation of policy conditions. The denial form states, in pertinent part, that the individual defendant failed to appear for EUOs on the abovementioned dates and that the failure to do so, *i.e.*, comply with conditions of the policy, prevented the plaintiff from obtaining proper proof of the claim.

The plaintiff has met its burden. Since the failure to appear for duly scheduled EUOs is a breach of a condition precedent to no-fault coverage, the plaintiff has established, *prima facie*, that it is entitled the relief sought as the coverage was vitiated by the individual defendant's failure to appear for the EUOs. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1<sup>st</sup> Dept. 2017); Unitrin Advantage Insurance Company v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1<sup>st</sup> Dept. 2011).

In opposition, the answering medical provider defendants fail to raise a triable issue of fact. Contrary to their contention otherwise, the plaintiff has established that it properly noticed the initial EUO "within 15 business days of receipt of [one] of the prescribed verification forms." 11 NYCRR 65-3.5(b); see Unitrin Direct Ins. Co. v Beckles, 188 AD3d 620, 621 (1<sup>st</sup> Dept. 2020); Unitrin Advantage Ins. Co. v Dowd, 194 AD3d 507 (1<sup>st</sup> Dept. 2021) (EUO timely requested as to one provider claim for benefits and so, "accordingly [the] defendant's failure to appear at the EUO voided the policy *ab initio* as to all claims"). The court has considered the answering medical provider defendants' remaining contentions and finds them to be without merit. See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1<sup>st</sup> Dept. 2011).

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment (MOT SEQ 001) is granted, without opposition; and it is further

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment (MOT SEQ 002) is granted; and it is further

ADJUDGED and DECLARED that defendants Jamir Johnson-Edwards, Comprehensive Psychological Evaluation, P.C., Suesserman Chiropractic P.C., Florid Leisure Acupuncture P.C., Inje Physical Therapy P.C., INew Rehab Physical Therapy, P.C., Insta Drugs Inc., Min

Physical Therapy, P.C., Masood Chiropractic Diagnostic, P.C., LZ Medical Diagnostic P.C., Grand Medical Supply Corp, and D.V. Chiropractic Care, P.C. d/b/a 21 Century Chiropractic Care are not entitled to no-fault benefits pursuant to Article 51 of the Insurance Law with regard to the motor vehicle accident that is alleged to have occurred on December 3, 2019, and that the plaintiffs are not obligated to honor or pay any claims for reimbursement submitted by the defendants under policy number 01 ES 7914210 18, claim number 000348293-003; and it is further

ADJUDGED AND DECLARED that all actions, proceedings or arbitrations arising from injuries alleged to have been sustained by the individual defendant as a result of the alleged December 3, 2019 motor vehicle accident are permanently stayed, and that defendants Jamir Johnson-Edwards, Comprehensive Psychological Evaluation, P.C., Suesserman Chiropractic P.C., Florid Leisure Acupuncture P.C., Inje Physical Therapy P.C., INew Rehab Physical Therapy, P.C., Insta Drugs Inc., Min Physical Therapy, P.C., Masood Chiropractic Diagnostic, P.C., LZ Medical Diagnostic P.C., Grand Medical Supply Corp, and D.V. Chiropractic Care, P.C. d/b/a 21 Century Chiropractic Care are enjoined from commencing any such further actions, proceedings, or arbitrations; 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 enter judgment accordingly.

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

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

03/03/2022  
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE