

Hereford Ins. Co. v Benessere Servs. Inc.
2022 NY Slip Op 30822(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 160857/2020
Judge: Lori Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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HEREFORD INSURANCE COMPANY,

Plaintiff,

INDEX NO. 160857/2020

MOTION DATE 02/14/2022

- v -

MOTION SEQ. NO. 001

BENESSERE SERVICES INC.,BLVD CHIROPRACTIC OF
NY PC,COMPREHENSIVE PSYCHOLOGICAL
SERVICES, P.C.,DR. OFFENBACHER MEDICAL
IMAGING PLLC,GRAND MEDICAL SUPPLY CORP,
HAPPINESS CHENG ACUPUNCTURE, P.C,
HEALTHMAX ACUPUNCTURE, P.C.,HEALTHWISE
MEDICAL ASSOCIATES PC,HLB MEDICAL PC,M EL
SAYED PT PC., MEDICAL SUPPLY DEPOT GROUP
CORP, METROPOLITAN AND SURGICAL PC,QR
MEDICAL SERVICES, PC,SA CHIROPRACTIC, P.C.,THE
BROOKDALE HOSPITAL MEDICAL CENTER, TIME TO
CARE PHARMACY INC, WELCOME PHYSICAL
THERAPY PC,ZUCCO WELL ACUPUNCTURE,
PC,AMANDA MCLEAN, SHAMIA PROPST, RACQUEL
WILLIAMS

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33,
34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiff Hereford Insurance Company (“Plaintiff”) seeks default judgment in its
declaratory judgment action against defendants Comprehensive Psychological Services, P.C.; Dr.
Offenbacher Medical Imaging, PLLC; Happiness Cheng Acupuncture, P.C.; HLB Medical, P.C.;
M El Sayed PT P.C.; Metropolitan and Surgical P.C.; QR Medical Services, P.C.; The Brookdale
Hospital Medical Center; Time to Care Pharmacy, Inc.; and Welcome Physical Therapy, P.C.
(collectively “Non-Answering Defendants”).¹ Pursuant to CPLR 3215, Plaintiff’s motion for

¹ Defendants Benesseere Services, Inc.; Blvd Chiropractic of NY, P.C.; Grand Medical Supply Corp.; Healthmax
Acupuncture, P.C.; Healthwise Medical Associates, P.C.; Medical Supply Depot Group Corp.; SA Chiropractic,
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default judgment is granted on the basis that the failure of Defendants Amanda McLean, Shamia Propst, and Racquel Williams (“Claimants”) to appear for duly scheduled Independent Medical Exams (“IMEs”) vitiated coverage under Plaintiff’s no-fault policy.

Plaintiff issued a “New York for Hire” automobile insurance policy (“the policy”) to the insured, non-party Bradley Limo, Inc., covering any occupants of the insured vehicle for medical expenses arising out of the use or operation of the insured vehicle and for any other person who sustains personal injury arising out of the use or operation of the vehicle in New York State. Claimants were passengers in the insured vehicle when it was involved in a collision on December 4, 2019, in Brooklyn, New York, in which another vehicle sideswiped the insured vehicle. Following the collision, the Claimants were removed to Brookdale Hospital. The remaining defendants (collectively “Medical Provider Defendants”) later submitted No-Fault claims for treatment provided to Claimants for injuries allegedly arising out of the collision.

During the insurance claims process that followed, Plaintiff challenged the No-Fault claims submitted by the Medical Provider Defendants. Plaintiff argued that Claimants’ injuries and subsequent treatment by Non-Answering Defendants were non-covered events under the policy. Plaintiff requested that each Claimant submit to an IME to assess the causal relationship between injuries sustained in the collision and subsequent treatment. Claimants twice failed to appear for their scheduled IMEs. Plaintiff then commenced the present action to disclaim No-Fault coverage and coverage under the policy. The Non-Answering Defendants were served with the Summons and Complaint and have not responded to the pleadings.

Plaintiff asserts in its instant motion two bases upon which default judgment against the Non-Answering Defendants should be granted. First, Plaintiff argues that Claimants’ failure to

P.C.; and Zucco Well Acupuncture, P.C. have answered the complaint. Defendants Amanda McLean, Shamia Propst, and Racquel Williams (“Claimants”) have not been located for service.

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appear for scheduled IMEs vitiated the policy and entitles it to a default judgment against the Non-Answering Defendants. Second, Plaintiff argues that it has a founded belief that Claimants' injuries and subsequent No-Fault treatment submitted by the Medical Provider Defendants were not causally related to the collision and/or that the injuries did not arise from an insured event, thereby entitling it to a default judgment declaring that it has no obligation to pay Non-Answering Defendants' claims.

A party is entitled to default judgment under CPLR 3215 where it files proof of service of the Summons and Complaint, proof of the facts constituting the claim, and proof of default (CPLR 3215[f]). Plaintiff properly filed proof of service of the Summons and Complaint on the Non-Answering Defendants, proof of the facts constituting its claims against the Defendants, and proof of Non-Answering Defendants' default.

11 NYCRR 65-1.1 stipulates that full compliance by a claimant with the terms of coverage in a No-Fault policy is a condition precedent to all claims against an insurance company under said policy. A claimant's failure to submit to an IME constitutes a breach of a condition precedent to coverage under a No-Fault policy and vitiates the policy (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]; *Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]). An insurer must establish that it requested IMEs in accordance with the procedures and time frames in the No-Fault regulations (11 NYCRR 65-3.5) in order to deny a claim where a claimant fails to appear for an IME (*Unitrin* at 560; *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841-42 [1st Dept 2019]).

Here, Plaintiff submitted proof that it timely requested IMEs from Claimants within 15 business days of its receipt of the prescribed verification from Claimant's providers (11 NYCRR

65-3.5[b]). Plaintiff further complied with the No-Fault regulations by scheduling the IMEs within 30 calendar days of its receipt of Claimants' verification forms (11 NYCRR 65-3.5[d]). The affidavit of Plaintiff's adjuster Joronda McBurnie ("affidavit") and subsequent correspondence sent by Plaintiff to Claimants with respect to rescheduled IME dates show that Claimants failed to appear for their scheduled IMEs. The affidavit and correspondence also show that Claimants failed to appear at the rescheduled IMEs. Having established its compliance with the procedures set forth in 11 NYCRR 65-3.5 and Claimants' failure to submit to properly scheduled IMEs, Plaintiff has established a breach of a condition precedent of the policy. Accordingly, this branch of Plaintiff's motion seeking a default judgment is granted.

An insurer may assert a lack of coverage defense based on the fact or founded belief that a claimant's alleged injury did not arise out of a covered accident (*Cent. Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 201 [1997]). In demonstrating the facts that constitute its founded belief, an insurer can present circumstantial evidence to prove such facts provided that a reasonable inference can be drawn from the facts presented (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2d Dept 2005], quoting *Staples v Sisson*, 274 AD2d 779, 781 [3d Dept 2000]).

Here, the exhibits affixed to Plaintiff's motion, specifically the affidavit and police report, are insufficient to demonstrate Plaintiff's founded belief that Claimants' alleged injuries did not arise from a covered event or that the injuries were not caused by the collision. Although Plaintiff claims that the police report concluded that the collision was "minor," the report itself is silent as to the severity of the accident. The police report is therefore ambiguous at best with respect to the casual relationship between the collision and Claimants' injuries. The adjuster's affidavit cites additional facts to support Plaintiff's founded belief that the Claimants' injuries

did not arise from a covered event. However, these facts are not reflected anywhere else in the record and the court is therefore unable to draw a reasonable inference from their presentation in the affidavit alone. Consequently, the report and adjuster's affidavit do not present facts sufficient to demonstrate a founded belief that the collision did not arise out of a covered incident or that Claimants' purported injuries were not caused by the collision.

Accordingly, it is hereby:

ORDERED that the Plaintiff's motion for default judgment against Comprehensive Psychological Services, P.C.; Dr. Offenbacher Medical Imaging, PLLC; Happiness Cheng Acupuncture, P.C.; HLB Medical, P.C.; M El Sayed PT P.C.; Metropolitan and Surgical P.C.; QR Medical Services, P.C.; The Brookdale Hospital Medical Center; Time to Care Pharmacy, Inc.; and Welcome Physical Therapy, P.C. is granted insofar as Claimants' failure to submit to IMEs were a breach of a condition precedent to the no-fault policy that vitiated coverage; and it is further

ORDERED that the Plaintiff's motion for default judgment against the Non-Answering Defendants declaring that Claimants' injuries did not arise from the collision or that the collision was a non-covered event is denied; and it is further

ORDERED, ADJUDGED and DECLARED that Plaintiff has no duty to pay any No-Fault benefits, in the form of sums, monies, damage, awards, or benefits to Comprehensive Psychological Services, P.C.; Dr. Offenbacher Medical Imaging, PLLC; Happiness Cheng Acupuncture, P.C.; HLB Medical, P.C.; M El Sayed PT P.C.; Metropolitan and Surgical P.C.; QR Medical Services, P.C.; The Brookdale Hospital Medical Center; Time to Care Pharmacy, Inc.; and Welcome Physical Therapy, P.C.; their agents, employees, assignees, or heirs arising out of any current or future proceeding, including without limitation, arbitrations and lawsuits seeking to

recover No-Fault benefits as for the December 4, 2019 collision referenced in the complaint and any such arbitration sand lawsuits are stayed in accordance with this order; and it is further

ORDERED that the balance of the action shall be severed and continue against defendants Benessere Services, Inc.; Blvd Chiropractic of NY, P.C.; Grand Medical Supply Corp.; Healthmax Acupuncture, P.C.; Healthwise Medical Associates, P.C.; Medical Supply Depot Group Corp.; SA Chiropractic, P.C.; Zucco Well Accupuncture, P.C.; Amanda McLean; Shamia Propst; and Racquel Williams; and it is further

ORDERED that counsel are direct to appear for a Preliminary Conference via Teams on May 10, 2022 at 11:30 AM.

This constitutes the Decision and Order of the court.

3/11/2022
DATE

LORI SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE