

<b>Liberty Mut. Ins. Co. v Smith</b>
2022 NY Slip Op 30900(U)
March 15, 2022
Supreme Court, New York County
Docket Number: Index No. 652509/2021
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<b>PRESENT:</b>	<u>HON. SABRINA KRAUS</u>	<b>PART</b>	<b>57TR</b>
	<i>Justice</i>		
-----X		<b>INDEX NO.</b>	<u>652509/2021</u>
LIBERTY MUTUAL INSURANCE COMPANY, LM GENERAL INSURANCE COMPANY,		<b>MOTION DATE</b>	<u>02/28/2022</u>
Plaintiff,		<b>MOTION SEQ. NO.</b>	<u>001</u>

- v -

SHERMA SMITH, ACCESS CARE PT P.C.,APEX MEDICAL P.C.,AVK RX INC.,BISOMA PHARMACY INC.,BV PHYSICAL THERAPY P.C.,ESSENTIAL RX LLC,IDEAL CARE PHARMACY, INC.,IGOR MAYZENBERG L.A.C., ISURPLY LLC,ROSAR MEDICAL EQUIPMENT CORP., STAY WELL CHIROPRACTIC P.C.,SURETOX LLC,TOPLAB

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for JUDGMENT - DEFAULT

**BACKGROUND**

This action arises from an automobile accident on October 10, 2020 wherein Sherma Smith (SS) was allegedly injured while in a vehicle insured by plaintiff. SS filed a claim with plaintiff as a purported injured person under an insurance policy, number AO522118851375, issued by plaintiff.

Plaintiff commenced this action on or about April 15, 2021, seeking a declaratory judgment against SS, Access Care Pt P.C., Apex Medical P.C., AVK Rx Inc., Bisoma Pharmacy Inc., BV Physical Therapy P.C., Essential Rx LLC, Ideal Care Pharmacy, Inc., Igor Mayzenberg L.A.C., Isurply LLC, Rosar Medical Equipment Corp., Stay Well Chiropractic P.C., Suretox LLC, and Toplab finding that plaintiff is not liable to pay no-fault benefits to the medical provider defendants for medical services allegedly provided to SS because plaintiff alleges SS

materially misrepresented the location of the garaging of the insured vehicle at the time of policy procurement. The policy address is for 7 Crane Street Clifton Springs, NY 14432, however the address on SS's driver's license, as well as the vehicle's registration, is 201 Linden Blvd., Apt. D6, Brooklyn, NY. SS testified at an examination under oath that she resided at 201 Linden Blvd., Apt. D6, Brooklyn, NY.

On June 3, 2021, defendant Rosar Medical Equipment appeared and filed an answer.

### **PENDING MOTION**

In this declaratory judgment action, plaintiff moves, pursuant to CPLR §3215, for a default judgment against defendant SS, Access Care Pt P.C., Apex Medical P.C., AVK Rx Inc., Bisoma Pharmacy Inc., BV Physical Therapy P.C., Essential Rx LLC, Ideal Care Pharmacy, Inc., Igor Mayzenberg L.A.C., Isurply LLC,, Stay Well Chiropractic P.C., Suretox LLC, and Toplab.

On March 4, 2022, the action was discontinued, with prejudice, as to Suretox Laboratory, LLC.

All other defendants 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).

Plaintiff submits in support of the motion, the affirmation of Richard Ahrens, Esq., (NYSCEF Doc. No. 7), copy of the summons and complaint (NYSCEF Doc 9) affidavits of

service on the defendants (NYSCEF Doc. No. 10), notice pursuant to CPLR § 3215(g) (NYSCEF Doc. No. 11); nonmilitary affidavit for SS (NYSCEF Doc 12); the application for motor vehicle no-fault benefits (NYSCEF Doc. No. 14); police report (NYSCEF Doc 15); notice of intention to make a claim form (NYSCEF Doc 16); affidavit of investigator (NYSCEF Doc 17); transcript of the examination under oath of SS (NYSCEF Doc 18); denial of claim form (NYSCEF Doc. No. 19); the affidavit of Sean Surdich, a claims department unit manager (NYSCEF Doc. No. 20), and an affidavit from the underwriter (NYSCEF Doc 21).

Plaintiff served the motion on SS by mailing to 201 Linden Blvd., Apt. D6, Brooklyn, NY. However, plaintiff admits that they were in contact with counsel for SS, the Law Office of Sergei Orel, LLC, and submit evidence that counsel for SS appeared at the examination under oath. However, plaintiff failed to serve even a courtesy copy of the instant motion on the Law Office of Sergei Orel, LLC.

In addition, although they seek a stay of any arbitration or court hearing brought by the non-answering defendants, plaintiff fails to specifically identify any pending arbitration or litigation between the parties. Nor does plaintiff affirmatively state there is no current pending arbitration or litigation between the parties. For these reasons, plaintiff's motion for a default judgment is denied without prejudice to renewal, on notice to counsel for any defendant and an affidavit listing any pending arbitration or litigation, or a statement affirming that none exists.

### **CONCLUSION**

Wherefore, it is hereby

ORDERED that plaintiff's motion seeking a default judgment against defendants Sherma Smith, Access Care Pt P.C., Apex Medical P.C., AVK Rx Inc., Bisoma Pharmacy Inc., BV Physical Therapy P.C., Essential Rx LLC, Ideal Care Pharmacy, Inc., Igor Mayzenberg L.A.C.,

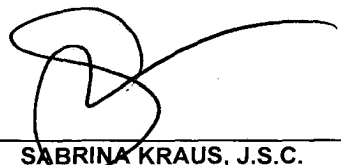
Isurply LLC, Stay Well Chiropractic P.C., and Toplab is denied without prejudice; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on all defendants, and on the Law Office of Sergei Orel, LLC, and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

This constitutes the decision and order of the court.

3/15/2022  
DATE

  
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SABRINA KRAUS, J.S.C.

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