

<b>Liberty Mut. Ins. Co. v Allen</b>
2022 NY Slip Op 31213(U)
April 6, 2022
Supreme Court, New York County
Docket Number: Index No. 650445/2021
Judge: Verna L. Saunders
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. VERA L. SAUNDERS, JSC**

**PART 36**

*Justice*

-----X

**INDEX NO. 650445/2021**

LIBERTY MUTUAL INSURANCE COMPANY,  
and LM GENERAL INSURANCE COMPANY,  
Plaintiffs,

**MOTION SEQ. NO. 001**

- v -

AARON ALLEN,  
TYLER THOMAS,  
ADVANCED MEDICAL SUPPLIES INC,  
ASTORIA ORGANIX PHARMACY,  
BAY PHARMACY 19 INC,  
CONTEMPORARY DIAGNOSTIC IMAGING LLC,  
CUTLER CHIROPRACTIC DIAGNOSTIC SERVICES PC,  
EAST TREMONT MEDICAL CENTER,  
GREENLEAF CHEMISTS INC,  
HUDSON REGIONAL HOSPITAL,  
INTROGEN INC,  
LEAH HALIKIOPOULOS,  
MACINTOSH MEDICAL PC,  
MEADLOWLANDS CARDIOLOGY PC,  
MIISUPPLY LLC,  
MK SUPPLY & TECH INC,  
NEW YORK PRESBYTERIAN HOSPITAL,  
NG ACUPUNCTURE CARE PC,  
NJMHMC LLC DBA HUDSON REGIONAL MEDICAL  
CENTER,  
ODED HAIDOTOV PA,  
PEAK ACUPUNCTURE PC,  
PREMIER ANESTHESIA ASSOCIATES PA,  
QUALITY MEDICAL & SURGICAL SUPPLIES LLC,  
QUINTERO PHYSICAL THERAPY PC,  
RALPH MEDICAL DIAGNOSTIC PC,  
SCOB LLC,  
SURINDER KAUR,  
TOPLAB AKA ADVANCED COMPREHENSIVE  
LABORATORY, LLC,  
TRINITY BRACING INC,  
W JOSEPH GORUM MD PC AKA WENDELL JOSEPH  
GORUM MD,  
WESTCHESTER RADIOLOGY & IMAGING PC  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 32

were read on this motion to/for

**DEFAULT JUDGMENT**

In this declaratory judgment action arising from an alleged motor vehicle accident on December 10, 2019 (“alleged accident”), involving individual defendants AARON ALLEN and TYLER THOMAS (collectively “claimants”), plaintiffs move this court, pursuant to CPLR 3215, for a declaration that, among other things, plaintiffs owe no duty to pay no-fault benefits to defendants AARON ALLEN, ADVANCED MEDICAL SUPPLIES INC, ASTORIA ORGANIX PHARMACY, BAY PHARMACY 19 INC, CONTEMPORARY DIAGNOSTIC IMAGING LLC, CUTLER CHIROPRACTIC DIAGNOSTIC SERVICES PC, EAST TREMONT MEDICAL CENTER, HUDSON REGIONAL HOSPITAL, MEALOWLANDS CARDIOLOGY PC, MIISUPPLY LLC, MK SUPPLY & TECH INC, NEW YORK PRESBYTERIAN HOSPITAL, NG ACUPUNCTURE CARE PC, NJMHC LLC DBA HUDSON REGIONAL MEDICAL CENTER, ODED HAIDOTOV PA, PEAK ACUPUNCTURE PC, PREMIER ANESTHESIA ASSOCIATES PA, QUALITY MEDICAL & SURGICAL SUPPLIES LLC, QUINTERO PHYSICAL THERAPY PC, RALPH MEDICAL DIAGNOSTIC PC, SCOB LLC, SURINDER KAUR, TOPLAB AKA ADVANCED COMPREHENSIVE LABORATORY, LLC, W JOSEPH GORUM MD PC AKA WENDELL JOSEPH GORUM MD, WESTCHESTER RADIOLOGY & IMAGINE PC (the “defaulting defendants”) on grounds that the alleged accident was minor and that the alleged injuries resulting from the accident were fraudulent, false or exaggerated. (NYSCEF Doc. Nos. 1, *summons and complaint*; 10, *affirmation in support of motion for default judgment*).<sup>1</sup>

Despite service of the motion (NYSCEF Doc. No. 27, *affidavit of service*), the defaulting defendants have failed to appear or oppose the motion.

CPLR 3215(a) provides, in pertinent part, that when “a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him [or her/they].” To establish his/her/their entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (See *PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 417, 317 [1st Dept 2016].) An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim. (See *Zelnick v Biderman Indus. U.S.A., Inc.*, 242 AD2d 227, 229 [1st Dept 1997]; *Hazim v. Winter*, 234 AD2d 422, 422 [2d Dept 1996].)

“An insurer may disclaim coverage based upon ‘the fact or founded belief that the alleged injury does not arise out of an insured incident’” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 NY Slip Op 33306 [U], \*6 [Sup Ct, NY County 2019], quoting *Central Gen. Hosp. v Chubb Group. of Ins. Co.*, 90 NY2d 195, 199 [1997].) To establish its entitlement to a default judgment based on a founded belief, a no-fault insurer need not “establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence.” (*State Farm Fire & Cas. Co. v All County, LLC*,

<sup>1</sup> No relief is sought as against the following defendants: TYLER THOMAS (NYSCEF Doc. No. 31, *answer*), GREENLEAF CHEMISTS INC (NYSCEF Doc. No. 6, *stipulation of discontinuance*), LEAH HALIKIOPOULOUS (NYSCEF Doc. No. 28, *stipulation of discontinuance*), MACINTOSH MEDICAL PC (NYSCEF Doc. No. 7, *answer*), and INTROGEN INC and TRINITY BRACING INC (NYSCEF Doc. No. 2, *answer*).

2019 NY Slip Op 33306 [U] at \*3 [internal quotation marks and citations omitted]; see *V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 25 Misc 3d 39, 40 [App Term. 2d Dept 2009]). “Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief” (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 NY Slip Op 33306 [U] at \*3), and “[c]ircumstantial evidence is sufficient if a defendant's conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence.” (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2d Dept 2005] [internal quotation marks and citation omitted]; see *American Alternative Insurance Corporation v Washington*, 60 Misc 3d 1222[A], 2018 NY Slip Op 51210[U], 2018 WL 3963545, \*3 [Sup Ct, NY County 2018].)

Here, plaintiffs have demonstrated that the defaulting defendants were duly served with process and that additional copies of the pleadings were mailed to them as required by CPLR 3215(g)(4). (NYSCEF Doc. Nos. 13-14, *affidavits of service*). Plaintiffs also annex an affidavit of non-military status for the individual defaulting defendants, AARON ALLEN, SURINDER KAUR, W JOSEPH GORUM MD PC aka WENDELL JOSEPH GORUM MD and ODED HAIVOTOV PA. (NYSCEF Doc. No. 15, *affidavit*). To date, the defaulting defendants have failed to answer, appear, or obtain an order from the court extending their time to do so, and the time to answer or otherwise appear has expired.

As to the facts constituting the claim, plaintiff submits, *inter alia*, the Examination Under Oath (“EUO”) transcripts of THOMAS and ALLEN (NYSCEF Doc. Nos. 18, 19, *EUO transcripts*), a biomechanical engineer report (NYSCEF Doc. No. 20, *biomechanical engineer report*), a forensic pathologist report (NYSCEF Doc. No. 21, *forensic pathologist report*) and denial of claim forms (NYSCEF Doc. No. 22, *claim denial forms*). The biomechanical engineer’s report concerning claimant indicates that, based upon “systematic, reliable analyses of the specific circumstances surrounding the alleged incident” detailed in the report, the biomechanical engineer’s conclusion was that the alleged accident “did not create the injury mechanisms required to cause the injuries claimed by ALLEN and THOMAS.” (NYSCEF Doc. No. 20, *biomechanical engineer report*). Similarly, the board-certified forensic pathologist asserts that, following his review of the relevant police report, accident, medical and photographic records, as well as the EUO transcripts, the claimed injuries are “not reasonably possible and would not have occurred in a normal individual.” (NYSCEF Doc. No. 21, *forensic pathologist report*). Upon review of these and other exhibits annexed to its motion, including the affidavit of David J. DeGeorge, an investigator in the Special Investigations Unit for plaintiffs (NYSCEF Doc. No. 17, *affidavit*), who further affirms that the alleged accident could not have reasonably caused the injuries alleged by claimant, this court finds that plaintiffs have established the facts constituting the claim. Accordingly, it is hereby

**ORDERED** that plaintiffs’ motion seeking a default judgment against AARON ALLEN, ADVANCED MEDICAL SUPPLIES INC, ASTORIA ORGANIX PHARMACY, BAY PHARMACY 19 INC, CONTEMPORARY DIAGNOSTIC IMAGING LLC, CUTLER CHIROPRACTIC DIAGNOSTIC SERVICES PC, EAST TREMONT MEDICAL CENTER, HUDSON REGIONAL HOSPITAL, MEALOWLANDS CARDIOLOGY PC, MIISUPPLY LLC, MK SUPPLY & TECH INC, NEW YORK PRESBYTERIAN HOSPITAL, NG ACUPUNCTURE CARE PC, NJMHMC LLC DBA HUDSON REGIONAL MEDICAL

CENTER, ODED HAIDOTOV PA, PEAK ACUPUNCTURE PC, PREMIER ANESTHESIA ASSOCIATES PA, QUALITY MEDICAL & SURGICAL SUPPLIES LLC, QUINTERO PHYSICAL THERAPY PC, RALPH MEDICAL DIAGNOSTIC PC, SCOB LLC, SURINDER KAUR, TOPLAB AKA ADVANCED COMPREHENSIVE LABORATORY, LLC, W JOSEPH GORUM MD PC AKA WENDELL JOSEPH GORUM MD, WESTCHESTER RADIOLOGY & IMAGINE PC is granted, without opposition; and it is further

**ORDERED, ADJUDGED and DECLARED** that plaintiffs have no duty to pay any no-fault benefits in the forms of sums, monies, damages, awards or benefits to AARON ALLEN, ADVANCED MEDICAL SUPPLIES INC, ASTORIA ORGANIX PHARMACY, BAY PHARMACY 19 INC, CONTEMPORARY DIAGNOSTIC IMAGING LLC, CUTLER CHIROPRACTIC DIAGNOSTIC SERVICES PC, EAST TREMONT MEDICAL CENTER, HUDSON REGIONAL HOSPITAL, MEALOWLANDS CARDIOLOGY PC, MIISUPPLY LLC, MK SUPPLY & TECH INC, NEW YORK PRESBYTERIAN HOSPITAL, NG ACUPUNCTURE CARE PC, NJMHC LLC DBA HUDSON REGIONAL MEDICAL CENTER, ODED HAIDOTOV PA, PEAK ACUPUNCTURE PC, PREMIER ANESTHESIA ASSOCIATES PA, QUALITY MEDICAL & SURGICAL SUPPLIES LLC, QUINTERO PHYSICAL THERAPY PC, RALPH MEDICAL DIAGNOSTIC PC, SCOB LLC, SURINDER KAUR, TOPLAB AKA ADVANCED COMPREHENSIVE LABORATORY, LLC, W JOSEPH GORUM MD PC AKA WENDELL JOSEPH GORUM MD, WESTCHESTER RADIOLOGY & IMAGINE PC, 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 with respect to the claims submitted by AARON ALLEN and TYLER THOMAS in connection with the December 10, 2019 accident referenced in the complaint; and it is further

**ORDERED, ADJUDGED and DECLARED** that all no-fault lawsuits, arbitrations, including uninsured motorists, awards and claims filed by AARON ALLEN, ADVANCED MEDICAL SUPPLIES INC, ASTORIA ORGANIX PHARMACY, BAY PHARMACY 19 INC, CONTEMPORARY DIAGNOSTIC IMAGING LLC, CUTLER CHIROPRACTIC DIAGNOSTIC SERVICES PC, EAST TREMONT MEDICAL CENTER, HUDSON REGIONAL HOSPITAL, MEALOWLANDS CARDIOLOGY PC, MIISUPPLY LLC, MK SUPPLY & TECH INC, NEW YORK PRESBYTERIAN HOSPITAL, NG ACUPUNCTURE CARE PC, NJMHC LLC DBA HUDSON REGIONAL MEDICAL CENTER, ODED HAIDOTOV PA, PEAK ACUPUNCTURE PC, PREMIER ANESTHESIA ASSOCIATES PA, QUALITY MEDICAL & SURGICAL SUPPLIES LLC, QUINTERO PHYSICAL THERAPY PC, RALPH MEDICAL DIAGNOSTIC PC, SCOB LLC, SURINDER KAUR, TOPLAB AKA ADVANCED COMPREHENSIVE LABORATORY, LLC, W JOSEPH GORUM MD PC AKA WENDELL JOSEPH GORUM MD, WESTCHESTER RADIOLOGY & IMAGINE PC in connection with the December 10, 2019 accident referenced in the complaint are hereby stayed; and it is further

**ORDERED** that this judgment shall have no effect as to the appearing defendants, being TYLER THOMAS, INTROGEN INC, MACINTOSH MEDICAL PC and TRINITY BRACING INC, and as to the defendants for whom a discontinuance has been filed, being GREENLEAF CHEMISTS INC and LEAH HALIKIOPOULOUS; and it is further,

**ORDERED** that, within twenty (20) days after this ordered is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, upon all defendants, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

**ORDERED** that service upon the Clerk of the Court 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)).

**ORDERED** that all parties who have appeared in this action shall participate in a remote conference on June 15, 2022, details which shall be provided no later than June 13, 2022.

This constitutes the decision and order of this court.

April 6, 2022

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: