

<b>State Farm Fire &amp; Cas. Co. v Pegus</b>
2022 NY Slip Op 31260(U)
April 7, 2022
Supreme Court, New York County
Docket Number: Index No. 156788/2021
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

*Justice*

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INDEX NO. 156788/2021STATE FARM FIRE AND CASUALTY COMPANY,  
Plaintiff,MOTION SEQ. NO. 001

- v -

CELINE PEGUS,  
JANICE PENDER,  
KEVIN DOUCHAND,  
MARTIN WALTERS,  
ACUPUNCTURE CARE P.C.,  
AZTEC MEDICAL PA,  
BEDFORD MEDICAL SERVICES P.C.,  
CAVALLARO MEDICAL SUPPLY INC,  
CITIMED COMPLETE MEDICAL CARE P.C.,  
CITIMED SURGERY CENTER, LLC,  
CONTEMPORARY ORTHOPEDICS, PLLC,  
CVS RX, INC.,  
ESM REHAB PT P.C.,  
HEALTH CHOICE PHARMACY INC,  
LONGEVITY MEDICAL SUPPLY, INC.,  
NEXRAY MEDICAL IMAGING, P.C.,  
NOVA MEDICAL DIAGNOSTIC P.C.,  
OPEOLUWA ELEYINAFE, M.D.,  
RIDGEWOOD DIAGNOSTIC LABORATORY LLC,  
SASHA CHIROPRACTIC P.C.,  
SUPRAMED INC,  
THODEN CHIROPRACTIC P.C.,  
YD MEDICAL SERVICES P.C.,  
YEVGENIY MARGULIS, PH.D.,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 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, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for

**DEFAULT JUDGMENT**

In this declaratory judgment action, plaintiff seeks to deny no-fault benefits relating to an accident on October 29, 2020 (the "accident"), involving claimant defendants CELINE PEGUS, JANICE PENDER, KEVIN DOUCHAND, and MARTIN WALTERS (collectively "claimants"), based on their failure to appear for duly scheduled examinations under oath ("EUOs"). (NYSCEF Doc. No. 1, *summons and complaint*). Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against claimants and defendants ACUPUNCTURE CARE P.C., AZTEC MEDICAL PA, BEDFORD MEDICAL SERVICES P.C., CITIMED COMPLETE MEDICAL CARE P.C., CITIMED SURGERY CENTER, LLC, CONTEMPORARY ORTHOPEDICS, PLLC, CVS RX, INC. d/b/a EXPRESS PHARMACY INC, ESM REHAB PT P.C., NEXRAY MEDICAL IMAGING, P.C., OPEOLUWA ELEYINAFE, M.D., RIDGEWOOD DIAGNOSTIC LABORATORY LLC,

SASHA CHIROPRACTIC P.C., SUPRAMED INC, THODEN CHIROPRACTIC P.C., YD MEDICAL SERVICES P.C., and YEVGENIY MARGULIS, PhD. (the “defaulting defendants”),<sup>1</sup> based on their failure to appear and/or serve an answer, and upon their default, declare that plaintiff is not obligated to provide any coverage, reimbursements, or pay any monies, sums or funds to any defaulting defendants that has been or may be submitted by said defendants by or on behalf of claimants; that defaulting defendants lack standing to seek or recover any benefits submitted by or on behalf of claimants for claimants’ failure to appear for EUOs; and that plaintiff is not obligated to provide any coverage for claims relating to third-party injury and uninsured/underinsured motorists benefits submitted by claimants arising from the accident. (NYSCEF Doc. No. 36, *notice of motion for default judgment*).

Despite service of the motion (NYSCEF Doc. Nos. 91-92, *affidavits 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/them].” 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.*, 2020 NY Slip op 07725[U] at \*1 [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].)

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. 4-10, 12-16, 19, 21-26, 49, *affidavits of service*). Plaintiffs also annex an affidavit of non-military status of the individual defaulting defendants, CELINE PEGUS, JANICE PENDER, KEVIN DOUCHAND, MARTIN WALTERS ALLEN, OPEOLUWA ELEYINAFE, M.D., and YEVGENIY MARGULIS, PhD. (NYSCEF Doc. Nos. 4-7, 26, 27, *affidavits of service*; 50, 52, 54, 56, *Department of Defense certificates*). To date, the defaulting defendants have failed to answer, appear, or obtain an order from the court extending the time to do so, and the time to answer or otherwise appear has expired.

“Pursuant to the Insurance Regulations, an insurer may request that an eligible injured party appear for an EUO to verify the no-fault claim, and may deny no-fault benefits if the eligible injured party fails to appear for the EUO” since “[c]ompliance with an EUO request is a condition precedent to no-fault coverage.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U], \*7 [Sup Ct, NY County 2019] [citation omitted].) “To establish the failure of the party to appear for duly scheduled EUOs, the insurer must establish as a matter of law that it twice duly demanded an examination under oath, that the party twice failed to appear and that the insurer issued a timely denial.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U] at \*8; *see Interboro Ins. Co.*

<sup>1</sup> No relief is sought on this motion as against the following defendants: CAVALLARO MEDICAL SUPPLY INC (NYSCEF Doc. No. 28, *answer*), HEALTH CHOICE PHARMACY INC (NYSCEF Doc. No. 31, *answer*), LONGEVITY MEDICAL SUPPLY, INC. (NYSCEF Doc. No. 28, *answer*), and NOVA MEDICAL DIAGNOSTIC P.C. (NYSCEF Doc. No. 32, *answer*).

*v Clennon*, 113 AD3d 596, 597 [2d Dept 2014].) “It is also incumbent upon the insurer to submit proof by someone with personal knowledge of the non-appearance.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U] at \*10.)

Here, the default is established by the records presented. Plaintiff submits records showing that claimants CELINE PEGUS, JANICE PENDER, KEVIN DOUCHAND, and MARTIN WALTERS were each noticed for at least two EUOs,<sup>2</sup> failed to appear at each of the two respective EUOs, including affirmations with personal knowledge concerning each non-appearance.

First, CELINE PEGUS was noticed for two EUOs, on January 12, 2021 and February 15, 2021, and failed to appear at both. (NYSCEF Doc. Nos. 60, 63, *letter notices*; NYSCEF Doc. Nos. 62, 64, *transcripts regarding non-appearance*). Plaintiff provides an affirmation of Kevin O’Leary, Esq. who stated that he was present at each of these two noticed EUOs when this claimant failed to appear. (NYSCEF Doc. No. 39, *affirmation*). Similarly, JANICE PENDER failed to appear at two properly noticed EUOs scheduled to take place on February 2, 2021, and April 9, 2021, on which dates Jeffrey S. Siegel, Esq. affirmed that he was personally present and the attorney who placed her non-appearance on the record. (NYSCEF Doc. Nos. 68, 76, *letter notices*; 69, 77, *transcripts regarding non-appearance*; 40, *affirmation*). The third claimant, KEVIN DOUCHAND, was noticed for two EUOs to take place on January 12, 2021 and February 15, 2021, failed to appear at both, for which plaintiff submits transcripts noting his non-appearances and O’Leary’s affirmation concerning these non-appearances based on personal knowledge. (NYSCEF Doc. Nos. 78, 81, *letter notices*; 80, 82, *transcripts regarding non-appearance*; 39, *affirmation*). Lastly, MARTIN WALTERS was noticed for two EUOs to take place on January 11, 2021, and February 8, 2021. (NYSCEF Doc. Nos. 83, 85, *letter notices*). Each of his two non-appearances was placed on the record, affirmed by Taylor Grogran, Esq. who was at the first EUO and O’Leary who was at the second EUO, based on their respective personal knowledge of this claimant’s non-appearances at those EUOs. (NYSCEF Doc. Nos. 84, 86, *transcripts regarding non-appearance*; NYSCEF Doc. Nos. 39, 41, *affirmations*). Finally, the denials of each of claimant’s claims were timely as they were made within thirty (30) days from the later of either plaintiff’s bill receipt date or final verification requests. (NYSCEF Doc. No. 87; *claim denials*; 11 NYCRR 65-3.8). Accordingly, it is hereby

**ORDERED** that plaintiff’s motion seeking a default judgment against CELINE PEGUS, JANICE PENDER, KEVIN DOUCHAND, MARTIN WALTERS, ACUPUNCTURE CARE P.C., AZTEC MEDICAL PA, BEDFORD MEDICAL SERVICES P.C., CITIMED COMPLETE MEDICAL CARE P.C., CITIMED SURGERY CENTER, LLC, CONTEMPORARY ORTHOPEDICS, PLLC, CVS RX, INC. d/b/a EXPRESS PHARMACY INC, ESM REHAB PT P.C., NEXRAY MEDICAL IMAGING, P.C., OPEOLUWA ELEYINAFE, M.D., RIDGEWOOD DIAGNOSTIC LABORATORY LLC, SASHA CHIROPRACTIC P.C., SUPRAMED INC, THODEN CHIROPRACTIC P.C., YD MEDICAL SERVICES P.C., and YEVGENIY MARGULIS, PhD. is granted; and it is further

<sup>2</sup> Claimant JANICE PENDER was noticed for at least four EUOs, seemingly once due to the fact that the first EUO notice letter was served upon her at her home address even though her counsel had already informed plaintiff that she had retained counsel (NYSCEF Doc. Nos. 65, *EUO letter notice*; 67, *letter regarding representation*), and at least one other where she appeared but was adjourned due to a death in her immediate family. (NYSCEF Doc. Nos. 72, *EUO letter notice*, 73, *transcript regarding nonappearance*). However, Claimant Pender thereafter failed to appear at two other properly-noticed EUOs, as discussed herein.

**ORDERED, ADJUDGED AND DECLARED** that plaintiff is not obligated to provide any coverage, reimbursements, or pay any monies, sums or funds to any of the defaulting defendants, being CELINE PEGUS, JANICE PENDER, KEVIN DOUCHAND, MARTIN WALTERS, ACUPUNCTURE CARE P.C., AZTEC MEDICAL PA, BEDFORD MEDICAL SERVICES P.C., CITIMED COMPLETE MEDICAL CARE P.C., CITIMED SURGERY CENTER, LLC, CONTEMPORARY ORTHOPEDICS, PLLC, CVS RX, INC. d/b/a EXPRESS PHARMACY INC, ESM REHAB PT P.C., NEXRAY MEDICAL IMAGING, P.C., OPEOLUWA ELEYINAFE, M.D., RIDGEWOOD DIAGNOSTIC LABORATORY LLC, SASHA CHIROPRACTIC P.C., SUPRAMED INC, THODEN CHIROPRACTIC P.C., YD MEDICAL SERVICES P.C., and YEYGENIY MARGULIS, PhD, for any and all no-fault related services for which claims and/or bills have been, or may in the future be, submitted by the defaulting defendants to plaintiff by or on behalf of claimants as they breached a condition precedent to coverage by failing to appear for an EUO in connection with the claim that gave rise to this lawsuit; and it is further

**ORDERED, ADJUDGED and DECLARED** that plaintiff is not obligated to provide any coverage for claims relating to third-party injury and uninsured/underinsured motorists benefits submitted by CELINE PEGUS, JANICE PENDER, KEVIN DOUCHAND, and MARTIN WALTERS arising from the October 29, 2020 accident; and it is further

**ORDERED** that this judgment shall have no effect as to the appearing defendants, being CAVALLARO MEDICAL SUPPLY INC, HEALTH CHOICE PHARMACY, INC, LONGEVITY MEDICAL SUPPLY INC, and NOVA MEDICAL DIAGNOSTIC P.C.; and it is further

**ORDERED** that, within twenty (20) days after this order 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)); and it is further

**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 7, 2022

  
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 HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: