

Liberty Mut. Ins. Co. v Henry
2022 NY Slip Op 31464(U)
May 4, 2022
Supreme Court, New York County
Docket Number: Index No. 650790/2021
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. 650790/2021

LIBERTY MUTUAL INSURANCE COMPANY and LM
INSURANCE CORPORATION,
Plaintiffs,

MOTION SEQ. NO. 001; 002

- v -

ANSELMO HENRY,
ACE EMERGENT MEDICAL CARE, PC,
ALL CITY FAMILY HEALTHCARE CENTER, INC.,
BAY RIDGE ORTHOPEDIC ASSOCIATES, PC,
CARESOFTE LEASING CORP.,
EXCELL CLINICAL LAB INC.,
EZ ORTHO SUPPLY INC.,
GRACE PHARMACY, LTD,
HERSCHEL KOTKES MD PC,
INTEGRATED MEDICINE OF SI PC,
LENCO DIAGNOSTIC LABORATORIES, INC.,
MAZ SUPPLY INC.,
MED TROVE INC.,
MKR MEDICAL PC,
MUTIMED SUPPLY, INC.,
NYC BEST MEDICAL SUPPLY, INC.,
PACEM PSYCHOLOGICAL SERVICES, P.C.,
QUALITY CARE RX INC.,
RENAN MACIAS MD,
ROSE CHIROPRACTIC PC,
ROSE CHIROPRACTIC HEALTH & WELLNESS PC,
SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC,
SMART INSPIRE PHYSICAL THERAPY, PC,
STEPHAN MATRANGOLO, DC,
SKY RADIOLOGY PC,
VITAL MEDICAL OF FOREST HILLS,
WAI HO LUM MD,
YE'S ACPUNCTURE PC,

**AMENDED DECISION + ORDER
ON MOTION**

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

were read on this motion to/for AMEND CAPTION/PLEADINGS

In this declaratory judgment action stemming from a January 27, 2020 collision, plaintiffs move, pursuant to CPLR 3215, for a default judgment against ANSELMO HENRY (“claimant”); ACE EMERGENT MEDICAL CARE, PC; BAY RIDGE ORTHOPEDIC ASSOCIATES, PC; EZ ORTHO SUPPLY INC; HERSCHEL KOTKES MD PC; LENCO DIAGNOSTIC LABORATORIES, INC.; MAZ SUPPLY INC.; MKR MEDICAL PC; ROSE CHIROPRACTIC HEALTH & WELLNESS PC; PACEM PSYCHOLOGICAL SERVICES, P.C.; SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC; SMART INSPIRE PHYSICAL THERAPY, PC; WAI HO LUM MD; and YE’S ACUPUNCTURE, PC (collectively “defaulting defendants”) (NYSCEF Doc. No. 18, *notice of motion*) (Mot. Seq. 001).¹

Plaintiff also moves the court to correct the name of medical provider defendant GRACE PHARMACY, LTD (NYSCEF Doc. No. 38, *notice of motion*) (Mot. Seq. 002).

Despite service of the motion papers (NYSCEF Doc. No. 19, *affidavit of service of motion papers*), the application is not opposed.

To establish its entitlement to a default judgment, a plaintiff 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 418, 418 [1st Dept 2016].)

An insurer may assert a lack of coverage based on a material misrepresentation. “A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented.” (*Liberty Mut. Ins. Co. v Castillo*, 2020 NY Slip Op 34358[U], *2 [Sup Ct, NY County 2020].) “To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application.” (*Schirmer v Penkert*, 41 AD3d 688, 690-691 [2d Dept 2007].)

Here, plaintiff submits proof that claimant was personally served with the summons and complaint pursuant to CPLR 308(1). Defendant WAI HO LUM, MD was served pursuant to CPLR 308(2). Said affidavits reflect that claimant and WAI HO LUM, MD are not in active military service. The remaining defendants were served via the Secretary of State and plaintiff submits proof demonstrating that it complied with the additional mailing requirements set forth in CPLR 3215(g)(4). (NYSCEF Doc. Nos. 5, 22-23, *affidavits of service*). The defaulting defendants’ failure to interpose an answer or otherwise appear in this action is established by the affirmation of Ashley Arcuri (NYSCEF Doc. No. 19, *Arcuri’s affirmation*).

As for the facts constituting the claim, this court has reviewed, *inter alia*, the affidavits of Lindsay Gray, an investigator in the special investigations unit for plaintiff, and Darren Demmon, the lead compliance analyst, who set forth facts that claimant misrepresented that he was residing in North Carolina when he procured the policy when, instead, he resided in Rosedale, New York. Demmon’s affidavit further establishes that said misrepresentation was material given the difference in premium between the two locations. Based on the foregoing, this court finds that plaintiff has established their *prima facie* entitlement to a default judgment against the defaulting defendants.

¹ This action was discontinued as against defendants RENAN MACIAS MD (NYSCEF Doc. No. 4); ROSE CHIROPRACTIC PC (NYSCEF Doc. No. 13); INTEGRATED MEDICINE OF SI PC (NYSCEF Doc. No. 14); STEPHAN MATRANGOLO, DC (NYSCEF Doc. No. 14); SKY RADIOLOGY PC (NYSCEF Doc. No. 16).

As to the motion to amend, seeking to correct the caption to read GRACE PHARMACY, LTD. aka GRACE PHARMACY d/b/a SAMANTHA'S PHARMACY, INC., that branch of the motion is granted, without opposition. Accordingly, it is hereby

ORDERED that the motion seeking a default judgment against ANSELMO HENRY; ACE EMERGENT MEDICAL CARE, PC; BAY RIDGE ORTHOPEDIC ASSOCIATES, PC; EZ ORTHO SUPPLY INC; HERSCHEL KOTKES MD PC; LENCO DIAGNOSTIC LABORATORIES, INC.; ROSE CHIROPRACTIC HEALTH & WELLNESS PC; MAZ SUPPLY INC.; MKR MEDICAL PC; PACEM PSYCHOLOGICAL SERVICES, P.C.; SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC; SMART INSPIRE PHYSICAL THERAPY, PC; WAI HO LUM, MD; and YE'S ACUPUNCTURE, PC is granted; and it is further

ORDERED, DECLARED and ADJUDGED that defendants ANSELMO HENRY; ACE EMERGENT MEDICAL CARE, PC; BAY RIDGE ORTHOPEDIC ASSOCIATES, PC; EZ ORTHO SUPPLY INC; HERSCHEL KOTKES MD PC; LENCO DIAGNOSTIC LABORATORIES, INC.; ROSE CHIROPRACTIC HEALTH & WELLNESS PC; MAZ SUPPLY INC.; MKR MEDICAL PC; PACEM PSYCHOLOGICAL SERVICES, P.C.; SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC; SMART INSPIRE PHYSICAL THERAPY, PC; WAI HO LUM, MD, and YE'S ACUPUNCTURE, PC are not entitled to no-fault benefits relating to the January 27, 2020 accident referenced in the complaint; and it is further

ORDERED, DECLARED and ADJUDGED that all arbitrations, lawsuits and enforcement of awards or judgments in connection with the January 27, 2020, loss, referenced in the complaint are hereby permanently stayed; and it is further

ORDERED that the action is hereby discontinued as against defendants RENAN MACIAS, MD; ROSE CHIROPRACTIC PC; INTEGRATED MEDICINE OF SI PC; STEPHAN MATRANGOLO, DC.; and SKY RADIOLOGY PC., and the caption shall be amended to reflect said discontinuances; and it is further

ORDERED that plaintiffs' motion seeking to amend the caption to correct the name of defendant GRACE PHARMACY, LTD is granted; and it is further

ORDERED that the caption in this action shall bear the following caption:

LIBERTY MUTUAL INSURANCE COMPANY
and LM INSURANCE CORPORATION,
Plaintiff,

Index No. 650790/2021

v

ANSELMO HENRY,
ACE EMERGENT MEDICAL CARE, PC,
ALL CITY FAMILY HEALTHCARE CENTER, INC.,
BAY RIDGE ORTHOPEDIC ASSOCIATES, PC,
CARESOFTEASING CORP.,
EXCELL CLINICAL LAB INC.,

EZ ORTHO SUPPLY INC.,
 GRACE PHARMACY, LTD aka
 GRACE PHARMACY d/b/a SAMANTHA'S PHARMACY, INC.,
 HERSCHEL KOTKES MD PC,
 Lenco DIAGNOSTIC LABORATORIES, INC.,
 MAZ SUPPLY INC.,
 MED TROVE INC.,
 MKR MEDICAL PC,
 MUTIMED SUPPLY, INC.,
 NYC BEST MEDICAL SUPPLY, INC.,
 PACEM PSYCHOLOGICAL SERVICES, P.C.,
 QUALITY CARE RX INC.,
 ROSE CHIROPRACTIC HEALTH & WELLNESS PC,
 SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC,
 SMART INSPIRE PHYSICAL THERAPY, PC,
 VITAL MEDICAL OF FOREST HILLS,
 WAI HO LUM MD,
 YE'S ACPUNCTURE PC,

Defendants.

and it is further

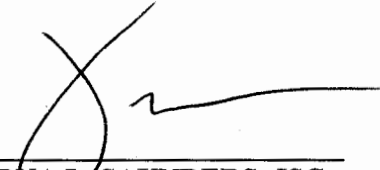
ORDERED that plaintiff shall file and serve an amended summons and complaint upon defendants within fifteen (15) days after this decision and order is uploaded to NYSCEF; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon 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).

This constitutes the decision and order of this court.

May 4, 2022



 HON. VERNAL L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER