

Hereford Ins. Co. v Bodybloom Servs., Inc.
2022 NY Slip Op 31562(U)
May 12, 2022
Supreme Court, New York County
Docket Number: Index No. 154313/2021
Judge: Lori Sattler
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
COUNTY OF NEW YORK: PART 02TR

-----X

HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

BODYBLOOM SERVICES, INC, 247 MEDICAL SUPPLIES
INC, RAF SPORTS CHIROPRACTIC, PC,BV PHYSICAL
THERAPY, PC,ACH CHIROPRACTIC, PC,BYOUNG LEE,
KYUNGSOOK BU, IGOR MAYZENBERG, APEX
MEDICAL, ACCESS CARE PT, PC,IDEAL CARE
PHARMACY, BISOMA PHARMACY, INC, ESSENTIAL
RX, ASG RX CORP, COMPLETE EXPRESS MEDICAL,
PC,HORIZON ORTHO SUPPLY CORP, SAINTS
CHIROPRACTIC OF NY, PC,QUEENS ARTHROSCOPY
& SPORTS MEDICINE, MARIE LOURDES JEAN-
FRANCOIS, DR. OFFENBACHER MEDICAL IMAGING,
PLLC,J SPORTS MEDICINE PC,ARS MEDICAL
EQUIPMENT CORP, JULIE JACOB, COMPLETE
NEUROPSYCHOLOGY, P.C.,TMVQS CORP. D/B/A
TRINITY PHARMACY, ENERGY CHIROPRACTIC,
PC,WELLNESS MEDICAL OF CORONA, PC,STAY WELL
CHIROPRACTIC, PC,AVK RX INC, ROSAR MEDICAL
EQUIPMENT CORP, ALTAI CORP. D/B/A GET READY
MEDICAL SUPPLY, FULL PSYCHOLOGY, PC,LILY
ZARHIN, SEONHEE ANN, CITY WIDE HEALTH
FACILITY, INC, TRAPEZIUS DIAGNOSTIC
CHIROPRACTIC, PC,BIG APPLE MEDICAL GROUP
CORP, MEDICAL DIAGNOSTIC CENTER, GEORGETTE
DIXON, TAMMEL EPPS, MARCUS MILLER, ANGELO
BUSH, ALONZO MCDANIELS, DENISHA MARTIN

Defendant.

-----X

HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 80, 81, 82, 83, 84,
85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - DEFAULT

In this action seeking declaratory judgment, Plaintiff Hereford Insurance Company
("Hereford") seeks a default judgment pursuant to CPLR 3215 against Defendants Bodybloom
Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care

PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc. (collectively “Non-Answering Medical Provider Defendants”); and against Tammel Epps; Marcus Miller; Angelo Bush; Alonzo McDaniels; and Denisha Martin (collectively “Claimants”).¹

This action arises out of a motor vehicle collision that occurred on August 9, 2020. Claimants were allegedly passengers in a livery vehicle driven by Mamadou Diallo (“Diallo”) and owned by Mouna, Inc. The livery vehicle had been issued a “New York For Hire” insurance policy by Hereford prior to August 9, 2020. According to the police report, the vehicle was driving east on Albemarle Avenue when it was rear ended by a second vehicle, which then fled the scene (NYSCEF Doc. No 83, “Police Report”). The responding officer reported that Diallo stated that a male passenger stated “get ready put on your seat belts” in the “seconds prior” to the collision (*id.*). Neither Diallo nor Claimants requested medical attention at the scene (*id.*).

Claimants subsequently asserted that they suffered significant bodily injuries stemming from the collision and submitted No-Fault claims for their alleged injuries and subsequent treatment (NYSCEF Doc. No. 84). Claimants then purportedly received treatment from the Medical Provider Defendants, who in turn submitted No-Fault claims for treatments allegedly provided to Claimants. Hereford requested that Claimants submit to examinations under oath

¹ Defendants Ideal care Pharmacy, Horizon Ortho Supply Corp., and J Sports Medicine PC have stipulated to discontinuance. Defendants 247 Medical Supplies Inc.; RAF Sports Chiropractic, PC; ACH Chiropractic, PC; Byoung Im Lee; Kyungsook Bu; Essential RX; ASG RX. Corp.; Complete Express Medical, PC; Marie Lourdes Jean-Francois; Ars Medical Equipment Corp.; Julie Jacob; Complete Neuropsychology, PC; TMVQS Corp. D/b/a/ Trinity Pharmacy; Energy Chiropractic PC; Stay Well Chiropractic PC; Rosar Medical Equipment Corp.; Altai Corpl. d/b/a/ Get Ready Medical Supply; Full Psychology, PC; Seonhee Ann; City Wide Health Facility, Inc.; Trapezius Diagnostic Chiropractic, PC; Big Apple Medical Group Gorp.; Medical Diagnostic Center; and Georgette T. Dixon have answered the complaint. Hereford states that Lily Zarhin, MD has not been located for service and that it has retained a private investigator to locate her.

(“EUOs”) and independent medical examinations (“IMEs”) to confirm the legitimacy of the collision and alleged subsequent treatment.

Hereford avers that Claimants Bush and McDaniels each failed to appear for their scheduled EUOs on two occasions and that Claimants Epps, Miller, McDaniel, and Martin each failed to appear for their scheduled IMEs on two occasions. Hereford further asserts that it maintains a founded belief that the collision was a non-covered event under the No-Fault Regulations and the policy because it either did not occur in the manner alleged by Claimants or because Claimants’ alleged injuries and subsequent treatments were not causally related to the collision. As a result, Hereford has denied all coverage arising out of the collision.

Hereford commenced the present action seeking a declaratory judgment that it has no duty to pay Defendants’ No-Fault claims arising from the collision on the basis that (1) Claimants’ failure to appear for duly scheduled EUOs and IMEs breached a condition of coverage under the No-Fault regulations and the policy and (2) that it maintains a founded belief that the collision was not a covered event, and that Claimants’ alleged injuries and treatment did not arise from an insured event and/or were not causally related to the collision. Hereford now seeks default judgment against the Non-Answering Medical Defendants and Claimants.

Failure of Claimants to Appear at EUOs & IMEs

A party is entitled to default judgment pursuant to CPLR 3215 where it files proof of service of its Summons and Complaint, proof of the facts constituting its claim, and proof of default (CPLR 3215[f]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 [1st Dept 2016]). Here, Hereford has properly filed proof of service of its summons and complaint upon the Non-Answering Medical Defendants and Claimants (NYSCEF Doc. No 89), has presented proof of

the facts in support of its claims (NYSCEF Doc. No. 82-87), and proof of default (NYSCEF Doc. No. 91).

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]).

Hereford is entitled to deny coverage for medical treatment purportedly rendered to Claimants Bush and McDaniels by the Non-Answering Medical Defendants based on the failure of Bush and McDaniels to appear at their duly scheduled EUOs. Hereford complied with the No-Fault regulations by notifying Claimants Bush and McDaniels about their first scheduled EUOs on September 28, 2020 and subsequent EUOs scheduled after their failure to appear (NYSCEF Doc. No. 85). Hereford received NF-3 forms for Bush and McDaniels' purported treatment on December 15, 2020, and October 15, 2020, respectively. Although Hereford notified these Claimants of their EUOs before receiving the verification forms, Hereford nonetheless complied with the requirements of 11 NYCRR 65-3.5(b) (*see Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 469 [1st Dept 2016] ["The notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply to EUOs that are

scheduled prior to the insurance company's receipt of a claim form"], citing *Stephen Fogel Psychological, P.C. v Progressive Sas. Ins. Co.*, 7 Misc.3d 18 [Appellate Term 2d Judicial Dept 2004]). The Court therefore grants the branch of Hereford's motion for default judgment as to claims submitted for treatment of Bush and McDaniels based on their failure to attend their respective EUOs.

Hereford is also entitled to default judgment based on the failure of Miller, McDaniels, and Martin to appear at their respective IMEs. Hereford sent notices scheduling IMEs for Claimants Miller, McDaniels, and Martin prior to its receipt of their respective NF-3 forms. Where an insurer has "sent the notices scheduling the IMEs prior to the receipt of each of the claims, the notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply" (*Hereford Ins. Co. v Lida's Med. Supply, Inc.*, 161 AD3d 442, 443 [1st Dept 2018]). Because Miller, McDaniels, and Martin failed to appear for their initial and rescheduled IMEs, Hereford is entitled to deny claims submitted for treatment of these individuals.

Hereford is not entitled to default judgment based on Claimant Epps' failure to appear for an IME. Although Hereford notified Epps of his first IME within 15 business days of Hereford's October 15, 2020 receipt of his NF-3 form, Epps' IME was scheduled for November 17, 2020, more than 30 days after receipt (NYSCEF Doc. No. 85, 87; *see* 11 NYCRR 65-3.5[d] ["If the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination *within 30 calendar days* from the date of the receipt of the prescribed verification forms"]) [emphasis added]). Default judgment on this branch of Hereford's motion, based on Epps' failure to appear for his IMEs, is denied.

Founded Belief

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]). A defaulting defendant is deemed to have admitted the allegations in a plaintiff's complaint by failing to answer (*State Farm Mut. Auto. Ins. Co. v Surgicore of Jersey City*, 195 AD3d 454, 455 [1st Dept 2021]).

The Court finds that Hereford has demonstrated facts sufficient to support its founded belief that the collision was not a covered event and that the injuries and treatments alleged by Claimants did not arise from the collision. The affidavit of Joronda McBurnie ("McBurnie"), Hereford's claims adjuster, states that Hereford's founded belief arose out of the fact that the collision was minor with no visible damage to the insured vehicle and Diallo's statement to the responding officer that he heard one of the passengers tell the others to "get ready" immediately prior to the collision (NYSCEF Doc. No. 82 at ¶ 13). The police report describes the collision in the same way and further states that the passengers of the insured vehicles (Claimants) refused medical attention on the scene (NYSCEF Doc. No. 83). Accordingly, Hereford's motion is granted on default. Hereford is therefore entitled to deny payment of No-Fault claims to the Claimants and the Non-Answering Medical Provider Defendants arising out of the injuries allegedly sustained by Claimants in the August 9, 2020 collision, and it is hereby:

ORDERED that the branch of Hereford's motion for default judgment against Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; Angelo Bush; and Alonzo McDaniels, based on Angelo Bush and Alonzo McDaniels' alleged breach of a condition of coverage under the No-Fault regulations due to Angelo Bush and Alonzo McDaniels' failure to appear for their respective EUOs is granted; and it is further

ORDERED that the branch of Hereford's motion for default judgment against Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; Marcus Miller; Alonzo McDaniels; and Denisha Martin, based on Marcus Miller's, Alonzo McDaniels', and Denisha Martin's breach of a condition of coverage under the No-Fault regulations due to Marcus Miller's, Alonzo McDaniels', and Denisha Martin's failure to appear for their IMEs is granted; and it is further

ORDERED that the branch of Hereford's motion for default judgment against Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; and Tammel Epps, based on Epps' alleged breach of a condition of coverage under the No-Fault regulations due to Epps' failure to appear for his IME is denied; and it is further

ORDERED that the branch of Hereford's motion for default judgment against Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; Tammel Epps, Marcus Miller, Angelo Bush, Alonzo McDaniels, and Denisha Martin, based on Hereford's founded belief that the August 9, 2020 collision was not a covered event and that Claimants' alleged injuries and treatments did not arise out of the collision is granted; and it is further

ORDERED, ADJUDGED, and DECLARED that Angelo Bush breached a condition precedent to coverage as established by the No-Fault Regulation and the subject policy of insurance and accompanying No-Fault endorsement by failing to appear for an EUO; and it is further

ORDERED, ADJUDGED, and DECLARED that Alonzo McDaniels breached a condition precedent to coverage as established by the No-Fault Regulation and the subject policy of insurance and accompanying No-Fault endorsement by failing to appear for an EUO; and it is further

ORDERED, ADJUDGED, and DECLARED that Marcus Miller breached a condition precedent to coverage as established by the No-Fault Regulation and the subject policy of insurance and accompanying No-Fault endorsement by failing to appear for an IME; and it is further

ORDERED, ADJUDGED, and DECLARED that Alonzo McDaniels breached a condition precedent to coverage as established by the No-Fault Regulation and the subject policy

of insurance and accompanying No-Fault endorsement by failing to appear for an IME; and it is further

ORDERED, ADJUDGED, and DECLARED that Denisha Martin breached a condition precedent to coverage as established by the No-Fault Regulation and the subject policy of insurance and accompanying No-Fault endorsement by failing to appear for an IME; and it is further

ORDERED, ADJUDGED, and DECLARED that Tammel Epps, Marcus Miller, Angelo Bush, Alonzo McDaniels, and Denisha Martin's alleged injuries and any subsequent No-Fault treatment provided by Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc., were not causally related to the August 9, 2020 collision (Hereford claim number 91423) and/or did not arise from an insured event; and it is further

ORDERED, ADJUDGED and DECLARED that Hereford owes no duty to provide any No-Fault reimbursements to Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; Tammel Epps; Marcus Miller; Angelo Bush; Alonzo McDaniels; for any claim or bill submitted by or on behalf of Alonzo McDaniels and/or Angelo Bush arising out of the alleged collision of August 9, 2020 (Hereford claim number 91423), as Alonzo McDaniels and Angelo Bush breached a condition precedent to

coverage as established by the subject policy of insurance and the accompanying No-Fault endorsement by failing to appear for an EUO; and it is further

ORDERED, ADJUDGED and DECLARED that Hereford owes no duty to provide any No-Fault reimbursements to Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; Tammel Epps; Marcus Miller; Angelo Bush; Alonzo McDaniels; for any claim or bill submitted by or on behalf of Marcus Miller, Alonzo McDaniels, and/or Denisha Martin arising out of the alleged incident of August 9, 2020 (Hereford claim number 91423), as Marcus Miller, Alonzo McDaniels, and Denisha Martin breached a condition precedent to coverage as established by the subject policy of insurance and the accompanying No-Fault endorsement by failing to appear for an IME; and it is further

ORDERED, ADJUDGED and DECLARED that Hereford, by reason of no coverage since Tammel Epps, Marcus Miller, Alonzo McDaniels, Angelo Bush, and Denisha Martin's alleged injuries and any subsequent No-Fault treatment submitted by Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc., were not causally related to the August 9, 2020 collision (Hereford claim number 91423), and/or did not arise from an insured event, is not required to pay any sums, monies, damages, awards, and/or benefits to Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens

Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc., Tammel Epps, Marcus Miller, Angelo Bush, Alonzo McDaniels, and Denisha Martin, including but not limited to Mandatory Personal Injury Protection (No-Fault), Additional Personal Injury Protection, Bodily Injury and Property Damage Liability, and Supplemental Uninsured/Underinsured Motorist Coverage, in connection with the alleged collision of August 9, 2020 (Hereford claim number 91423); and it is further

ORDERED that the Clerk is directed to enter judgment as against the defaulting defendants Bodybloom Services, Inc.; BV Physical Therapy, PC; Igor Mayzenberg, LAC; Apex Medical; Access Care PT, PC; Bisoma Pharmacy, Inc.; Saints Chiropractic of NY, PC; Queens Arthroscopy & Sports Medicine; Dr. Offenbacher Medical Imaging, PLLC; Wellness Medical of Corona, PC; AVK RX Inc.; Tammel Epps; Marcus Miller; Angelo Bush; Alonzo McDaniels; and Denisha Martin.

This constitutes the order and decision of the Court.

5/12/2022

DATE



LORI SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE