

Hereford Ins. Co. v Oracle Chiropractic PC
2022 NY Slip Op 32036(U)
June 29, 2022
Supreme Court, New York County
Docket Number: Index No. 151569/2021
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,

INDEX NO. 151569/2021

MOTION DATE 02/11/2022

- v -

MOTION SEQ. NO. 001

ORACLE CHIROPRACTIC PC,3 STAR ACUPUNCTURE,
PC,REHAB TIME PT PC,DELPHI CHIROPRACTIC
PC,STAR OF N.Y. CHIROPRACTIC DIAGNOSTIC,
P.C.,TOPLAB, ASC OF ROCKAWAY BEACH, APPLE
PAIN MANAGEMENT, PLLC,SCOB, LLC,CLASS POINT
ACUPUNCTURE, PC,TIME TO CARE PHARMACY INC,
JOSEPH A. RAIA MD PC,LONGEVITY MEDICAL
SUPPLY, INC, NEW MILLENIUM MEDICAL IMAGING,
PC,RADCITI IMAGING PC,DAVID HANSEN,
METROPOLITAN MEDICAL & SURGICAL, PC,SEDATION
VACATION PERIOP MED PLLC,CMA PSYCHOLOGY
PC,MK SUPPLY & TECH INC, MAIMONIDES MEDICAL
CENTER, GARA MEDICAL CARE PC,AZCAREMENT,
INC, COMPREHENSIVE MEDICAL ASSIST PC,MICHAEL
YUREV, TRAPEZIUS DIAGNOSTIC CHIROPRACTIC
PC,SACRUM CHIROPRACTIC PC,ATLANTIC
DIAGNOSTICS LLC,MAJESTIC MEDICAL IMAGING,
PC,JOHN LYONS, MD, DAVIDSON SAINTYL, GARY
BABB, WIGUENE JACQUES

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58

were read on this motion to/for JUDGMENT - DEFAULT.

In this action seeking declaratory judgment, Plaintiff Hereford Insurance Company (“Hereford”) moves for a default judgment pursuant to CPLR 3215 against Defendant medical providers Oracle Chiropractic PC; Rehab Time PT PC; Delphi Chiropractic; Star of N.Y. Chiropractic Diagnostic, P.C.; Toplab; ASC of Rockway Beach; Apple Pain Management, PLLC; Time to Care Pharmacy Inc.; Joseph A. Raia MD PC; Sedation Vacation Periop Med PLLC; MK Supply & Tech, Inc.; Gara Medical Care PC; Azcarerent Inc.; Michael Yurev;

Sacrum Chiropractic P.C.; Atlantic Diagnostics LLC; Majestic Medical Imaging, PC; John Lyons, MD; and Defendant claimant Gary Babb (collectively “Non-Answering Defendants”). Hereford’s motion for default judgment against Defendant medical providers 3 Star Acupuncture PC; Classpoint Acupuncture, PC; Longevity Medical Supply, Inc.; CMA Psychology PC a/k/a Psychological PC; and Trapezius Diagnostic Chiropractic PC, and those Defendants’ cross-motion to vacate a default are withdrawn. Defendant medical providers New Millennium Medical Imaging, PC and David W. Hanson and Defendant claimants Davidson Saintyl and Wiguene Jacques have not been located for service. Hereford and the remaining Defendant medical providers have stipulated to discontinuance.

This action arises out of a motor vehicle collision that occurred on December 8, 2019. Defendants Gary Babb, Davidson Saintyl, and Wiguene Jacques (collectively “Claimants”) were allegedly passengers in a livery vehicle driven by Jean Merisma which had been issued a “New York For Hire” insurance policy by Hereford prior to December 8, 2019. According to the police report, the vehicle was driving north in the bus lane on Rogers Avenue in Brooklyn and, while attempting to merge to the right out of the bus lane, collided with a second vehicle whose driver was attempting to merge to the left into the bus lane (NYSCEF Doc. No. 37, “Police Report”). The Police Report further describes the collision as a “side swipe” (*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. Claimants purportedly received treatment from the medical providers named as Defendants in this action, who in turn submitted No-Fault claims for treatments allegedly provided to Claimants. Hereford requested that Claimants submit to examinations under oath (“EUOs”).

Hereford avers that Claimant Davidson Saintyl failed to appear for his EUO on two occasions, and that Claimants Gary Babb and Wiguene Jacques failed to subscribe their EUO transcripts. 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 matter 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.

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]). Hereford has properly filed proof of service of its summons and complaint upon the Non-Answering Defendants (NYSCEF Doc. No 42) and proof of default (NYSCEF Doc. No. 44).

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 EUO constitutes a breach of a condition precedent to coverage under a No-Fault policy and vitiates the policy (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). An insurer must establish that it requested EUOs 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 EUO (*Unitrin* at 560; *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841-42 [1st Dept 2019]). A request for an EUO is timely when it is made within 15 days of the receipt of a medical provider claim (*Unitrin Direct Ins. Co. v Beckles*, 188 AD3d 620 [1st

Dept 2020]), but can also be sought prior to receipt thereof (*Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 469 [1st Dept 2016]). A claimant who appears for an EUO but then fails to subscribe and return the transcript of that EUO also violates a condition precedent to coverage and denial of that claimant's claims is warranted (*Kemper Independence Ins. Co. v Cornerstone Chiropractic, P.C.*, 185 AD3d 468 [1st Dept 2020]; *Hereford Ins. Co. v Forest Hills Med., P.C.*, 172 AD3d 567 [1st Dept 2019]).

Hereford is entitled to deny coverage for medical treatment purportedly rendered to Claimant Davidson Saintyl by the Non-Answering Defendant medical providers based on the failure of Saintyl to appear at his duly scheduled EUO. Hereford notified Saintyl of his first scheduled EUO by letter dated February 6, 2020 (NYSCEF Doc. No. 39) and received an NF-3 form for his purported treatment on March 6, 2020. In noticing the EUO prior to receipt of the NF-3, Hereford complied with the requirements of the No-Fault regulations as to notice. The notices annexed to the papers indicate that Saintyl's EUO was adjourned several times due to the pandemic, and notice was sent of each adjournment. The notices further indicate that Saintyl failed to appear for his EUO on August 24, 2020, and again on September 3, 2020. The Court therefore grants the branch of Hereford's motion for default judgment as to claims submitted for treatment of Claimant Davidson Saintyl based on his failure to attend his EUO.

Hereford is further entitled to deny coverage for medical treatment purportedly rendered to Claimants Gary Babb and Wiguene Jacques. Claimants Babb and Jacques appeared for their duly noticed EUOs on February 27, 2020. Hereford sent Babb's EUO transcript to Babb and his counsel with a request for signature on March 13, 2020 and sent a second request for same on April 20, 2020 (NYSCEF Doc. No. 40). Hereford sent Jacques' EUO transcript to Jacques and his counsel with a request for signature on March 17, 2020 and sent a second request for same on

April 20, 2020 (*id.*). Therefore, the Court grants the branch of Hereford's motion for default judgment as to claims submitted for treatment of Claimants Gary Babb and Wiguene Jacques based on their failure to subscribe and return their EUO transcripts.

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 not 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. According to the affidavit of Joronda McBurnie, Hereford's claims adjuster, Hereford's founded belief stems from the fact that while Claimants alleged significant injuries, "the police report indicated the loss was a minor sideswipe" and "Hereford obtained a sworn statement from its insured wherein the Hereford-insured swore to the collision being extremely minor" and that Claimants did not appear in need of medical assistance (NYSCEF Doc No. 36, "McBurnie Affidavit" ¶¶ 8-9). However, the Police Report does not use the word "minor" or otherwise describe the severity of the collision. The Court notes that where the form states "Cost of repairs to any one vehicle will be more than \$1000," the officer checked "Yes." Hereford further fails to annex the insured's sworn statement

referenced in the McBurnie Affidavit. Hereford's additional contentions that the EUO testimony of Claimants Babb and Jacques are contradictory is also unavailing. To the extent the EUO testimony of Claimants Jacques and Babb differs, they are not incongruous when taken in the larger context of their statements.

Accordingly, for the reasons set forth herein, it is hereby:

ORDERED that the branch of Hereford's motion for default judgment against Oracle Chiropractic PC; Rehab Time PT PC; Delphi Chiropractic; Star of N.Y. Chiropractic Diagnostic, P.C.; Toplab; ASC of Rockway Beach; Apple Pain Management, PLLC; Time to Care Pharmacy Inc.; Joseph A. Raia MD PC; Sedation Vacation Periop Med PLLC; MK Supply & Tech, Inc.; Gara Medical Care PC; Azcarerent Inc.; Michael Yurev; Sacrum Chiropractic P.C.; Atlantic Diagnostics LLC; Majestic Medical Imaging, PC; John Lyons, MD; and Gary Babb based on the claimants' respective breaches of conditions of coverage under the No-Fault regulations, to wit Davidson Saintyl's failure to appear for his EUO and Gary Babb and Wiguenne Jacques' failure to subscribe and return their respective EUO transcripts, is granted; and it is further

ORDERED that the branch of Hereford's motion for default judgment against Oracle Chiropractic PC; Rehab Time PT PC; Delphi Chiropractic; Star of N.Y. Chiropractic Diagnostic, P.C.; Toplab; ASC of Rockway Beach; Apple Pain Management, PLLC; Time to Care Pharmacy Inc.; Joseph A. Raia MD PC; Sedation Vacation Periop Med PLLC; MK Supply & Tech, Inc.; Gara Medical Care PC; Azcarerent Inc.; Michael Yurev; Sacrum Chiropractic P.C.; Atlantic Diagnostics LLC; Majestic Medical Imaging, PC; John Lyons, MD; and Gary Babb based on a founded belief that the December 8, 2019 collision was not a covered event and that Claimants' alleged injuries and treatments did not arise out of the collision is denied; and it is further

ORDERED, ADJUDGED, and DECLARED that Davidson Saintyl 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 Gary Babb 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 subscribe and return his EUO transcript; and it is further

ORDERED, ADJUDGED, and DECLARED that Wiguene Jacques 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 subscribe and return his EUO transcript; and it is further

ORDERED, ADJUDGED and DECLARED that Hereford owes no duty to provide any No-Fault reimbursements to Oracle Chiropractic PC; Rehab Time PT PC; Delphi Chiropractic; Star of N.Y. Chiropractic Diagnostic, P.C.; Toplab; ASC of Rockway Beach; Apple Pain Management, PLLC; Time to Care Pharmacy Inc.; Joseph A. Raia MD PC; Sedation Vacation Periop Med PLLC; MK Supply & Tech, Inc.; Gara Medical Care PC; Azcarerent Inc.; Michael Yurev; Sacrum Chiropractic P.C.; Atlantic Diagnostics LLC; Majestic Medical Imaging, PC; John Lyons, MD; and Gary Babb for any claim or bill submitted by or on behalf of Davidson Saintyl, Gary Babb, and/or Wiguene Jacques arising out of the alleged collision of December 8, 2019, as Davidson Saintyl 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 Oracle Chiropractic PC; Rehab Time PT PC; Delphi Chiropractic; Star of N.Y. Chiropractic Diagnostic, P.C.; Toplab; ASC of Rockway Beach; Apple Pain Management, PLLC; Time to Care Pharmacy Inc.; Joseph A. Raia MD PC; Sedation Vacation Periop Med PLLC; MK Supply & Tech, Inc.; Gara Medical Care PC; Azcarerent Inc.; Michael Yurev; Sacrum Chiropractic P.C.; Atlantic Diagnostics LLC; Majestic Medical Imaging, PC; John Lyons, MD; and Gary Babb for any claim or bill submitted by or on behalf of Davidson Saintyl, Gary Babb, and/or Wiguenne Jacques arising out of the alleged collision of December 8, 2019, as Gary Babb and Wiguenne Jacques breached a condition precedent to coverage as established by the subject policy of insurance and the accompanying No-Fault endorsement by failing subscribe and return their EUO transcripts; and it is further

ORDERED that the Clerk is directed to enter judgment as against the defaulting defendants Oracle Chiropractic PC; Rehab Time PT PC; Delphi Chiropractic; Star of N.Y. Chiropractic Diagnostic, P.C.; Toplab; ASC of Rockway Beach; Apple Pain Management, PLLC; Time to Care Pharmacy Inc.; Joseph A. Raia MD PC; Sedation Vacation Periop Med PLLC; MK Supply & Tech, Inc.; Gara Medical Care PC; Azcarerent Inc.; Michael Yurev; Sacrum Chiropractic P.C.; Atlantic Diagnostics LLC; Majestic Medical Imaging, PC; John Lyons, MD; and Gary Babb.

This constitutes the Decision and Order of the Court.

6/29/2022
DATE


LORI SATTLER, J.S.C.

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