

<b>Liberty Mut. Ins. Co. v Harry</b>
2022 NY Slip Op 32376(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 652314/2021
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 36M**

*Justice*

-----X  
LIBERTY MUTUAL INSURANCE COMPANY and LM  
GENERAL INSURANCE COMPANY,  
INDEX NO. 652314/2021  
MOTION SEQ. NO. 001

Plaintiff,

- v -

DAVID HARRY,  
TAFARIE GLASGOW,  
ABLE CHIROPRACTIC PC,  
ALIGNMENT CHIROPRACTIC PC,  
APEX MEDICAL PC,  
BETTER HANDS PHYSICAL THERAPY,  
CITIMEDICAL SERVICES PC,  
COMPLETE EXPRESS MEDICAL PC,  
ECLIPSE MEDICAL IMAGING PC,  
GENTLE CARE ACUPUNCTURE PC,  
GYSAKA SERVICES INC.,  
HEALING SERVICES INC,  
HONG ZHU WU LAC,  
LEVMIC INC,  
MACINTOSH MEDICAL PC,  
MYEHM RX INC,  
NEW PATH DIAGNOSTICS LLC,  
NEW SENSE ACUPUNCTURE PC,  
NOVA MEDICAL DIAGNOSTIC PC,  
NYC CARE PT PC,  
PREMIER ANESTHESIA ASSOCIATES PC,  
QUEENS ARTHROSCOPY AND SPORTS MEDICINE PC,  
RALPH MEDICAL DIAGNOSTICS PC,  
RELIABLE REHAB PHYSICAL THERAPY PC,  
RGM CHIROPRACTIC PC,  
RIU CHIROPRACTIC PC,  
SCOB LLC,  
TOPLAB a/k/a ADVANCED COMPREHENSIVE  
LABORATORY, LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 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**

In this declaratory judgment action, plaintiffs seek to deny no-fault benefits relating to a motor vehicle accident on March 11, 2020, based on the material misrepresentation of DAVID

HARRY as to the garaging of the vehicle and the policy address. (NYSCEF Doc. No. 1, *summons and complaint*). Plaintiffs now move, pursuant to CPLR 3215, for a default judgment against the following defendants: DAVID HARRY, TAFARIE GLASGOW, ABLE CHIROPRACTIC PC, ALIGNMENT CHIROPRACTIC PC, APEX MEDICAL PC, BETTER HANDS PHYSICAL THERAPY, CITIMEDICAL SERVICES PC, COMPLETE EXPRESS MEDICAL PC, ECLIPSE MEDICAL IMAGING PC, GENTLE CARE ACUPUNCTURE PC, HEALING SERVICES INC, HONG ZHU WU LAC, LEVMIC INC, MACINTOSH MEDICAL PC, MYEHM RX INC, NEW PATH DIAGNOSTICS LLC, NEW SENSE ACUPUNCTURE PC, NYC CARE PT PC, PREMIER ANESTHESIA ASSOCIATES PC, QUEENS ARTHROSCOPY AND SPORTS MEDICINE PC, RALPH MEDICAL DIAGNOSTICS PC, RELIABLE REHAB PHYSICAL THERAPY PC, RGM CHIROPRACTIC PC, RIU CHIROPRACTIC PC, SCOB LLC TOPLAB a/k/a ADVANCED COMPREHENSIVE LABORATORY, LLC, and VVX INC (“defaulting defendants”) for their failure to answer or appear in this action. (NYSCEF Doc. No. 7, *Notice of Motion*).

Despite service of the motion papers (NYSCEF Doc. No. 37, *affidavit of service of motion*), the defaulting defendants do not oppose the instant application, except for defendant COMPLETE EXPRESS MEDICAL, P.C. who opposes the motion and cross-moves, pursuant to CPLR 3012(d), for an order compelling defendant to accept its answer (NYSCEF Doc. No. 28, *notice of cross-motion*), which plaintiffs oppose (NYSCEF Doc. No. 35, *affidavit in opposition*).

As an initial matter, given the strong public policy in favor of resolving cases on the merits, this court grants COMPLETE EXPRESS MEDICAL, P.C.’s cross-motion and compels plaintiffs to accept its answer. Thus, plaintiffs’ motion as against said defendant is denied.

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].” To establish his or her 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 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].)

“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 N.Y. Slip Op. 30444[U], \*3 [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 \*4; see *Interboro Ins. Co. v Clennon*, 113 A.D.3d 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 \*4.)

Here, the default is established by the affirmation of Richard Ahrens (NYSCEF Doc. No. 8). Plaintiffs submit an affidavit of service demonstrating that the defaulting defendants were served with the pleadings (NYSCEF Doc. No. 11). Plaintiffs also submit proof that it complied with the additional mailing requirements of CPLR 3215(g)(4)(i) and (ii). (NYSCEF Doc. No. 12, *notice of additional mailing*) and that the individual defendants are not in active military service (NYSCEF Doc. No. 13).

Plaintiffs establish the facts constituting the claim by submitting, *inter alia*, EUO scheduling letters (NYSCEF Doc. No. 17-18); the examination under oath transcript (NYSCEF Doc. No. 20); affidavit of Lisa Saccone, an investigator in the special investigations unit for plaintiffs, who affirms that claimants DAVID HARRY and TAFANE GLASGOW failed to attend two scheduled EUO’s and further that the investigation reveals that DAVID HARRY misrepresented the address for the vehicle and the garaging of the vehicle in order to secure a lower premium (NYSCEF Doc. No. 16). Plaintiff also annexes the affidavit of Darren Demmon who affirms that the premium in Brooklyn, New York would have been approximately \$5,758.00 more for the same vehicle at the inception of the policy than if procured in Troy, New York and that plaintiffs would not have issued said policy at the given rate had they known of HARRY’s correct address. (NYSCEF Doc. No. 22, *Demmon’s affidavit*). Based on the foregoing, it is hereby

**ORDERED** that plaintiffs’ motion is granted to the extent they seek a default judgment against DAVID HARRY, TAFARIE GLASGOW, ABLE CHIROPRACTIC PC, ALIGNMENT CHIROPRACTIC PC, APEX MEDICAL PC, BETTER HANDS PHYSICAL THERAPY, CITIMEDICAL SERVICES PC, ECLIPSE MEDICAL IMAGING PC, GENTLE CARE ACUPUNCTURE PC, HEALING SERVICES INC, HONG ZHU WU LAC, LEVMIC INC, MACINTOSH MEDICAL PC, MYEHM RX INC, NEW PATH DIAGNOSTICS LLC, NEW SENSE ACUPUNCTURE PC, NYC CARE PT PC, PREMIER ANESTHESIA ASSOCIATES PC, QUEENS ARTHROSCOPY AND SPORTS MEDICINE PC, RALPH MEDICAL DIAGNOSTICS PC, RELIABLE REHAB PHYSICAL THERAPY PC, RGM CHIROPRACTIC PC, RIU CHIROPRACTIC PC, SCOB LLC TOPLAB a/k/a ADVANCED COMPREHENSIVE LABORATORY, LLC, and VVX INC and it is otherwise denied; and it is further

**ORDERED** that the cross-motion of COMPLETE EXPRESS MEDICAL, P.C. is granted, and plaintiffs are hereby directed to accept its answer in the form annexed to it cross-motion (NYSCEF Doc. No. 30, *answer*); and it is further

**ORDERED, ADJUDGED and DECLARED** that plaintiffs have no duty to pay any no-fault benefits in the form of sums, monies, damages, awards or benefits to DAVID HARRY,

TAFARIE GLASGOW, ABLE CHIROPRACTIC PC, ALIGNMENT CHIROPRACTIC PC, APEX MEDICAL PC, BETTER HANDS PHYSICAL THERAPY, CITIMEDICAL SERVICES PC, ECLIPSE MEDICAL IMAGING PC, GENTLE CARE ACUPUNCTURE PC, HEALING SERVICES INC, HONG ZHU WU LAC, LEVMIC INC, MACINTOSH MEDICAL PC, MYEHM RX INC, NEW PATH DIAGNOSTICS LLC, NEW SENSE ACUPUNCTURE PC, NYC CARE PT PC, PREMIER ANESTHESIA ASSOCIATES PC, QUEENS ARTHROSCOPY AND SPORTS MEDICINE PC, RALPH MEDICAL DIAGNOSTICS PC, RELIABLE REHAB PHYSICAL THERAPY PC, RGM CHIROPRACTIC PC, RIU CHIROPRACTIC PC, SCOB LLC TOPLAB a/k/a ADVANCED COMPREHENSIVE LABORATORY, LLC, and VVX INC., 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 collision that occurred on March 11, 2020 loss, referenced in the complaint and it is further

**ORDERED, ADJUDGED and DECLARED** that all no-fault lawsuits, arbitrations, including uninsured motorist, awards, and claims filed by DAVID HARRY, TAFARIE GLASGOW, ABLE CHIROPRACTIC PC, ALIGNMENT CHIROPRACTIC PC, APEX MEDICAL PC, BETTER HANDS PHYSICAL THERAPY, CITIMEDICAL SERVICES PC, ECLIPSE MEDICAL IMAGING PC, GENTLE CARE ACUPUNCTURE PC, HEALING SERVICES INC, HONG ZHU WU LAC, LEVMIC INC, MACINTOSH MEDICAL PC, MYEHM RX INC, NEW PATH DIAGNOSTICS LLC, NEW SENSE ACUPUNCTURE PC, NYC CARE PT PC, PREMIER ANESTHESIA ASSOCIATES PC, QUEENS ARTHROSCOPY AND SPORTS MEDICINE PC, RALPH MEDICAL DIAGNOSTICS PC, RELIABLE REHAB PHYSICAL THERAPY PC, RGM CHIROPRACTIC PC, RIU CHIROPRACTIC PC, SCOB LLC TOPLAB a/k/a ADVANCED COMPREHENSIVE LABORATORY, LLC, and VVX INC arising from or related to the March 11, 2020 loss referenced in the complaint are hereby stayed; 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](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

July 7, 2022

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER