

**State Farm Mut. Auto. Ins. Co. v Flatbush
Acupuncture, P.C.**

2022 NY Slip Op 32496(U)

July 27, 2022

Supreme Court, New York County

Docket Number: Index No. 154135/2021

Judge: William Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Plaintiff,

INDEX NO. 154135/2021

MOTION DATE 11/24/2021

MOTION SEQ. NO. 001

- v -

FLATBUSH ACUPUNCTURE, P.C.,FREE STEPS
PHYSICAL THERAPY, P.C.,INTEGRATED SPECIALTY
ASC, L.L.C., PREMIER ANESTHESIA ASSOCIATES, P.A.,
CARESOFT LEASING CORP., BV PHYSICAL THERAPY,
P.C.,HFP CHIROPRACTIC, P.C.,ATLAS PHARMACY,
L.L.C., GYSAKA SERVICES, INC.,CITIMEDICAL
SERVICES, P.C.,LZ MEDICAL DIAGNOSTIC,
P.C.,BODYWORKS CHIROPRACTIC, P.C.,ACUTIS
DIAGNOSTICS, INC.,ASG RX CORP., AZTEC MEDICAL,
P.A., J SPORTS MEDICINE, P.C.,KOLB RADIOLOGY,
P.C.,LENCO DIAGNOSTIC LABORATORY, INC.,QUALITY
CARE RX, INC.,VITAL MEDICAL OF FOREST HILLS,
FLORAL MED SUPPLY, INC.,LIMA SUPPLY, INC.,MED
TROVE, INC.,CONRAD CEAN, M.D., RICHARD
STERNBERG, D.C., SEDATION VACATION
PERIOPERATIVE MEDICINE, P.L.L.C., NYEEQASC, L.L.C.
A/K/A NORTH QUEENS SURGICAL CENTER, DYNAMISM
PHYSICAL THERAPY, P.C., JAMAICA HEALTHY CORNER
CORP., 5 BOROUGH ANESTHESIA, P.L.L.C.,
DEWELLNESS CARE, L.L.C. D/B/A NORACARE, ERIC
FISHER

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59,
60, 61, 62, 63, 64, 65, 66, 67, 68

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

In this action plaintiff State Farm Mutual Automobile Insurance Company (SFMAIC) seeks, *inter alia*, a declaratory judgment that it owes no duty to pay any and all no-fault claims arising from the underlying May 14, 2020 collision. SFMAIC alleges that the no-fault regulations have been violated for the following two reasons: (1) defendant Eric Fisher (Fisher) failed to appear for a duly and properly scheduled examination under oath (EUO) on two or more

occasions, a violation of a condition precedent for coverage (1st cause of action); and (2) SFMAIC maintains a founded belief that defendant Fisher's injuries did not arise from an insured incident (second cause of action).

Within one year of default, plaintiff brings this motion for default judgment, pursuant to CPLR 3215, against the defendants who were served with the summons and verified complaint but failed to answer the summons and complaint or otherwise appear. These defendants are: FREE STEPS PHYSICAL THERAPY, P.C., INTEGRATED SPECIALTY ASC, L.L.C., BV PHYSICAL THERAPY, P.C., CITIMEDICAL SERVICES, P.C., LZ MEDICAL DIAGNOSTIC, P.C., ACUTIS DIAGNOSTICS, INC., AZTEC MEDICAL, P.A., J SPORTS MEDICINE, P.C., KOLB RADIOLOGY, P.C., Lenco DIAGNOSTIC LABORATORIES, INC., QUALITY CARE RX, INC., LIMA SUPPLY INC., CONRAD CEAN, M.D., SEDATION VACATION PERIOPERATIVE MEDICINE, P.L.L.C., DYNAMISM PHYSICAL THERAPY, P.C., JAMAICA HEALTHY CORNER CORP., 5 BOROUGH ANESTHESIA, P.L.L.C., and DEWELLNESS CARE, L.L.C. d/b/a NORACARE (collectively, the defaulting defendants). Despite service of the motion papers, the defaulting defendants did not oppose the motion.

SFMAIC does not seek entry of default judgment against the following defendants who answered the summons and verified complaint: Flatbush Acupuncture, P.C., Premier Anesthesia Associates, P.A., Caresoft Leasing Corp., HFP Chiropractic, P.C., Atlas Pharmacy, L.L.C., Gysaka Services, Inc., Bodyworks Chiropractic, P.C., ASG RX Corp., Vital Medical Forest Hills, Floral Med Supply, Inc., Med Trove, Inc., Richard Sternberg, D.C., and NYEEQASC, L.L.C., a/k/a North Queens, Surgical Center (collectively, the answering defendants) (affirmation

in support [supporting aff], doc 56, at 2 footnote 1). Plaintiff also does not seek a default judgment against defendant Fisher, plaintiff noting that he could not be located for service (*id.*).

Of the answering defendants, defendants Vital Medical of Forest Hills, Floral Med Supply Inc., and Med Trove Inc. (collectively, Vital/Floral/Med Trove) file partial opposition. Vital/Floral/Med Trove oppose the motion to the extent plaintiff requests that the court issue an order granting declaratory relief against them and the other answering defendants. Vital/Floral/Med Trove also request severance of the action against them and the other answering defendants.

Plaintiff replies that it did not file the motion against Vital/Floral/Med Trove and the other answering defendants and does not seek default judgment against them. Rather, plaintiff seeks default judgment against the defaulting defendants.

“A plaintiff moving for a default judgment based upon a defendant’s failure to appear must submit proof of service of the summons and complaint and proof of the facts constituting the claim” (*PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020], citing CPLR 3215 [f]).

Here, plaintiff submits the affidavits of service and demonstrates the failure of the defaulting defendants to answer the summons and complaint (NYSCEF Doc. No. [doc] 58). Plaintiff also submits the notice of default and affidavits of service of additional copies of the pleadings upon the non-individual defaulting defendants as required by CPLR 3215 (g) (4) (63 & 64). Plaintiff, however, is mistaken when it states that none of the defaulting defendants are individuals and therefore it is not necessary to search the Service Members Civil Relief Act website (supporting aff., doc 56 at 12, ¶ 32).

Defendant Conrad Cean, M.D. (Cean) is included as one of the defaulting defendants against whom plaintiff seeks relief (supporting aff, doc 56 at 2, ¶ 2; notice of motion, doc 55 at 2). The caption does not list Cean under a corporate name and plaintiff's affidavit of service for Cean includes his non-military status at that time. While Cean's inclusion as one of the defaulting defendants may have been a clerical error or oversight, nonetheless, it appears that plaintiff is seeking relief against Cean. Accordingly, that part of plaintiff's motion seeking a default judgment against Cean is denied, as plaintiff failed to submit the requisite affidavit as to Cean's non-military status based upon an investigation conducted no more than 30 days prior to this motion for default judgment (*See Thomas D. Shanahan, P.C. v Bottini*, 2016 WL 3370354, at *1 [Sup Ct, NY County 2016]).

For proof of the facts constituting SFMAIC's claim, plaintiff submits the supporting aff and an affidavit of merit from a claims specialist familiar with the procedures followed by plaintiff and the facts of this action based upon his personal review of the claim file (SFMAIC references the claim as claim number 52-06W4-29), and documents created, maintained or received in the regular course of business (doc 56), with accompanying exhibits. These exhibits include: the police report (doc 59); Fisher's application for motor vehicle no-fault benefits (form NF-2) (doc 60); the Event Links Plate Hit Report (doc 61); and the letters providing notice to Fisher of his scheduled EUO and the respective transcripts of the missed EUO (doc 62). The affidavit of merit sets forth the factual basis for the declaration of noncoverage as sought in the first and second causes of action. "By failing to answer, the defaulting defendants are 'deemed to have admitted' the allegations in the complaint" (*State Farm Mut. Auto. Ins. Co. v Surgicore of Jersey City, LLC*, 195 AD3d 454, 455 [1st Dept 2021] [internal citation omitted]).

As to the first cause of action, plaintiff sufficiently established that Fisher failed to appear for a properly noticed EUO on two occasions (*see Hertz Vehs., LLC v Alluri*, 171 AD3d 432, 432 [1st Dept 2019] [internal citation omitted]). Fisher's failure to appear was a breach of a condition precedent to coverage and voids the policy ab initio (*see id.*). As to the second cause of action, plaintiff sufficiently established for purposes of this default judgment motion against the defaulting defendants that plaintiff has a founded belief that defendant Fisher's injuries did not arise from an insured incident

For purposes of this default motion, the court finds that SFMAIC sufficiently set forth the basis for plaintiff's claims seeking a declaration of noncoverage against the defaulting defendants (*see CPLR 3215[f]; State Farm Mut. Auto. Ins. Co.*, 195 AD3d at 455 - 456).

Accordingly, it is

ORDERED that plaintiff's motion seeking a default judgment against the defaulting defendants is granted in part and denied in part; and it is further

ORDERED that plaintiff's motion seeking a default judgment against defaulting defendants FREE STEPS PHYSICAL THERAPY, P.C., INTEGRATED SPECIALTY ASC, L.L.C., BV PHYSICAL THERAPY, P.C., CITIMEDICAL SERVICES, P.C., LZ MEDICAL DIAGNOSTIC, P.C., ACUTIS DIAGNOSTICS, INC., AZTEC MEDICAL, P.A., J SPORTS MEDICINE, P.C., KOLB RADIOLOGY, P.C., Lenco DIAGNOSTIC LABORATORIES, INC., QUALITY CARE RX, INC., LIMA SUPPLY INC., SEDATION VACATION PERIOPERATIVE MEDICINE, P.L.L.C., DYNAMISM PHYSICAL THERAPY, P.C., JAMAICA HEALTHY CORNER CORP., 5 BOROUGH ANESTHESIA, P.L.L.C., and DEWELLNESS CARE, L.L.C. d/b/a NORACARE is granted; and it is further

ORDERED that plaintiff's motion seeking a default judgment against defaulting defendant CONRAD CEAN, M.D., is denied; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff has no duty to pay any no-fault benefits in the form of sums, monies, damages, awards or benefits to defendants FREE STEPS PHYSICAL THERAPY, P.C., INTEGRATED SPECIALTY ASC, L.L.C., BV PHYSICAL THERAPY, P.C., CITIMEDICAL SERVICES, P.C., LZ MEDICAL DIAGNOSTIC, P.C., ACUTIS DIAGNOSTICS, INC., AZTEC MEDICAL, P.A., J SPORTS MEDICINE, P.C., KOLB RADIOLOGY, P.C., Lenco Diagnostic Laboratories, Inc., Quality Care Rx, Inc., Lima Supply Inc., Sedation Vacation Perioperative Medicine, P.L.L.C., Dynamism Physical Therapy, P.C., Jamaica Healthy Corner Corp., 5 Borough Anesthesia, P.L.L.C., and DevWellness Care, L.L.C. d/b/a NORACARE (collectively, the defaulting defendants), 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 respects to the claims submitted in connection with the May 14, 2020 collision referenced in the complaint; and it is further

ORDERED that this judgment shall have no effect as to defendants Flatbush Acupuncture, P.C., Premier Anesthesia Associates, P.A., Caresoft Leasing Corp., HFP Chiropractic, P.C., Atlas Pharmacy, L.L.C., Gysaka Services, Inc., Bodyworks Chiropractic, P.C., ASG RX Corp., Vital Medical Forest Hills, Floral Med Supply, Inc., Med Trove, Inc., Richard Sternberg, D.C., and NYEEQASC, LLC., a/k/a/ North Queens, Surgical Center (collectively, the answering defendants) and defendant Eric Fisher; and it is further

ORDERED that the action as against the answering defendants and defendants Eric Fisher is severed; and it is further

ORDERED that, within twenty days after this decision and order is uploaded to NYSCEF, counsel for plaintiff 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).

7/27/2022
DATE


WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: