

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

2022 NY Slip Op 33536(U)

October 14, 2022

Supreme Court, New York County

Docket Number: Index No. 157273/2021

Judge: Dakota D. Ramseur

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

†

Default Judgment

CPLR 3215(f) requires a movant seeking default judgment to submit the following proofs: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of the facts constituting the claim; and (3) an affidavit showing the default in answering or appearing. Here, plaintiff demonstrates its entitlement to a default judgment pursuant to CPLR 3215, as plaintiff served the summons and complaint upon the defaulting defendants, that the defaulting defendants failed to answer, and as discussed below, the meritorious nature of plaintiff's claims.

The failure to appear for the scheduled Examination Under Oath (EUO) violated a condition precedent for No-Fault claims by a claimant and the medical providers as assignees and entitles plaintiff to deny payment to both the claimant and medical providers (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015] ["The No-Fault Regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the no-fault insurer if there has not been full compliance with the conditions precedent to coverage. Thus, defendants' failure to attend the EUOs is a violation of a condition precedent to coverage that vitiates the policy"]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618 [1st Dept 2014] ["Plaintiff established that defendants are not entitled to no-fault benefits because their assignors failed to appear at scheduled examinations under oath (EUOs)"]).

Here, plaintiff demonstrates that both Frantzy and Symby failed to appear at their respective EUOs. Plaintiff issued five letters scheduling an EUO of Frantzy, on April 9, 2020, on July 24, 2020, on August 14, 2020, on September 30, 2020, and again on October 16, 2020. Plaintiff issued two letters scheduling an EUO of both Symby, on April 9, 2020, and again on July 24, 2020. Both Frantzy and Symby failed to appear, reschedule the EUOs, or otherwise contact the insurer concerning the EUOs. The EUO, as plaintiff demonstrates, was necessary to determine the facts surrounding the claim, including the necessity of alleged treatment and referrals. Accordingly, as both Frantzy and Symby breached a condition precedent to coverage, plaintiff's motion for summary judgment is granted.

Plaintiff also argues that the alleged December 30, 2019 collision was not a covered event and that any alleged injuries or treatment did not arise from that alleged occurrence. A No-Fault insurer "[m]ay assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]). A No-Fault insurer is "[n]ot required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter ..., by clear and convincing evidence" (*VS. Med Sews., P.C. v Allstate Ins. Co.*, 25 Misc3d 39 [App Term, 2d Dept 2009, 2nd, 11th & 13th Jud Dists]). "Circumstantial evidence is sufficient if a defendant's conduct may be 'reasonably inferred' based upon 'logical inferences to be drawn from the evidence' " (*Benzaken v Verizon Commcns. Inc.*, 21 AD3d 864, 865 [2d Dept 2005], quoting *Staples v Sisson*, 274 AD2d 779 [3d Dept 2000]).

Here, it may be reasonably inferred from the evidence, including Abel's EUO testimony concerning the details of the December 30, 2019 incident revealing that the incident was nearly identical to a January 10, 2018 motor vehicle accident Able was involved in, including that the

adverse vehicle involved in the January 10, 2018 loss was a livery vehicle containing three passengers, Jean Pascal, Synthia Pierre Lewis and Yveline Lamothe, that plaintiff discovered multiple family and residential connections between Abel and Yveline Lamothe, that Abel submitted documentation alleging a social security number associated with an individual named Monique Excellent, the grandmother of Yveline Lamothe, that Abel was unable to provide any specific information regarding where she was coming from, where she was going, or when Frantzy and Symby entered the insured vehicle, that Abel's recounting of the events following the collision in were contradicted by the police report, and that she was directed to a treatment facility in Brooklyn, New York by Frantzy, despite the fact that she lives in the Bronx, that plaintiff had a founded belief that the injuries were not causally related to the December 30, 2020 incident and/or did not arise from the accident. Thus, plaintiff is not entitled to a default judgment against the defaulting defendants on its first cause of action to deny No-Fault benefits on the basis of founded belief.

Extend Time to Serve

Generally, a motion to extend the time for service of a summons and complaint may be granted upon "good cause shown or in the interest of justice" (CPLR 306-b). To establish good cause, movants must demonstrate that they exercised reasonably diligent efforts in attempting to effect proper service of process upon the defendants (*Moundrakis v Dellis*, 96 AD3d 1026, 1026-27 [2d Dept 2012]). Where a movant seeks to extend the time to serve in the interest of justice, the court will consider the following: 1) the potentially meritorious nature of the cause of action; 2) the length of delay in service, 3) the promptness of plaintiffs' request for the extension of time 4) any prejudice to defendant; and 5) any other relevant factor (*id.*). Here, plaintiff demonstrates that it exercised reasonably diligent efforts in attempting to effect proper service of process upon Oluwatozin J. Oderinde, including by attempting to serve process at his last known address. Further, plaintiff has a potentially meritorious claim, plaintiff promptly moved for an extension of time to serve, and there would be no prejudice to the defendant in extending the time to serve.

Accordingly, it is hereby

ORDERED that plaintiff State Farm Fire and Casualty Company's motion for default judgment as against defendants Advanced Comprehensive Laboratory, LLC d/b/a Toplab, Inc., Azcarerent, Inc., Delphi Chiropractic, P.C., Gara Medical Care, P.C. Graham Wellness Medical, P.C., Joseph A. Raia, M.D P.C., Lee Acupuncture, P.C., New York Physical Therapy Care, P.C., Oracle Chiropractic, P.C. Premier Anesthesia Associates PA, Radciti Imaging, P.C., Ralph Medical Diagnostics, P.C., Rand Medical, P.C., Rehab Time Pt, P.C., Sacrum Chiropractic, P.C., Scob, LLC, Time To Care Pharmacy, Inc., Micho Olumaseun, Jean Frantzy, Leila Symby and Dadnique Abel, is granted; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff State Farm Fire and Casualty Company, or any of its affiliates or subsidiaries, has no duty provide a defense or indemnification for any of potential liability claims arising from the December 30, 2019 collision or pay any No-Fault benefits, in the form of sums, monies, damage, awards, or benefits to Advanced Comprehensive Laboratory, LLC d/b/a Toplab, Inc., Azcarerent, Inc., Delphi Chiropractic, P.C., Gara Medical Care, P.C. Graham Wellness Medical, P.C., Joseph A. Raia,

M.D P.C., Lee Acupuncture, P.C., New York Physical Therapy Care, P.C., Oracle Chiropractic, P.C. Premier Anesthesia Associates PA, Radciti Imaging, P.C., Ralph Medical Diagnostics, P.C., Rand Medical, P.C., Rehab Time Pt, P.C., Sacrum Chiropractic, P.C., Scob, LLC, Time To Care Pharmacy, Inc., Micho Olumaseun, Jean Frantzy, Leila Symby and Dadnique Abel; and it is further

ORDERED, ADJUDGED and DECLARED that all actions, proceedings or arbitrations arising from injuries alleged to have been sustained by the claimants as a result of the alleged December 30, 2019, accident arising under auto policy claim number 32-C578-2X7 are stayed, and that the defaulting defendants Advanced Comprehensive Laboratory, LLC d/b/a Toplab, Inc., Azcarerent, Inc., Delphi Chiropractic, P.C., Gara Medical Care, P.C. Graham Wellness Medical, P.C., Joseph A. Raia, M.D P.C., Lee Acupuncture, P.C., New York Physical Therapy Care, P.C., Oracle Chiropractic, P.C. Premier Anesthesia Associates PA, Radciti Imaging, P.C., Ralph Medical Diagnostics, P.C., Rand Medical, P.C., Rehab Time Pt, P.C., Sacrum Chiropractic, P.C., Scob, LLC, Time To Care Pharmacy, Inc., Micho Olumaseun, Jean Frantzy, Leila Symby And Dadnique Abel, and are enjoined from commencing any such further actions, proceedings or arbitrations; and it is further

ORDERED that the Clerk is directed to enter default judgment in favor of plaintiff State Farm Fire and Casualty Company as against the defaulting defendants Advanced Comprehensive Laboratory, LLC d/b/a Toplab, Inc., Azcarerent, Inc., Delphi Chiropractic, P.C., Gara Medical Care, P.C. Graham Wellness Medical, P.C., Joseph A. Raia, M.D P.C., Lee Acupuncture, P.C., New York Physical Therapy Care, P.C., Oracle Chiropractic, P.C. Premier Anesthesia Associates PA, Radciti Imaging, P.C., Ralph Medical Diagnostics, P.C., Rand Medical, P.C., Rehab Time Pt, P.C., Sacrum Chiropractic, P.C., Scob, LLC, Time To Care Pharmacy, Inc., Micho Olumaseun, Jean Frantzy, Leila Symby And Dadnique Abel; and it is further

ORDERED, that plaintiff's motion to extend the time to serve a copy of the summons and complaint upon the defendant Oluwatozin J. Oderinde is granted; and it is further

ORDERED that plaintiff's time to serve a copy of the summons and complaint upon the defendant Oluwatozin J. Oderinde and file an affidavit of service with the clerk of the court is extended for a period of one hundred and twenty (120) days from the date of entry of this order; and it is further

ORDERED that plaintiff shall serve a copy of this order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

DAKOTA D. RAMSEUR, J.S.C.

10/14/2022
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<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