

Travelers Personal Ins. Co. v Valdez

2022 NY Slip Op 34008(U)

November 22, 2022

Supreme Court, New York County

Docket Number: Index No. 152745-2021

Judge: Lynn R. Kotler

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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

The Travelers Personal Insurance Company

INDEX NO. 152745-2021

- v -

MOT. DATE

MOT. SEQ. NO. 003

Anthony Valdez, et. al.

The following papers were read on this motion to/for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)
Replying Affidavits NYSCEF DOC No(s)

In this action, plaintiff-insurer, The Travelers Personal Insurance Company ("Travelers") seeks to renew its default judgment against defendants Anthony Valdez, Compass Chiropractic of NY, P.C., M. El Sayed Physical Therapy, P.C., Metropolitan Medical & Surgical, P.C., Straight Spine Chiropractic, P.C., and Far Rockaway Medical, P.C. (collectively the "defaulting defendants"). Upon renewal, Travelers seeks a default judgment pursuant to CPLR § 3215 against the defaulting defendants and a declaration that Travelers has no obligation to pay no-fault benefits in connection with a motor vehicle accident. This action is predicated on an accident that occurred on April 10, 2019 on 907 L Northbound FDR Drive in New York, New York. Plaintiff alleges that the policy holder made material misrepresentations in the policy application and attempted to defraud Travelers in making those material misrepresentations.

A motion for leave to renew shall be identified specifically as such, shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion (CPLR R §2221[e]). Courts have discretion to relax the statute's requirements and to grant such a motion in the interest of justice (Mejia v. Nanni, 307 AD2d 870 [1st Dept. 2003]). In the prior order, dated May 31, 2022, this court permitted a renewal of the motion for default judgement within ninety days and stated that the plaintiff should submit an affidavit of facts made by one with personal knowledge of the facts surrounding the claim.

Plaintiff filed this motion on August 25, 2022 and has successfully submitted an affidavit from Harvey Aloni, Regional Director in the Investigative Services department at Travelers. Therefore, the motion was renewed within the ninety days provided by the court.

Dated: 11/22/22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Here, plaintiff has demonstrated proof of service of the motion on all the defaulting defendants via regular mail. Travelers has also submitted affidavits demonstrating that the summons and complaint were served upon Straight Spine Chiropractic, P.C., Compass Chiropractic of NY, P.C., Far Rockaway Medical, P.C., M. El Sayed Physical Therapy, P.C., and Metropolitan Medical & Surgical, P.C. by personally serving Colleen Banahan, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306. Travelers has submitted an affidavit demonstrating that the summons and complaint were served upon Anthony Valdez by personally delivering a copy to a John Doe, a person of suitable age and discretion, at the last known place of residence of Valdez, 2 Radde Place, Unit 1, Brooklyn, NY 11233 and by mailing a copy to that same address. Despite such service, none of the defaulting defendants have answered the complaint and their time to do so has not been extended by the court. Therefore, plaintiff has established that these defendants have defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

In support of the motion, plaintiff submits the police report from the accident. According to the police report, at the time of the loss, Anthony Valdez ("Valdez") was driving the insured BMW. While driving, Valdez came to an abrupt stop, causing the adverse vehicle to collide with the rear end of the BMW.

The motion is also supported by the sworn affidavit of Harvey Aloni, the Regional Director of plaintiff's Investigative Services department. Aloni states based upon personal knowledge the following. The insured and sole driver on the policy for the 2018 BMW was Kimberly Pettus ("Pettus"). However, Valdez was driving the BMW at the time of the accident and Pettus was not in the vehicle. Travelers also ran the BMW through the Digital Recognition Network and found that it was parked in proximity to Valdez's residence between October 21, 2017 and March 14, 2019 on multiple occasions and at different times of day. An Insurance Services Office report demonstrated that Valdez was involved in six accidents in the two years prior to the time that the insurance policy was procured by Pettus on April 15, 2018. Three of those accidents occurred when Valdez was driving the insured BMW that was registered to Pettus. On each November 12, 2017, November 23, 2017 and December 16, 2017, Valdez was involved in an accident while driving the insured BMW. On May 6, 2017 and on August 12, 2017, Valdez was involved in an accident while driving a 2017 Honda which was also registered to Pettus and was using the same license plate as that registered to the insured BMW. On April 13, 2016, Pettus was involved in an accident while driving a 2000 Nissan that was registered to a Sadick Arayfa. Additionally, the insurance activity expansion report for the insured BMW showed that prior to being insured by Travelers, the vehicle was insured by Progressive and the Progressive policy listed Valdez as a spouse and additional driver, yet no mention of him was made in the application for the Travelers policy.

Aloni further states that as part of the investigation, Travelers sought the Examinations Under Oath ("EUO"s) of Valdez and Pettus. Pettus failed to appear for two scheduled EUOs and failed to participate in the investigation of the claim. Valdez appeared for his EUO on August 22, 2019. A transcript of the EUO was mailed to Valdez for his signature, but he never returned it as requested. In his EUO, Valdez testified that the BMW that is the subject of the insurance policy was purchased by him in 2017 from a dealership in Long Island. He stated that he traded in the 2017 Honda Accord that was the subject of the May 6, 2017 and August 12, 2017 accidents outlined above for the BMW and that the license plates were transferred. He stated that he paid half of the Travelers insurance policy. He also admitted that he

attempted to insure the BMW with Travelers under his own name, but his application was rejected and so asked Pettus to apply for the Travelers insurance policy on her own.

Although Pettus failed to appear at her scheduled EUOs, Travelers did meet with Pettus and she provided a sworn statement in which she stated that she met Valdez around December 2016 and they became friendly. She stated that their relationship was minimal, that they would talk minimally and that they only saw each other in person about once a month. Pettus asserted that Valdez stated that he had no way to get to appointments, parole meetings, and work because he had no car and had a fear of public transportation. Pettus asked if she could help. This resulted in Pettus cosigning the lease on the 2017 Honda Accord since Valdez's credit was too low to qualify by himself. She also cosigned onto the insurance policy with him. She states that she was aware that Valdez was in a series of accidents with the Honda Accord, but that Valdez assured her that the accidents were not his fault. She states that she never drove the Accord and that it never left Valdez's possession. Pettus claims that after several months, Valdez stopped making payments on the Accord and the insurance for the Accord, and that she was required to make those payments. Valdez approached her again in October 2017 to ask for help getting another vehicle. Pettus states that she made him aware of her financial worries and that Valdez told her that if she bought the BMW, in 6 months, she could sell it to Valdez when his credit was better. She agreed. She states that she never had possession of the BMW and never drove the vehicle. She states that once she became aware of the continued accidents, she asked Valdez to return the BMW. He said that he would do so but only if Pettus helped him to obtain a new vehicle. Pettus states that she gave Valdez \$4,000, that he returned the BMW, that she called and had it repossessed, and that she stopped communications with Valdez.

Based upon this evidence, Aloni asserts that the underlying policy was based upon material misrepresentations and that it was procured through the provision of false information. He states that if Travelers would have been aware of the facts, they would not have issued the policy. He also states that Valdez was involved in a scheme to defraud Travelers by not applying for the insurance in his name even though he drove the BMW regularly. In support of the motion, Travelers provided copies of the policy issued to Pettus for the BMW, Pettus' insurance application, the Insurance Services Office report, the EUO transcript of Valdez, the sworn statement of Pettus and the Vehicle plate location search.

In its complaint, plaintiff asserts four causes of action. The first and third causes of action are based on a theory of material misrepresentations wherein plaintiff asserts that Pettus made material misrepresentations in procuring the insurance policy and that it was obtained in furtherance of a scheme to defraud Travelers. The second cause of action is based on a theory of breach of the condition precedent to coverage, wherein plaintiff states that because Pettus failed to appear for her EUOs, the claimants breached a condition precedent to coverage and, therefore, that Travelers has no obligation to cover any injuries arising from the April 10, 2019 accident. The fourth cause of action is based on a theory of irreparable harm wherein the plaintiff asserts that it will suffer irreparable harm if a stay of all arbitrations, lawsuits, and/or claims by the defendants is not issued.

An insurer may deny coverage based upon an insured's material misrepresentation in his or her insurance application (See Insurance Law § 3105; *Ambac Assurance Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83 [1st Dept. 2017]; *Tower Ins. Co. of N.Y. v Khan*, 93 AD3d 618 [1st Dept. 2012]). "A misrepresentation is material if the insurer would not have issued the policy or would have issued a higher premium had it known the facts misrepresented." (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993 [2d Dept 2011]; *Arch Specialty Ins. Co. v Kam Cheung Const., Inc.*, 104 AD3d 599 [1st Dept. 2013]).

Based on the foregoing, plaintiff has established a *prima facie* case based on a theory of material misrepresentations. The second cause of action based on a theory of breach of the condition precedent to coverage, and the fourth cause of action based on a theory of irreparable harm are therefore moot.

In light of this result, the motion is granted as follows.

In accordance herewith, it is hereby

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for a default judgment against defendants Anthony Valdez, Compass Chiropractic of NY, P.C., M. El Sayed Physical Therapy, P.C., Metropolitan Medical & Surgical, P.C., Straight Spine Chiropractic, P.C., and Far Rockaway Medical, P.C. is granted on default; and it is further

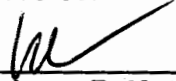
ORDERED and DECLARED that plaintiff has no duty to pay any no-fault, bodily injury/liability coverage, or uninsured motorists benefits, in the form of sums, monies, damage, awards, or benefits to Anthony Valdez, Compass Chiropractic of NY, P.C., M. El Sayed Physical Therapy, P.C., Metropolitan Medical & Surgical, P.C., Straight Spine Chiropractic, P.C., and Far Rockaway Medical, P.C., 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, bodily injury/liability coverage, or uninsured motorists benefits for the April 10, 2019 collision referenced in the complaint.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

11/27/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.