

Hereford Ins. Co. v 247 Med. Supplies, Inc.

2023 NY Slip Op 34268(U)

December 4, 2023

Supreme Court, New York County

Docket Number: Index No. 159689/2020

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

Justice

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INDEX NO. 159689/2020
MOTION DATE 11/29/2022
MOTION SEQ. NO. 002

HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

247 MEDICAL SUPPLIES, INC., ACCESS CARE P.T., P.C.,
ADA TSARNAS LCSW, AMIT KHANEJA NEUROLOGY
PRACTICE, PLLC, APEX MEDICAL, P.C., ARCHER LEWIS
CHIROPRACTIC, P.C., ARS MEDICAL EQUIPMENT
CORP., ASC OF ROCKAWAY BEACH LLC, ASHLEY SIM,
PA, ATLAS PHARMACY, LLC, ATTIA REHABILITATION
P.T., P.C., BIOSMA PHARMACY, INC., BRIARWOOD RX,
INC., BV PHYSICAL THERAPY, P.C., BLVD
CHIROPRACTIC OF NY, P.C., COMMUNITY MEDICAL
CARE OF FLATBUSH, P.C., COMPLETE
NEUROPSYCHOLOGY, P.C., COMPREHENSIVE
PSYCHOLOGICAL, P.C., DI PHARMACY CORP., DR.
OFFENBACHER MEDICAL IMAGING, PLLC, GRAND
MEDICAL SUPPLY CORP., HORIZON ORTHO SUPPLY
CORP., IGOR MAYZNERBERG, LAC, INTEGRATIVE FAMILY
HEALTH NP, PLLC, M EL SAYED PHYSICAL THERAPY,
P.C., MYRTLE AVENUE TRADING, LLC, NY
CHIROPRACTIC REHABILITATION CARE, P.C.,
PROVISTA DIAGNOSTICS, INC., RAF SPORTS
CHIROPRACTIC, P.C., RAMZAN CHIROPRACTIC, P.C.,
RIGHTWAY PHARMACY, INC., ROCKLAND AND BERGEN
SURGERY CENTER, LLC, SEDATION VACATION
PERIOPERATIVE MEDICINE, PLLC, SUPPORTIVE
PRODUCTS, CORP., TIME TO CARE PHARMACY, INC.,
TOP CHOICE PHARMACY CORP., TRAPEZIUS
DIAGNOSTIC CHIROPRACTIC, P.C., YEVGENIY
MARGUILIS, PHD, ZUCCO WELL ACUPUNCTURE, P.C.,
LASHANA MILLER, TERRELL ROBERSON, WILLIAM
EDWARDS,

Defendants.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 84, 85, 86, 87, 88, 89

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

Plaintiff Hereford Insurance Company (Hereford) moves, unopposed, pursuant to CPLR 2221 (d), for leave to reargue the decision and order of Honorable Barbara Jaffe dated March 22,

2022, denying Hereford's motion for a default judgment in its entirety (the prior order), and, upon reargument, granting default judgment on the first and second causes of action against defendants 247 Medical Supplies, Inc., Access Care P.T., P.C., Amit Khaneja Neurology Practice, PLLC, ARS Medical Equipment Corp., Attia Rehabilitation PT, P.C., Biosma Pharmacy, Inc., By Physical Therapy, P.C., Community Medical Care of Flatbush, P.C., Comprehensive Psychological, P.C., Di Pharmacy Corp., Igor Mayzenberg, L.A.C., Integrative Family Health NP, PLLC, M El Sayed Physical Therapy, P.C., Provista Diagnostics, Inc., Rockland and Bergen Surgery Center, LLC, Sedation Vacation Perioperative Medicine, PLLC, Supportive Products, Corp., and Time to Care Pharmacy, Inc., (collectively, the defaulting defendants).¹

Hereford correctly argues that, in the prior order, the Court failed to address the second cause of action, i.e. the independent medical examinations (IMEs) no-show disclaimer. Hereford further contends that this motion for reargument is timely as no notice of entry has been served. No party has submitted opposition. Therefore, Hereford's is granted leave to reargue.² As such, the Court now turns to the merits of this argument.

With few exceptions, a motion for leave to reargue must be made to the judge who signed the underlying order unless they are unavailable. *See* CPLR 2221 (a). As this matter was reassigned upon Justice Jaffe's retirement to Justice Leslie A. Stroth, this motion is properly before this Court for determination. *See C & N Camera & Elecs. Inc. v Public Serv. Mut. Ins. Co.*, 210 AD2d 132, 133 (1st Dept 1994) (it was proper for new justice presiding in the part to hear reargument motion).

¹ All claims against defendants Archer Lewis Chiropractic, Offenbacher Medical Imaging, and NY Chiropractic have been settled and discontinued. *See* NYSCEF doc no. 85 at n 1.

² The Court notes that although Hereford's motion is defective because it failed to submit copies of all the papers submitted on the prior motion (*see* CPLR 2214 [c]), such defects are *de minimus*. Pursuant to CPLR 2001, the Court will nevertheless overlook the procedural defects and reconsider the previous decision and order.

A motion for leave to reargue pursuant to CPLR 2221 (d) is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *See* CPLR 2221 [d] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 (2d Dept 2012); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 (1993); *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). Reargument is “not designed to afford the unsuccessful party with successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted.” *Matter of Setters v Al Props. & Devs. [USA] Corp.*, 139 AD3d 492, 492 (1st Dept 2016) (internal quotation marks and citation omitted). CPLR 2221 (d) (3) provides that a motion for leave to reargue “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”

Hereford’s motion for reargument is timely because a copy of the prior order with notice of entry was never served, thus, the thirty-day statutory time to file a motion to reargue was not triggered. *See Zhi Fang Shi v Sanchez*, 36 AD3d 486, 486 (1st Dept 2007) (second motion to reargue was timely since notice of entry on the first motion had not yet been served); *Luming Cafe, Inc. v Birman*, 125 AD2d 180, 181 (1st Dept 1986) (motion to reargue was timely because “no judgment or order had been settled or entered”).

Upon review of the order, the Court finds that in its prior order it overlooked the fact that that Hereford sought to disclaim coverage for the accident due to the failure of defendants Lashana Miller, Terrell Robinson, and William Edwards’ (collectively, claimants) to appear for IMEs. In support of the original motion, Hereford submitted the affidavit of a senior no-fault adjuster

demonstrating that the notices scheduling the claimants' IMEs were timely and properly mailed,³ as well as affirmations from the scheduled examining physician and an affidavit from the employee of another examining physician that the claimants failed to appear at the scheduled IMEs (*see* NYSCEF doc no. 70; NYSCEF doc no. 86).

Plaintiff submitted competent evidence of the mailing of the notices scheduling the claimants' IMEs and of their failure to appear sufficient to disclaim coverage. *See American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 (1st Dept 2013) ("The failure to attend duly scheduled medical exams voids the policy ab initio"), citing *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 (1st Dept 2011), *lv denied* 17 NY3d 705 (2011) ("when defendants' assignors failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued").

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to reargue this Court's prior decision and order, dated March 22, 2022, is granted; and that upon reargument, it is further

ORDERED, ADJUDGED, and DECLARED that the defaulting defendants are not entitled to no-fault benefits because of a motor vehicle accident involving claimants under claim number 90593 for the collision that occurred on May 27, 2020, due to claimants' failure to appear for duly noticed and scheduled IMEs; and it is further

³ As the claim number and accident date are correct, the Court disregards the scrivener's error in Joronda McBurnie's affidavit which incorrectly refers to the claimants as "Yolanda Jennings" and "Gail Carwell." *See* NYSCEF Doc No. 86, Exhibit A at ¶ 7.

ORDERED that the Court otherwise adheres to the decision and order dated, March 22, 2022.

The foregoing constitutes the decision and order of the Court.

12/4/2023
DATE


LESLIE A. STROTH, J.S.C.

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