

LM Gen. Ins. Co. v James
2025 NY Slip Op 35445(U)
January 7, 2025
Supreme Court, Nassau County
Docket Number: Index No. 614285/2023
Judge: Ellen Tobin
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: Hon. Ellen Tobin, A.J.S.C.

_____X

LM GENERAL INSURANCE COMPANY,

Plaintiff,

- against -

CHRISTOPHER JAMES, et al.,

Defendants.

_____X

TRIAL/IAS PART 35

Index No. 614285/2023

Motion Sequence No. 001

DECISION AND ORDER

The following papers were read on this motion:

NYSCEF Doc. Nos.

Notice of Motion, Affirmations in Support and Exhibits	34-72
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Upon the foregoing papers, plaintiff LM General Insurance Company (“Plaintiff”) moves for an Order pursuant to CPLR § 3215 entering default judgments against non-appearing individual defendant Christopher James (“James”), and non-appearing entity defendants Atlantic Medical & Diagnostic, P.C.; Avi Weinberger, D.C.; Bright Star Rehab Physical Therapy P.C.; Central Diagnostic Inc.; Happy Apple Medical Services P.C.; Herschel Kotkes, M.D. P.C.; JTK Chiropractic Care, P.C.; Lorraine Pharmacy Inc.; Medical MRI P.C.; Next Generation Diagnostic Imaging P.C.; PMK Acupuncture P.C.; Rapid Equipment Inc.; Red Medical Supply Inc.; Royal Care Pharmacy, Inc.; Sanford Chiropractic, P.C.; Stand-Up MRI of Bensonhurst, P.C.; V&S Supply Inc.; Vaynshteyn Chiropractic P.C. and Vish Supply Inc. (collectively, the “Provider Defendants” and, together with James, “Defendants”).¹

¹ Defendant Christopher Thompson (“Thompson”) interposed an Answer on October 9, 2023 (NYSCEF Doc. No. 27). Defendant Medsource Solutions, Inc. (“Medsource”) interposed an Answer on October 11.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants James and Thompson (together, the “Individual Defendants”) were passengers in a car involved in an alleged accident on the New Jersey Turnpike on July 9, 2022 (the “Accident”). The Individual Defendants reportedly sustained injuries in the Accident, for which they sought treatment under the personal injury protection or “No Fault” coverage of an insurance policy issued by Plaintiff (the “Policy”). The Provider Defendants are healthcare providers that allegedly provided medical treatment, services and/or equipment to the Individual Defendants in connection with their injuries from the Accident. Prior to receiving services, the Individual Defendants provided the Provider Defendants with Assignments of Benefits, transferring their rights of repayment of no-fault benefits under the Policy to the Provider Defendants. After rendering services to the Individual Defendants, the Provider Defendants submitted to Plaintiff their bills for services allegedly rendered along with the Assignment of Benefits forms, seeking reimbursement under the Policy and applicable law (the “Claims”).

As part of its process to investigate and verify the Claims pursuant to the terms and conditions of the Policy and applicable law, Plaintiff scheduled an Examination Under Oath (“EUO”) of James, which was scheduled to take place on October 3, and November 10, 2022. Plaintiff’s submissions in support of the within motion detail the correspondence sent to James providing notice of the EUO dates and attaching copies of the same. James failed to appear for the EUO on either date. Plaintiff contends that James’s failure to appear for the EUO was a breach of a condition precedent to coverage under the Policy that rendered the Provider Defendants ineligible to receive the requested No-Fault reimbursements for the Claims.

2023 (NYSCEF Doc. No. 28). Pursuant to a Stipulation of Partial Discontinuance dated October 16, 2023, the action was discontinued against Medsource (NYSCEF Doc. No. 29).

Plaintiff commenced this action in September 2023, by filing and serving a summons and complaint seeking declaratory and injunctive relief regarding its obligation — or lack thereof — to pay the requested No-Fault reimbursements to the Provider Defendants under the Policy. Under the first cause of action, Plaintiff seeks a declaration pursuant to CPLR § 3001 that Plaintiff “is under no obligation to pay, honor or reimburse the Defendants for the claim(s) arising out of the motor vehicle accident of July 9, 2022 ... submitted by and of the Defendants.” Under the second cause of action, Plaintiff seeks a permanent injunction of all actions, arbitrations or other proceedings commenced by or on behalf of Defendants against Plaintiff or its insureds because the Individual Defendants failed to cooperate with Plaintiff’s investigation by not appearing for an EUO and breached a condition precedent to coverage.

In September and October 2023, Defendants were served with the summons and complaint pursuant to BCL § 306 and/or CPLR § 308 [2], [4] (NYSCEF Doc. Nos. 43-62). Plaintiff also served the required additional notices pursuant to CPLR § 3215 [g], by mailing copies of the summons and complaint by first class mail to the Provider Defendants’ last known addresses (NYSCEF Doc. No. 63). Defendants were also served with copies of the notice of the within default motion and the supporting papers via first class mail at their last known addresses on June 20, 2024 (NYSCEF Doc. No. 75).

James and the Provider Defendants failed to answer or move with respect to the complaint or otherwise appear in the case. James and the Provider Defendants did not respond to the default motion, which is unopposed.

DISCUSSION AND ANALYSIS

CPLR § 3215 [a] permits a plaintiff to seek default when a defendant fails to appear. A plaintiff seeking a default judgment under CPLR § 3215 must present *prima facie* proof of a cause

of action, and while a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions, which are reserved for the court's determination (*McGee v Dunn*, 75 AD3d 624, 624 [2d Dept 2010]; *Green v Dolphy Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]; *Silberstein v Presbyterian Hospital in the City of New York*, 96 AD2d 1096, 1096 [2d Dept 1983]).

On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit (1) proof of service of the summons and complaint; (2) proof of the facts constituting the movant's claim; and (3) proof of the defaulting party's default in answering or appearing (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011], citing CPLR § 3215 [f]). A plaintiff seeking to assert jurisdiction over a defendant "bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (*Gottesman v Friedman*, 90 AD3d 608, 609 [2d Dept 2011]). Upon an "application for judgment by default, proof of the facts constituting the claim, the default, and amount due are to be set forth in an affidavit made by the party" (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009], quoting CPLR § 3215 [f]). Alternatively, a verified complaint "may be used as the affidavit of facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney" (CPLR § 3215 [f]).

In support of this motion for default judgments, Plaintiff submits affirmations from (1) Vanessa Hlinka, Esq, a partner at the law firm representing Plaintiff in this matter; (2) Michael A. Callinan, Esq., another partner at the law firm representing Plaintiff in this matter; (3) Jennifer Petito, who is employed by Plaintiff as a Claims Department Team Manager – No Fault; and (4) Carla Silvera, an investigator in Plaintiff's Special Investigative Unit.

In her affirmation, Ms. Silvera attests she was assigned to handle Plaintiff's investigation of the Claims. Ms. Silvera attests that Plaintiff initiated the investigation because of discrepancies in the Police Report, including conflicting versions of the Accident, that the Report did not indicate injuries were sustained, there was no evidence from the scene and the Individual Defendants were treating excessively with suspect medical providers. Based on this information and in order to verify coverage, investigate the causal relationship and determine the medical necessity of treatment, Plaintiff sought James's EUO.

In his affirmation, Mr. Callinan describes his knowledge of Plaintiff's counsel's business practices, including the scheduling of EUOs and drafting and of mailing EUO notices. Mr. Callinan details Plaintiff's efforts to schedule the EUO with James, and attests that multiple letters were timely sent to James's correct address for the purpose of scheduling the EUO. Copies of these documents are annexed as Exhibits "DD" and "FF" to the Hlinka affirmation. Mr. Callinan further attests that James failed to appear for the EUO on two occasions (*see* Exs. "EE" and "GG" to the Hlinka affirmation).

In her affirmation, Ms. Petito describes her knowledge of Plaintiff's business practices and procedures regarding the receipt of claims for No Fault benefits, including mailing requests for additional verifications (the "Delay Letters") and No-Fault denial of claim forms ("Denial Forms"). Ms. Petito attests she reviewed the relevant Delay Letters and Denial Forms for the Claims at issue here, and confirms they accurately reflect the dates Plaintiff received verification of treatment forms and issued the Delay Letters. Ms. Petito further attests that all Delay Letters and Denial Forms for the Claims were timely mailed to the Provider Defendants. Copies of these documents are annexed as Exhibit "HH" to the Hlinka affirmation.

Plaintiff's submissions contain the proof required by the first and third prongs of CPLR § 3215 [f]: as discussed above, Defendants were served with the summons and complaint and the Provider Defendants were served with the required additional notices. Defendants did not appear in the case, file timely answers or move with respect to the complaint. Defendants were also served with notices of the default motion and did not respond.

Plaintiff also satisfies the second prong of CPLR § 3215 (f). By failing to answer or otherwise respond to the complaint, Defendants are deemed to have admitted the factual allegations in the complaint (*see State Farm Fire & Cas. Co. v. AA Acupuncture Serv., P.C.*, 217 AD3d 643, 643 [2d Dept 2023]). The record contains proof of the facts constituting Plaintiff's claims for declaratory judgment and injunctive relief based on James's failure to satisfy the condition precedent to coverage by failing to appear for properly and timely noticed EUOs (*State Farm Fire & Cas. Co. v. Soliman*, 215 AD3d 479, 479 [1st Dept 2023]; *State Farm Mut. Auto. Ins. Co. v. AK Global Supply Corp.*, 203 AD3d 556, 557 [1st Dept 2022]) *see* 11 NYCRR § 65-3.5 [e]; 11 NYCRR § 65-1.1 [d]). Based on the foregoing, it is hereby:

ORDERED, that Plaintiff's motion for a default judgment as against non-appearing defendants Christopher James; Atlantic Medical & Diagnostic, P.C.; AVI Weinberger DC; Bright Star Rehab Physical Therapy, P.C.; Central Diagnostics Inc.; Happy Apple Medical Services, P.C.; Herschel Kotkes, M.D., P.C.; JTK Chiropractic Care, P.C.; Lorraine Pharmacy Inc.; Medical MRI P.C.; Next Generation Diagnostic Imaging, P.C.; PMK Acupuncture P.C.; Rapid Equipment Inc.; Red Medical Supply, Inc.; Royal Care Pharmacy, Inc.; Sanford Chiropractic, P.C.; Stand-Up MRI of Bensonhurst, P.C.; V&S Supply, Inc.; Vaynshteyn Chiropractic P.C. and Vish Supply Inc. is **GRANTED**; and it is further

ORDERED, that Plaintiff shall submit proposed Judgment on notice to Defendants; and it is further

ORDERED, that Plaintiff shall file an RJl within 14 days of entry of this Decision and Order and pursuant to 22 NYCRR § 202.12 (j), the **Preliminary Conference in this action shall be held on February 27, 2025**. In accordance with the Court's Preliminary Conference Rules and Procedures, a Court Notice will be uploaded following issuance of this Decision and Order providing further instructions; and it is further

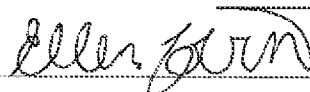
ORDERED, that Plaintiff shall serve a copy of this Decision and Order with notice of entry on Defendants by certified mail and regular mail within ten (10) days of the date of entry of this Decision and Order and shall file proof of such service on NYSCEF.

Any other relief sought herein and not addressed or ruled on is **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
January 7, 2025

ENTER:



HON. ELLEN TOBIN, A.J.S.C.

ENTERED

Jan 13 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE