Hertz Vehs., LLC v Advanced Orthopedics Joint Preserv., P.C.
2017 NY Slip Op 30633(U)
April 3, 2017
Supreme Court, New York County
Docket Number: 151488/16
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------X

HERTZ VEHICLES, LLC,

Plaintiff,

-against-

ADVANCED ORTHOPEDICS AND JOINT PRESERVATION, P.C. a/k/a ADVANCED ORTHOPEDICS AND JOINT, METROPOLITAN MEDICAL & SURGICAL, P.C., DCJ ACUPUNCTURE, P.C., CITI MEDICAL, P.C., JM HEALTH ACUPUNTURE, P.C., MERRICK MEDICAL, P.C., OMEGA DIAGNOSTIC IMAGING, P.C., HEALTHY LIVING CHIROPRACTIC, P.C., HELPFUL MEDICAL SUPPLY CORP., MKR MEDICAL, P.C., EVANS PIERRE and GIOVANNI MONTAS,

Defendants.

----------X

DECISION AND ORDER
Index No. 151488/16
Mot. Seq. No. 001

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND ESON AFFIRMATION IN SUPPORT	1-2 (Exs. A-J)
WOLKOW AFFIRMATION IN SUPPORT	3
BOUCHER AFFIRMATION IN SUPPORT	4
STROMBERG AFFIDAVIT IN SUPPORT	5

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff, Hertz Vehicles, LLC, moves for an order: (1) pursuant to CPLR 3215, granting it a judgment on default against defendants METROPOLITAN MEDICAL & SURGICAL, P.C., DCJ ACUPUNCTURE, P.C., CITI MEDICAL, P.C., JM HEALTH ACUPUNTURE, P.C., MERRICK MEDICAL, P.C., OMEGA DIAGNOSTIC IMAGING, P.C., HEALTHY LIVING CHIROPRACTIC, P.C., HELPFUL MEDICAL SUPPLY

CORP., MKR MEDICAL, P.C. (hereinafter collectively "the medical provider defendants"), and EVANS PIERRE and GIOVANNI MONTAS (hereinafter collectively "claimants"), for failure to appear or answer in this action; (2) granting plaintiff a judgment declaring that there is not any no-fault coverage for alleged claims relating to the alleged May 29, 2015 collision referenced by plaintiff's claim number 02-2015-08317; and (3) for such other and further relief as this Court deems just and proper. After a review of plaintiff's motion papers, as well as the relevant case law and statutes, the motion is **denied with leave to renew upon proper papers.**

FACTUAL AND PROCEDURAL BACKGROUND

Claimants were allegedly involved in a collision on May 29, 2015 while they were passengers in a vehicle owned and self-insured by plaintiff. Eson Aff. in Supp., at par. 3; Ex. E.[1] The car in which claimants were passengers was driven by nonparty Serge Pierre, who rented the vehicle. Id. According to the police report, an unidentified vehicle sideswiped the vehicle in which claimants were riding, forcing their vehicle to collide with a parked car. Ex. E.

As a result of the alleged incident, the medical provider defendants, as well as other medical providers not named in this action, submitted over $39,500 in bills for treatment allegedly rendered to claimants. Eson Aff., at par. 5. Plaintiff questioned the legitimacy of the charges because they were inconsistent with the minor damage to the vehicle itself caused by the low impact collision, including that the air bags did not deploy and the vehicle could be driven after the incident; that claimants did not complain of injuries at the scene but later alleged serious injuries; and claimants

[1]Unless otherwise noted, all references are to the affidavit of Jason Eson, Esq. submitted in support of the motion.

alleged virtually identical injuries and received nearly identical treatment. Eson Aff., at pars. 4, 6, 8. Thus, in order to confirm the legitimacy of the claim and injuries, plaintiff sought to compel the claimants to submit to an examination under oath (hereinafter "EUO"). Id., at par. 10.

Lawrence Wolkow, Esq., an attorney associated with plaintiff's law firm, was assigned to take the EUOs of claimants. Wolkow Aff., at par. 2. Wolkow stated that claimants appeared for their EUOs (Exs. F and G) but that they never responded to his requests that they subscribe the transcripts from those proceedings. Wolkow Aff., at pars. 4, 7 and 10.

Lawrence Boucher, Jr., Esq., another attorney associated with plaintiff's law firm, stated that it was part of his duties to arrange the EUOs of the medical provider defendants and that, although he made numerous efforts to have them appear, they did not do so. Boucher Aff., at pars. 5-22. Boucher further represented that neither claimant was on active duty in the military. Boucher Aff., at pars. 23-24.

In an affidavit in support of the motion, Maureen Stromberg, a claim representative for plaintiff, stated that she personally investigated claim number 02-2015-08317. Stromberg Aff., at par. 2. "Counsel [had] informed" Stromberg that, although claimants and Serge Pierre appeared for EUOs. their testimony was inconsistent and thus "led [plaintiff] to conclude that the underlying loss was not accidental." Id., at par. 10. Stromberg further stated that "[c]ounsel [had] informed [her] that despite due demand[s]," the medical provider defendants failed to appear for their EUOs and that their claims were thus denied. Id., at par. 13. She concluded in her affidavit that "[plaintiff] maintained a founded belief that the alleged injuries of the [c]laimants and any subsequent [n]o-[f]ault treatment submitted by the [m]edical [p]rovider [d]efendants was not causally related to an insured incident and [plaintiff] has duly denied all claims on this basis." Id., at par. 14.

Plaintiff commenced this action on February 23, 2016 (Ex. A) and now moves, pursuant to CPLR 3215, for a default judgment against claimants as well as against the medical provider defendants due to their failure to answer or otherwise appear in this matter.[2] Upon default, plaintiff seeks a declaration that it is under no obligation to pay any claims based on the May 29, 2015 accident based on the failure by claimants and the medical provider defendants to comply with conditions precedent to suit and a founded belief that the alleged injuries were not causally related to an insured incident. Plaintiff also seeks a permanent stay of arbitration. In support of the motion, plaintiff submits the affirmations of Eson, Wolkow, Boucher, and Stromberg; the summons and complaint verified by Charles Rubin Esq. of plaintiff's law firm; affidavits of service of the summons and complaint; the accident report; claimants' no-fault claim forms (NF-2's); transcripts of claimants' EUOs with letters by Wolkow to claimants requesting that the transcripts be executed; the transcript of the EUO of Serge Pierre; letters from Boucher to the medical provider defendants requesting that they appear for EUOs; and follow up service of the summons and complaint on the medical provider defendants pursuant to CPLR 3215(g).

PLAINTIFF'S ARGUMENTS

Plaintiff argues that it is entitled to a default judgment against claimants and the medical provider defendants since it proved proper service of the summons and complaint, the facts constituting the claim (in the form of the affidavit and affirmations submitted in support of the application), and proof of defendants' defaults. It further asserts that it established a lack of

[2]Plaintiff does not move against Advanced Orthopedics and Joint Preservation, P.C. a/k/a Advanced Orthopedics and Joint, which has answered the complaint. Eson Aff., at par. 2.

coverage defense by setting forth its founded belief that the alleged injuries did not arise from an insured accident.

CONCLUSIONS OF LAW

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial. . ., the plaintiff may seek a default judgment against him [or her]." "[T]he movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and 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); *see Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 784-785 (2d Dept 2015); *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 668 (2d Dept 2014); *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 (2d Dept 2010).

Here, plaintiff established presumptively valid proof of service of process on the claimants as well as on the medical provider defendants. Exs. B and J. Plaintiff has also established that the claimants and medical provider defendants have defaulted in answering. Eson Aff., at par. 2. However, plaintiff has failed to submit sufficient "proof of the facts constituting the claim." CPLR 3215(f); *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). Where a verified complaint is submitted in support of a motion for default pursuant to CPLR 3215, it may be used to establish the facts constituting the claim. See CPLR 3215(f). Here, however, since the complaint is verified by plaintiff's attorney (Ex. A), it is "purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." *Martinez v Reiner*, 103 AD3d 477, 478 (1st Dept 2013)(internal quotation marks and citation omitted).

Since it is error to issue a default judgment "without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]), it is incumbent upon plaintiff, in the absence of a complaint verified by one with personal knowledge, to submit an affidavit by one with such knowledge setting forth the facts constituting the claim. However, for the reasons set forth below, the facts submitted in support of the motion are insufficient to warrant the granting of a default judgment in favor of plaintiff.

"New York courts "rarely, if ever" grant declaratory judgments on default "with no inquiry by the court as to the merits." *Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 (1st Dept 1978). Default declaratory judgment actions "'will not be granted on the default and pleadings alone'" but require that the "'plaintiff establish a right to a declaration against . . . a defendant.'" *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 (3d Dept 1986), *quoting National Sur. Corp. v Peccichio*, 48 Misc2d 77, 78 (Sup Ct Albany County 1965)." *de Beeck v Costa*, 39 Misc3d 347 (Sup Ct New York County 2013). Here, since plaintiff has failed to establish its prima facie entitlement to the relief sought, the motion is denied. See *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d at 902.

Initially, plaintiff has not submitted any documentation proving that any of the medical provider defendants submitted claims for treatment of the claimants. Section 11 NYCRR 65-3.8 of the no-fault regulations requires an insurer to pay or deny a claim within 30 days of receipt of proof of a claim. If an insurer does not act within the 30-day period, it is precluded from asserting a defense against payment of the claim. *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 282-283 (1997). Here, plaintiff has failed to submit any proof regarding the timing of

any denial of claims by the medical provider defendants. Since the failure of a claimant or its assignee to appear for an EUO is a breach of a condition precedent to coverage under a no-fault policy, an insurer can deny all claims by any parties which may be entitled to benefits under such a policy retroactively to the date of the alleged accident, regardless of whether a denial was issued in a timely fashion. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy*, PLLC, 82 AD3d 559, 560 (1st Dept 2011). However, 11 NYCRR 65-3.5(b) requires that insurers request additional verification, including requests for EUOs, within 15 business days after receipt of the verification forms from those claiming coverage under the policy. Since plaintiff has submitted no evidence in support of its motion that it requested the EUOs of the medical provider defendants within the time frame set forth in 11 NYCRR 65-3.5(b), it cannot be granted a default judgment against them. *See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, ___ AD3d ___ (1st Dept February 7, 2017); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015).[3]

In addition, in his affirmation in support of the motion, plaintiff's counsel represents that, given the "minimal damage" to the vehicle the claimants were in at the time of the incident and the "magnitude of the claims submitted" (Eson Aff., at par. 6), as well as the fact that claimants did not complain of any injuries at the scene of the accident but later claimed serious injuries and received "nearly identical" treatment (Id., at par. 13), plaintiff had a founded belief that the alleged injuries did not arise from an accident covered under its policy. However, counsel's contention is conclusory and speculative. Indeed, the claim form submitted by claimant Pierre reflects that he injured his knees, neck, left shoulder, back, and head, whereas the claim form submitted by claimant Montas

[3]Although plaintiff contends that 11 NYCRR 65-3.5(p) excuses such an omission, it sets forth no authority for this assertion which would lead this Court to disregard the *Kemper* and *National Liab. & Fire Ins.* decisions cited above.

reflects that he injured his right shoulder, back, neck, and head (Ex. D), and the claimants' EUO testimony, to the limited extent it addressed their treatment, does not reveal that such treatment was identical. Exs. F and G.

The affidavit of Stromberg, plaintiff's claim representative, is of no further probative value. Stromberg repeats, almost verbatim, the conclusory language set forth by plaintiff's counsel regarding the excessiveness of the claims, the allegedly identical treatment rendered to claimants, the fact that claimants did not claim injuries at the scene but later alleged serious injuries, and the minimal damage to the insured vehicle. Stromberg Aff., at pars. 6 and 8.

Additionally, although Stromberg, an employee of plaintiff, represents in her affidavit that she personally investigated the claim, she also states that "[c]ounsel [for plaintiff] has informed me that the [c]laimants and non-party Serge Pierre appeared for their EUOs, however, their testimony contained many inaccuracies and inconsistencies that led [plaintiff] to conclude that the underlying loss was not accidental and thus not an insured event." Stromberg Aff., at par. 10. Thus, not only is Stromberg's conclusion based at least in part on what she was told by plaintiff's counsel, but it is unclear whether the conclusion itself was hers or plaintiff's.

Stromberg also states that "[c]ounsel [for plaintiff] informed [her]" that the medical provider defendants failed to appear for EUOs and that their failure to appear was a violation of the no-fault regulations and a violation of a condition precedent to coverage for their no-fault claims, and that plaintiff "duly denied their claims on this basis." Stromberg Aff., at par. 13. This, too was a conclusion based not on her own personal knowledge, but on what counsel told her. Indeed, as a no-fault claim representative who investigated the claim, Stromberg was in a position to interpret the terms and conditions of the policy rather than relying on what she was told by counsel. Further,

despite her representation that plaintiff denied the claims by the medical provider defendants, such denials, as noted above, do not appear in the moving papers.

Finally, plaintiff's argument that the failure by claimants to subscribe and return their executed EUO transcripts resulted in a breach of the policy is without merit. In letters sent by plaintiff's counsel to claimants seeking their execution of the EUO transcripts, Wolkow represented that 11 NYCRR 65-3.8(b) allowed plaintiff to deny their claims if they failed to subscribe the transcripts within 120 calendar days after the request to do so was made.[4] Although 11 NYCRR 65-3.8(b)(3) indeed contains a 120-day provision regarding verification requests, that paragraph specifically states that it does not apply to an "examination under oath request." Nor does that paragraph contain any deadline for subscribing an EUO transcript. Thus, the said regulation does not entitle plaintiff to a default judgment against claimants.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion for a default judgment against defendants is denied with leave to renew upon proper papers; and it is further

[4]This regulation is not relied on by plaintiff in its motion papers.

ORDERED that this constitutes the decision and order of this Court.

Dated: April 3, 2017

ENTER:

KATHRYN E. FREED, J.S.C.