

<b>Country-Wide Ins. Co. v Bird</b>
2017 NY Slip Op 31613(U)
August 4, 2017
Supreme Court, New York County
Docket Number: 157819/16
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

TAJHAY RODARI BIRD, ANDREW J DOWD, MD,  
PATCHOGUE OPEN MRI, P.C., METROPOLITAN  
MEDICAL & SURGICAL P.C., AVANGUARD  
MEDICAL GROUP, PLLC, RIVER CHEMISTS CORP.,  
ADVANCED RECOVERY EQUIPMENT AND  
SUPPLIES LLC, ADVANCED ORTHOPEDICS AND  
JOINT PRESERVATION P.C., CHOICE MEDICAL &  
DIAGNOSTIC SERVICES P.C., MKR MEDICAL P.C.,  
MERIDIAN CHIROPRACTIC, P.C., SANG SING  
ACUPUNCTURE, P.C., UPRIGHT REHAB CARE PT,  
P.C.,

Defendants.

-----X  
SHERY KLEIN HEITLER, J.S.C.

Motion sequence no.'s 001 and 002 are consolidated for disposition herein.

In motion sequence 001, plaintiff Country-Wide Insurance Company ("Plaintiff") seeks a default judgment pursuant to CPLR 3215<sup>1</sup> against defendants Tajhay Rodari Bird, Andrew J Dowd, MD, Patchogue Open MRI, P.C., Metropolitan & Surgical, P.C., Avanguard Medical Group, PLLC, Advanced Recovery Equipment and Supplies LLC, Choice Medical & Diagnostic Services, P.C., MKR Medical, P.C., Meridian Chiropractic, P.C., Sang Sing Acupuncture, P.C., and Upright Rehab Care PT, P.C. ("Defaulting Defendants") for failing to answer or appear in this action. In motion sequence 002, Plaintiff seeks summary judgment pursuant to CPLR 3212

<sup>1</sup> CPLR 3215(a) provides in relevant part that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him."

against defendants River Chemists Corp., and Advanced Orthopedics and Joint Preservation P.C. (“Answering Defendants”).<sup>2</sup>

Plaintiff further seeks a declaratory judgment that it is not obligated to pay Defendants’ claims for reimbursement under Country-Wide policy RS810927415 (“Policy”) regarding claim number 000310899-002 (“Claim”) because of a breach in a condition precedent to coverage.

Both motions are unopposed.

The court notes that a copy of the Policy is not part of the record on either motion. According to Plaintiff’s counsel, however, the Policy was issued by Plaintiff to defendant Bird and it was in effect on November 13, 2015 when Bird was allegedly involved in an automobile accident. Plaintiff alleges that Bird subsequently sought and received medical services from Defendants who sought reimbursement under the Policy.

Plaintiff received Bird’s New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle Benefits form (“NF-2”) on December 18, 2015.<sup>3</sup> On January 21, 2016, Plaintiff mailed a notice to Mr. Bird and his attorney advising them of Plaintiff’s intent to examine Mr. Bird under oath (“EUO”) on February 11, 2016.<sup>4</sup> It is alleged that Mr. Bird did not appear.<sup>5</sup> Plaintiff rescheduled the EUO for March 9, 2016 and advised Mr. Bird and his counsel in writing.<sup>6</sup> Plaintiff’s notice warned that the failure to appear could result in the denial of Bird’s

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<sup>2</sup> The court shall refer to the Defaulting Defendants and Answering Defendants collectively as “Defendants”. The exhibits referenced herein are annexed to Plaintiff’s default motion.

<sup>3</sup> See Exhibit D.

<sup>4</sup> See Exhibit E.

<sup>5</sup> See Exhibit F.

<sup>6</sup> See Exhibit G.

application for no-fault benefits. Again Mr. Bird did not appear.<sup>7</sup> On March 31, 2016, Plaintiff issued a general denial of benefits based upon Mr. Bird's alleged failure to attend his EUO.<sup>8</sup>

### DISCUSSION

An application for a default judgment must include proof of service of the summons and complaint, proof of the claim, and proof of the default.

The moving papers establish that Plaintiff duly served the summons and complaint upon Defendants pursuant to CPLR 308 and 311, Business Corporation Law 306, and Limited Liability Company Law 303.<sup>9</sup> Additional copies were mailed to the necessary defendants pursuant to CPLR 3215(g)(4)(i).<sup>10</sup> The affirmations and affidavits that are annexed to the moving papers set forth the facts constituting Plaintiff's claims herein in compliance with CPLR 3215(f).<sup>11</sup> Defendants Bird, Andrew J Dowd, MD, Patchogue Open MRI, P.C., Metropolitan & Surgical, P.C., Avanguard Medical Group, PLLC, Advanced Recovery Equipment and Supplies LLC, Choice Medical & Diagnostic Services, P.C., MKR Medical, P.C., Meridian Chiropractic, P.C., Sang Sing Acupuncture, P.C., and Upright Rehab Care PT, P.C. have not answered the complaint or otherwise appeared in this action, and their time to do so has not been extended. Based on the foregoing, this court finds that they are in default.

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<sup>7</sup> See Exhibit H.

<sup>8</sup> See Exhibit L.

<sup>9</sup> See Exhibit B.

<sup>10</sup> See Exhibit C. CPLR 3215(g)(4)(i) provides in the relevant part that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served. . . an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment."

<sup>11</sup> CPLR 3215(f) provides in relevant part that "[o]n any application for judgment by default, the applicant shall file...proof of the facts constituting the claim... Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due."

However, Plaintiff has not shown its entitlement to the declaratory relief it seeks. In this regard, New York's no-fault system is designed "to ensure prompt compensation for losses incurred by accident victims without regard to fault of negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists[.]" *Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 317 (2007) (quoting *Matter of Medical Socy. Of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]). As part of this framework, the New York State Department of Financial Services has promulgated regulations which require insurers to provide benefits to persons injured in the use or operation of vehicles in New York State, subject to certain conditions.

For example, after an insurer receives a completed NF-2 form, the insurer has 10 business days to send out verification forms to medical providers seeking reimbursement prior to issuing payment. 11 NYCRR 65-3.5(a). Any additional verification required by the insurer to establish proof of the claim must be requested within 15 business days of the date of receipt of the verification forms. 11 NYCRR 65-3.5(b). An insurer must affirmatively establish its compliance with these claim procedures in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for an EUO. *American Transit Ins. Co. v. Vance*, 131 AD3d 849 (1st Dept 2015); *American Transit. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015).

These regulations also require insurers to include certain endorsements as part of any motor vehicle policy. As is relevant to this case, 11 NYCRR 65-1.1 provides:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

\* \* \* \*

Upon request by the Company, the eligible injured person or that person's assignee or representative shall . . . as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same. . .

As noted above, Plaintiff has not submitted a copy of the Policy for the court's review and the court will not assume that it contained a provision allowing Plaintiff to deny Mr. Bird's no-fault application for failing to appear for his EUO. Even if the court did have a copy of the Policy and it did contain the necessary endorsements, a declaratory judgment would still not be appropriate since Plaintiff has not shown that it complied with the timeframes set forth at 11 NYCRR 65-3.5(a).

These omissions preclude Plaintiff from obtaining a declaratory judgment and also preclude Plaintiff from obtaining summary judgment against the Answering Defendants.<sup>12</sup>

*See Vance.*

Accordingly, it is hereby

ORDERED that Plaintiff's motions are granted to the extent that the court finds Tajhay Rodari Bird, Andrew J Dowd, MD, Patchogue Open MRI, P.C., Metropolitan & Surgical P.C., Avanguard Medical Group PLLC, Advanced Recovery Equipment and Supplies LLC, Choice Medical & Diagnostic Services, P.C., MKR Medical, P.C., Meridian Chiropractic, P.C., Sang Sing Acupuncture, P.C., and Upright Rehab Care PT, P.C. to be in default; and it is further

ORDERED that Plaintiff's motions are otherwise denied with leave to renew upon complete papers within 30 days from the date of entry of this decision and order and upon proof of proper service thereof, failing which this action shall be dismissed in its entirety; and it is further

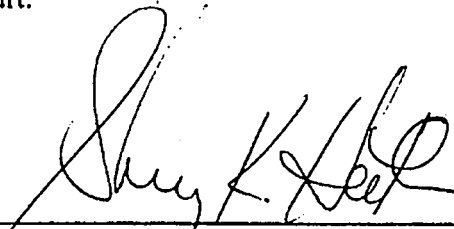
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<sup>12</sup> The "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see also Winegrad v NYU Med. Center*, 64 NY2d 851, 853 (1985).

ORDERED that Plaintiff shall serve a copy of this order upon all parties by first class mail within 15 days from the date of entry of this decision and order.

This constitutes the decision and order of the court.

DATED: Aug 4, 2017

  
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SHERRY KLEIN HEITLER, J.S.C