

**Kemper Independence Ins. Co. v Flatlands Med.,
P.C.**

2010 NY Slip Op 34080(U)

June 11, 2010

Supreme Court, New York County

Docket Number: 107641/2009

Judge: O. Peter Sherwood

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
COUNTY OF NEW YORK: PART 61**

**KEMPER INDEPENDENCE INSURANCE
COMPANY,**

Plaintiff,

-against-

**FLATLANDS MEDICAL, P.C., RELIABLE PHYSICAL
THERAPY, P.C., FLUSHING TRADITIONAL
ACUPUNCTURE, P.C., CANARSIE CHIROPRACTIC, P.C.,
ESSENTIAL RADIOLOGY, P.C., RADIOLOGY TODAY, P.C.,
IMMEDIATE IMAGING, P.C., EAGLE SURGICAL SUPPLY,
INC., PRECISE REHAB PT, P.C., NEW ERA MASSAGE
THERAPY, P.C., NUMBER 1 ACUPUNCTURE OFFICE, P.C.,
ARGOS CHIROPRACTIC, P.C., AKO MEDICAL, P.C. and
DWAYNE GRIFFITHS,**

Defendants.

**-----X
DECISION, ORDER
AND JUDGMENT**

Index No. 107641/2009

O. PETER SHERWOOD, J.:

Plaintiff Kemper Independence Insurance Company (“Kemper” or “plaintiff”) commenced this action seeking, *inter alia*, a judgment declaring that it has no duty to pay no-fault benefits to defendant medical providers with respect to a July 6, 2008 collision due to the failure of such defendants’ assignee to appear for an independent medical examination and on the ground that the injuries for which defendants’ assignee was treated were not causally related to the July 6, 2008 collision and permanently staying all no-fault suits and arbitrations relating to this accident and for a temporary stay of all arbitrations, lawsuits and/or claims by defendants relating to no-fault claims of their assignee arising from the July 6, 2008 pending the determination of this action. Kempner is now moving for a default judgment as against all named defendants except the claimant/assignee Dwayne Griffiths based upon their failure to appear or answer.

The subject no-fault claims stem from an accident that occurred on July 6, 2008. On that date, defendant Dwayne Griffiths (“the claimant”), an occupant of a vehicle covered by a policy of insurance issued by Kemper, was allegedly injured as a result of the accident. Thereafter, Kemper received claims from various medical providers relative to treatment rendered to the claimant for injuries allegedly sustained in the accident. Kemper sought verification of these claims by requesting

that the various medical providers submit to examinations under oath (EUOs). Despite due demand, none of the medical providers appeared for the requested EUOs.

Plaintiff then commenced the instant declaratory judgment action. Service of the summons and complaint was effectuated upon each of the thirteen named medical providers on June 26, 2009 at 8:40 a.m. as to some of the defendant medical providers and at 1:15 p.m. as to the remaining defendant medical providers, by delivering two copies of the summons and complaint as to each of the named defendant medical providers to an agent of the Secretary of State at the Albany Office and paying the requisite fee of \$40.00 as to each pursuant to section 306 of the Business Corporations Law.

On February 22, 2010, plaintiff mailed a Notice of Default together with an additional copy of the summons and verified complaint to the afore-named corporate defendants thereby complying with the additional notice requirements of BCL § 306 (b) (2). Such additional notice was served at least 20 days prior to entry of a default judgment.

The above-named defendants have neither appeared nor answered the complaint within the time provided under the CPLR, nor has any of those defendants obtained an order from the Court extending the time to do so.

Plaintiff is now moving for a default judgment against all of the named defendants except claimant. In support of its motion for a default, plaintiff submits an affirmation of its attorney, Joseph R. Federici, Esq. of Rubin, Fiorella & Friedman, LLP, attesting to the default, and an affidavit of Denise Winant, a claims representative employed by Merastar Insurance Company which manages Kemper's claims, in addition to claims of other underwriting companies, together with exhibits "A" through "D" consisting, *inter alia*, of the summons and complaint, the affidavits of service, and the notices of the EUOs. Ms. Winant stated that she had personal knowledge of the facts and that Kemper had duly requested EUOs of the medical providers and that they failed to appear. Ms. Winant states further that although the accident was minor, the claimants had submitted over \$25,000.00 in no-fault claims which raised questions about the legitimacy of their claims and whether the treatment rendered was not causally related to the subject accident.

It is well settled that a party may obtain a default judgment against a defendant who fails to appear or answer (CPLR § 3215 [a]). On an application for a default judgment, the moving party must present proof of service of the summons and complaint, proof of the claim by a person with

personal knowledge of the facts and proof of ... default (*see*, CPLR § 3215 [f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]).

In the first instance, plaintiff properly effectuated service upon the defendant medical pursuant to Business Corporation Law § 306 (b) by delivering duplicate copies of the summon and complaint to the Secretary of State and paying the appropriate fee (*see*, *Trini Realty Corp. v Fulton Center LLC*, 53 AD3d 479 [2d Dept 2008]; *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881 [2d Dept 2007]; *Shimel v 5 South Fulton Ave. Corp.*, 11 AD3d 527 [2d Dept 2004]). Therefore, jurisdiction over such defendants has been obtained.

Having failed to answer the allegations of the complaint, the defendants are deemed to have admitted “all traversable allegations in the complaint, including the basic allegation of liability” (*Curiale v Andra Ins. Co.*, 88 NY2d 268, 279 [1996]). Nevertheless, in order to be entitled to a default judgment, plaintiff must allege enough facts to enable a court to determine whether the plaintiff has established, prima facie, entitlement to judgment (*see*, *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept. 2007]; *Dyno v Rose*, 260 AD2d 694 [3d Dept. 1999]). If upon review of the facts proffered to establish the merits of a claim the court concludes that plaintiff has failed to establish a prima facie case, plaintiff is not entitled to a default judgment (*see*, *Dyno v Rose*, *supra*).

Ms. Winant’s affidavit is sufficient to establish that the EUO requests were sent to the defendant medical providers, that they failed to appear for the EUOs, and that in failing to do so they breached a condition precedent to payment on the policy of insurance covering the vehicle at the time of the accident in issue (*see*, *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2d Dept 2006]; *Richard Morgan Do, P.C. v State Farm Mut. Auto. Ins. Co.*, 2009 WL 383270 [App. Term, 9th & 10th Jud. Dist. 2009]). Accordingly, plaintiff is entitled to a declaration that the specifically named defaulting defendants are not entitled to recover assigned first-party no-fault benefits stemming from the accident at issue.

Accordingly, it is

ORDERED, that plaintiff’s motion seeking a default judgment is granted upon default as against defendants Flatlands Medical, P.C., Reliable Physical Therapy, P.C., Flushing Traditional Acupuncture, P.C., Canarsie Chiropractic, P.C., Essential Radiology, P.C., Radiology Today, P.C., Immediate Imaging, P.C., Eagle Surgical Supply Inc., Precise Rehab PT, P.C., New Era Massage

Therapy, P.C., Number 1 Acupuncture Office, P.C., Argos Chiropractic, P.C. and AKO Medical, P.C.; and it is further

ORDERED, ADJUDGED and DECLARED that Kemper Independence Insurance Company has no duty to pay any No-Fault benefits to defendants Flatlands Medical, P.C., Reliable Physical Therapy, P.C., Flushing Traditional Acupuncture, P.C., Canarsie Chiropractic, P.C., Essential Radiology, P.C., Radiology Today, P.C., Immediate Imaging, P.C., Eagle Surgical Supply Inc., Precise Rehab PT, P.C., New Era Massage Therapy, P.C., Number 1 Acupuncture Office, P.C., Argos Chiropractic, P.C. and AKO Medical, P.C. arising out of a July 6, 2008 motor vehicle accident referenced in the complaint relating to Kemper Independence Insurance Company under policy no. VF893761 and claim number 331A6450472 that is the subject of this action; and it is further

ORDERED that the action as against defendant Dwayne Griffiths is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon defendants within 20 days of entry; and it is further

This constitutes the decision, order and judgment of the Court.

DATED: *5/11/10*

FILED
JUN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER,
O.P. Sherwood
O. PETER SHERWOOD
J.S.C.

Neuman Sherman
Clerk