Hertz Vehs., LLC v Cliffside Park Imaging & Diagnostic Ctr.
2017 NY Slip Op 32947(U)
November 21, 2017
Supreme Court, New York County
Docket Number: 154073/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon **PART 42**
Justice

HERTZ VEHICLES, LLC

-v-

CLIFFSIDE PARK IMAGING & DIAGNOSTIC CENTER, LLC, et al.

INDEX NO. 154073/2015

MOTION DATE 4/24//2017

MOTION SEQ. NO. 003

The following papers were read on this motion for leave to enter a default judgment:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law---------- No(s). 1

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Cliffside Park Imaging & Diagnostic Center, LLC, Cranio Associates, P.A., Barnet Surgical Center, Medicsburg, Interstate Multi-Specialty Medical Group, P.C., and Accelerated Surgical Center of North Jersey, LLC (collectively the nonanswering defendants), as assignees of Joshua Marshall and Steven Winans, declaring that it is not obligated to reimburse the nonanswering defendants for no-fault benefits referable to treatment they rendered or equipment and supplies they provided to Marshall and Winans in connection with injuries they sustained in a motor vehicle accident. The motion is denied.

Marshall and Winans allege that they were injured in a motor vehicle accident on August 30, 2014, involving a vehicle owned by the plaintiff's insured, Wilbur B. Daly, and that they thereafter obtained medical treatment or equipment and supplies from the nonanswering defendants. Marshall and Winans submitted claims for no-fault benefits to the plaintiff. Although the plaintiff's submissions do not reveal when those claimants filed NF-2 no-fault claim forms with the plaintiff, they appeared for examinations under oath (EUOs) on November 4, 2014, and November 25, 2014, respectively, and the plaintiff does not contend that these claimants were untimely. The nonanswering defendants sought payment, as the assignees of Marshall and Winans, for no-fault benefits from the self-insured plaintiff under claim number 02-2014-21971. See Insurance Law 5106(a); 11 NYCRR 65-1.1. However, the plaintiff's submissions do not reflect the dates on which the several nonanswering defendants submitted NF-5 claim forms for reimbursement of charges for medical services and equipment. The plaintiff, which asserts that it suspected that the claimants obtained more treatment for their injuries than was necessary, nonetheless mailed the nonanswering defendants requests for additional verification, specifically requesting that each of the nonanswering defendants provide

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

a representative to appear for an EUO with respect to the nature and extent of the treatment rendered and equipment provided to Marshall and Winans. The plaintiff's submissions show that these demands for EUOs were mailed to all of the nonanswering defendants on December 8, 2014, with a followup demand sent on January 6, 2015,

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In support of its motion, the plaintiff submits the complaint, two attorney's affirmations, an affidavit from one of its no-fault claims supervisors, the transcripts of the EUOs of Marshall and Winans, the relevant police accident report, and the affidavits of service referable to service of process upon the nonanswering defendants. It also submits copies of the requests for EUOs that it sent to the nonanswering defendants.

The plaintiff's submissions, however, fail to demonstrate when it received NF-5 claim forms from any of the nonanswering defendants. Hence, the plaintiff fails to show that, within 15 business days after its receipt of any particular NF-5 form, it delivered a prescribed request for additional verification form to the relevant defendant, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851, 851 (1st Dept 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441, 441 (1st Dept 2015); see also 11 NYCRR 65-3.5(d). Rather, the proof demonstrates only that the plaintiff received some type of claim forms from the nonanswering defendants on unspecified dates, and first mailed EUO notices to them on December 8, 2014. Thus, the plaintiff fails to demonstrate, prima facie, that any of the nonanswering defendants breached a condition precedent to the effectiveness of no-fault insurance coverage, or that coverage was thereby vitiated. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., supra; Hertz

Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014).

Contrary to the plaintiff's contention, 11 NYCRR 65-3.5(p) does not absolve it of its obligation to demonstrate, on a motion for leave to enter a default judgment, that it timely requested the nonanswering defendants to appear for EUOs. That regulation provides that

> "[w]ith respect to a verification request and notice, an insurer's non-substantive technical or immaterial defect or omission, as well as an insurer's failure to comply with a prescribed time frame, shall not negate an applicant's obligation to comply with the request or notice. This subdivision shall apply to medical services rendered, and to lost earnings and other reasonable and necessary expenses incurred, on or after April 1, 2013."

The plaintiff, however, sets forth no applicable authority for its interpretation, which would require this court to disregard the determinations of the Appellate Division, First Department, in Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., supra, and National Liability & Fire Ins. Co. v Tam Med. Supply Corp., supra. Those cases expressly hold that, where an insurer disclaims coverage based on an applicant's failure to appear for a scheduled EUO, or to provide other additional requested verification, proof of timely mailing of a request for that additional verification is an integral part of an insurer's prima facie burden. Since those decisions post-date the effective date of 11 NYCRR 65-3.5(p) by several years, the Appellate Division is deemed to have been aware of the promulgation of that regulation.

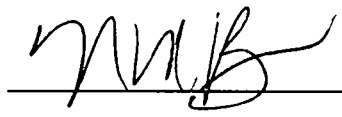
The plaintiff's submissions also do not establish, prima facie, that Marshall or Winans "over-treated" with any of nonanswering defendants, or that any of those defendants overcharged for medical services and supplies. The submissions do not include an expert's affidavit that would support the contention that any particular treatment or equipment was unnecessary, or that charges therefor were inflated.

Accordingly, it is

ORDERED that the plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

Dated: November 21, 2017



, JSC

HON. NANCY M. BANNON

1. Check one: ..... ☐ **CASE DISPOSED** ■ **NON-FINAL DISPOSITION**

2. Check as appropriate: MOTION IS: ☐ **GRANTED** ■ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**