

**Country-Wide Ins. Co. v Ramirez**

2018 NY Slip Op 30704(U)

April 18, 2018

Supreme Court, New York County

Docket Number: 653128/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED**

**PART 2**

*Justice*

-----X

COUNTRY-WIDE INSURANCE COMPANY,

**INDEX NO. 653128/2017**

Plaintiff,

**MOTION DATE \_\_\_\_\_**

- v -

APRIL RAMIREZ, A.O.T. CHIROPRACTIC P.C., MORRIS PARK  
PRIMARY MEDICAL CARE, P.C., PARADISE ACUPUNCTURE  
P.C.,

**MOTION SEQ. NO. 001**

Defendants.

**DECISION, ORDER AND  
JUDGMENT**

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for

JUDGMENT - DEFAULT

In this declaratory judgment action, plaintiff Country-Wide Insurance Company (“Country-Wide”) moves for an order, pursuant to CPLR 3215, granting it a default judgment against defendants A.O.T. CHIROPRACTIC P.C., MORRIS PARK PRIMARY MEDICAL CARE, P.C., PARADISE ACUPUNCTURE P.C. (“the medical provider defendants”) and APRIL RAMIREZ (“Ramirez”) (collectively “defendants”) due to their failure to answer the complaint. After a review of plaintiff’s papers and the relevant statutes and case law, plaintiff’s motion, which is unopposed, is **granted**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

In this declaratory judgment action, Country-Wide seeks a judgment declaring that it has no obligation to pay defendants' claims for No-Fault benefits because said defendants breached a condition precedent to coverage pursuant to the relevant policy of insurance. Doc. 1.<sup>1</sup>

This action was commenced by the filing of a summons and verified complaint on June 8, 2016. Doc. 1. In its complaint, Country-Wide alleged that, on May 2, 2016, Ramirez, the eligible injured party, was involved in a motor vehicle accident. Doc. 1. As a result of the accident, Ramirez made a claim (under claim number 000316193-002) to Country-Wide for no-fault benefits pursuant to policy number VS 7820416 16. Ramirez sought medical treatment from the medical provider defendants and assigned her right to recover no-fault benefits from Country-Wide to the said providers.

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<sup>1</sup>Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this action.

On July 22, 2016, Country-Wide demanded that Ramirez appear for an examination under oath (“EUO”) on August 17, 2016. Doc. 14. Despite this letter, however, Ramirez failed to appear for the EUO on August 17, 2016. On August 22, 2016, Country-Wide demanded again that Ramirez appear for EUO, this time on September 14, 2016. Doc. 16. However, Ramirez failed to appear for that EUO as well. See Affidavit of Fatima Zuhra, employed by plaintiff as an EUO Clerk, dated October 20, 2017. Doc. No. 19.

Country-Wide further alleged that the policies it issued contained the “New York Mandatory Personal Injury Protection Endorsement” of the No-Fault regulations, which provide No-Fault benefits pursuant to certain terms and conditions. Such conditions prohibited any action against County-Wide unless, as a condition precedent thereto, there was full compliance with the terms of the coverage, which included an EUO of Ramirez upon Country-Wide’s request. Doc. 1.

As a first cause of action, Country-Wide alleged it was entitled to judgment declaring that it had no duty to defendant to pay any of the subject claims due to Ramirez’s failure to appear for an EUO. Doc. 1, at pars.34-37.

As a second cause of action, Country-Wide asserted that it would suffer irreparable harm without a permanent stay of all arbitrations, lawsuits, and/or claims by Ramirez and the medical provider defendants relating to the No-Fault claims asserted. Doc. 1, at pars.38-39.

### **LEGAL CONCLUSIONS:**

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.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the 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.” *See Atlantic Cas. Ins. Co. v. RJNJ Servs. Inc.*, 89 A.D.3d 649, 651 (2d Dept. 2011). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 63 (2003).

Country-Wide's application for a default judgment on the complaint is granted. The summons and complaint were served on Ramirez by substituted service on September 1, 2017, with a follow-up mailing thereafter. Doc. 7. The medical provider defendants were served via the Secretary of State. Docs No. 2, 4, and 5. Additional copies of the summons and complaint were served on the medical provider defendants pursuant to CPLR 3215(g). Doc.6. According to the affirmation of Country-Wide's attorney, R. Diego Velasquez, Esq., in support of the motion, defendants failed to answer or appear in this matter and are now in default. Country-Wide filed the instant motion for default on October 20, 2017 (Docs No. 8 and 9.) and defendants failed to respond to the same.

Country-Wide has also established facts constituting the claim as set forth in the summons and verified complaint and the affidavits of Jessica Mena-Sibrian, employed by plaintiff as a No-Fault Litigation Supervisor, (Doc. No. 18) and the affidavit of Fatima Zuhra. Doc. No 19.

"The No-Fault Regulations provide that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage." *Hertz Vehicles, LLC v Delta Diagnostic Radiology, P.C.*,

2015 WL 708610, 2015 NY Slip Op 30242(U), \*3 (Sup Ct, NY County, Feb. 18, 2015, No. 158504/12) (Rakower, J.). In particular, 11 NYCRR 65-1.1 states: “No action shall lie against [a No-Fault insurer] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.” The Regulation at 11 NYCRR 65-1.1 also mandates that: “Upon request by the Company, the eligible injured person or that person’s assignee or representative shall: . . . (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.”

In *Hertz Vehicles, supra*, this Court further stated, inter alia, that:

The failure to appear for a scheduled [EUO] is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1<sup>st</sup> Dep’t 2011]; *Hertz Corp. v. V.S. Care Acupuncture, P. C.*, 2013 NY Slip Op 30895(U), \*3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A), \*1 [N.Y. App. Term 2012]. Accordingly, when the claimants or the assignors fail to appear for the requested exams, “the . . . insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the 30 day period . . . Since the contract has been vitiated, [the insurer] may deny all the claims retroactively to the date of loss.” See *LK Health Care Prods. Inc. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1230(A), \*5 [N.Y. Civ. Ct. 2013].

*Id.*, \*3; *see also Hertz Vehicles, LLC v New Utrecht Servs., Inc.*, 2014 WL 5426997, 2014 NY Slip Op 32767(U), \*2-3 (Sup Ct, NY County, Oct. 27, 2014, No. 151559/12).

Here, Country-Wide has demonstrated, through its complaint, as verified by Nick Filacouris, the Senior Vice President, Treasurer and Chief Operating Officer of plaintiff, its prima facie entitlement to a judgment declaring that defendant is not entitled to No-Fault coverage for the subject claims due to its failure to twice appear for duly noticed and scheduled EUOs, thereby breaching a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. Additionally, Country-Wide is entitled to a permanent stay of any arbitration, lawsuit, or claim relating to the subject claims.

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

ORDERED, DECLARED AND ADJUDGED that the motion by plaintiff COUNTRY WIDE INSURANCE COMPANY seeking a default judgment against defendants A.O.T. CHIROPRACTIC P.C., MORRIS PARK PRIMARY MEDICAL CARE P.C., PARADISE ACUPUNCTURE P.C. and APRIL RAMIREZ is granted; and it is further,



ORDERED, DECLARED AND ADJUDGED that plaintiff COUNTRY WIDE INSURANCE COMPANY is not obligated to provide No-Fault coverage to defendants A.O.T. CHIROPRACTIC P.C., MORRIS PARK PRIMARY MEDICAL CARE P.C., PARADISE ACUPUNCTURE P.C. and APRIL RAMIREZ for the No-Fault claims submitted to Country-Wide Insurance Company pursuant to policy number VS 7820416 16 and claim number 000316193-002; and it is further,


ORDERED, DECLARED AND ADJUDGED that plaintiff COUNTRY WIDE INSURANCE COMPANY is granted a permanent stay of any arbitration, lawsuit, or claim relating to the subject claims;

ORDERED that plaintiff Country-Wide Insurance Company is to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED the Clerk is directed to enter judgment accordingly; and it is further,

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

4/18/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE