

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

2018 NY Slip Op 31404(U)

June 26, 2018

Supreme Court, New York County

Docket Number: 158400/2017

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 IAS MOTION 2

Justice

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INDEX NO. 158400/2017

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHARENE BRISSETTE, INTERFAITH MEDICAL CENTER, MITCHELL PHARMACY SOLUTIONS D/B/A AUTO RX, LC, PALM CHIROPRACTIC P.C., BASEM MANSOUR P.T. P.C., AMBEL ACUPUNCTURE P.C.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this breach of contract action, plaintiff Country-Wide Insurance Company ("Country-Wide") moves, pursuant to CPLR 3215, for a default judgment against defendant Sharene Brissette ("Brissette") and defendants Mitchell Pharmacy Solutions D/B/A Auto Rx, LC, Palm Chiropractic P.C., Basem Mansour P.T. P.C., and Ambel Acupuncture P.C. (hereinafter the "Medical Provider Defendants"). After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Brissette had an insurance contract with Country-Wide under policy number VS-9640954-16 that was effective from March 11 to August 3, 2016. Doc. 14.<sup>1</sup> On May 15, 2016,

<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

Brissette was allegedly involved in a motor vehicle accident while in a vehicle that was insured by Country-Wide. Docs. 14, 27. Brissette thereafter sought medical treatment from the above-captioned medical providers and, on May 19, 2016, she made a claim to Country-Wide via telephone for no-fault benefits under claim number 000316202-001. Docs. 14, 17, 23. The Medical Provider Defendants, as assignees of Brissette, have also made claims to Country-Wide for the medical services which they provided to her. Doc. 14.

On July 27, 2016, Country-Wide requested Brissette and her attorney to appear at an Examination Under Oath (“EUO”) to be held on August 16, 2016, to verify her claim as well as the circumstances surrounding the accident. Doc. 13. In Country-Wide’s request letter, plaintiff and her attorney were to confirm their attendance at the EUO at least two days in advance. Doc. 18. Brissette appeared at the August 16 EUO without her attorney. Doc. 13. She also appeared without prior confirmation. *Id.* On August 22, Country-Wide thereafter rescheduled the EUO for September 16, 2016. *Id.*; Doc. 19. However, neither Brissette nor her attorney appeared for this second EUO. Doc. 20. On September 20, 2016, Country-Wide sent a notice for a final EUO attempt that was to be held on October 11, 2016. Docs. 13, 21. The final notice made clear that a failure to attend the EUO may be considered a breach of the insurance contract and that it could result in the denial of Brissette’s entire claim. Doc. 21. Again, Brissette and her attorney did not appear at the EUO. Docs. 13, 22. On October 27, 2016, Country-Wide issued a general denial of the claim. Doc. 13. According to Country-Wide, pursuant to 11 NYCRR §§ 65-1.1 and 65-3.5(e), attending the requested EUOs was a condition precedent to coverage with which Brissette did not comply. *Id.*

On September 14, 2017, Country-Wide commenced this declaratory judgment action against Brissette and the Medical Provider Defendants by filing a summons and verified complaint alleging that it was not required to provide coverage due to Brissette missing her scheduled EUOs. Docs. 1, 13. Process was properly served on all the Medical Provider Defendants on October 6, 2017, via the Secretary of State and on Brissette on October 9, 2017. Docs. 4, 15. Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against all defendants. The motion is unopposed.

### 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.” *Atlantic Cas. Ins. Co. v. RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept. 2011). Proof of the facts constituting the claim may be provided by the plaintiff’s affidavit or by a verified complaint. *See* CPLR 3215(f).

Counsel for plaintiff has submitted affidavits of service establishing that the summons and complaint were properly served on defendant Brissette at her last known address. Doc. 15. The affidavits also establish that the Medical Provider Defendants were properly served via the Secretary of State. Docs. 4, 13, 15. Moreover, in an affirmation in support of the motion, plaintiff has shown that neither Brissette nor the Medical Provider Defendants have answered or have otherwise appeared in this matter. Doc. 13.

Although Country-Wide has proved that process was properly served on all defendants and that none of the defendants have answered or appeared in this matter, the Court nevertheless denies Country-Wide's motion for a default judgment in its favor because it failed to establish the facts constituting the claim. *See* CPLR 3215(f). 11 NYCRR § 65-3.4(a) provides that an insurer may receive notice of a claim by telephone.<sup>2</sup> When a claim is processed via telephone, 11 NYCRR § 65-3.4(b) mandates that the insurer, within five business days after notice is received, must "forward to the applicant the prescribed application for motor vehicle no-fault benefits (NYS form N-F 2) accompanied by the prescribed cover letter (NYS form N-F 1)."

Here, although plaintiff has submitted proof of the NF-3 forms, (Doc. 26), which verify that the Medical Defendants gave treatment to Brissette, as well as the NF-10 form, (Doc. 25), which is the form utilized for denials of claims, plaintiff has not submitted proof of the NF-1 or NF-2 forms. Plaintiff has also submitted an affidavit by one of its employees who references receipt of the NF-2, but this affidavit does not give any indication as to what date the NF-2 was forwarded to Brissette. Doc. 23. Without record of the NF-2 form, it is impossible for this Court to determine whether plaintiff followed the procedures mandated by 11 NYCRR § 65-3.4(b).

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that plaintiff's motion for default judgment against Brissette and the Medical Provider Defendants is denied with leave to renew upon proper papers, and it is further

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<sup>2</sup> "Whenever the insurer receives notice of claim by telephone, the party receiving such notice on behalf of the insurer shall be identified to the caller by name and title and shall request the name, address and telephone number of the applicant and the name of the policyholder or the policy number or both, if available, along with reasonably obtainable information regarding the time, place and circumstances of the accident which will enable the insurer to begin processing the claim." 11 NYCRR § 65-3.4(a).

**ORDERED** that Country-Wide is to serve a copy of this order, with notice of entry, on all parties within twenty days hereof; and it is further

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

6/26/2018

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: