

Liberty Mut. Ins. Co. v Acevedo
2019 NY Slip Op 33283(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 655492/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 655492/2017

LIBERTY MUTUAL INSURANCE COMPANY and LM
GENERAL INSURANCE COMPANY,

MOTION DATE 08/12/2019

Plaintiffs,

MOTION SEQ. NO. 003

- v -

DANNY ACEVEDO, AHMED MEDICAL CARE, P.C.,
CLEAR WATER PSYCHOLOGICAL SERVICES P.C.,
DIRECT CHIROPRACTIC CARE, P.C., FJL MEDICAL
SERVICES P.C., HANDS ON PHYSICAL THERAPY CARE
P.C., ISLAND AMBULATORY SURGERY CENTER, LLC,
LENEX SERVICES INC., LESLEY ANNE UY BENDIGO, PT,
LIFE EQUIPMENT INC., LN MEDICAL DIAGNOSTIC P.C.,
LR MEDICAL, PLLC, MED EQUIPMENTS SERVICES, P.C.,
MEDICAL DIAGNOSTIC SERVICES, P.C., MEDICAL
SUPPLY STORE INC., NY CENTER FOR SPECIALTY
SURGERY, PARK AMBULATORY MEDICAL SERVICES,
PLLC, PRO-ALIGN CHIROPRACTIC, P.C., RADIOLOGY
RESOURCES, P.C., STARTING POINT ACUPUNCTURE,
P.C., and WOODSIDE CHEMISTS, INC.

**DECISION, ORDER, and
JUDGMENT**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58,
59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for

JUDGMENT - DEFAULT

In this declaratory judgment action, the plaintiff insurers move pursuant to CPLR 3215
for leave to enter a default judgment against the defendants Danny Acevedo and the
defendants Clear Water Psychological Services, P.C., Island Ambulatory Surgery Center, LLC,
Lenex Services, Inc., Lesley Anne Uy Bendigo, PT, Life Equipment, Inc., LN Medical Diagnostic,
P.C., Med Equipments Services, P.C., Medical Diagnostic Services, P.C., Medical Supply Store,
Inc., NY Center for Specialty Surgery, Park Ambulatory Medical Services, PLLC, Radiology
Resources, P.C., Starting Point Acupuncture, P.C., and Woodside Chemists, Inc. (collectively
the defaulting health-care defendants), declaring that the plaintiffs are not obligated to pay no-

fault benefits to Acevedo in connection with injuries that he sustained in a motor vehicle accident, or to reimburse the defaulting health-care defendants for treatment that they rendered or equipment and supplies that they provided to him for those injuries. No opposition is submitted. While the motion was pending, the plaintiffs discontinued the action against Woodside Chemists, Inc. The motion is granted as against Acevedo and all of the defaulting health-care defendants save Woodside Chemists, Inc., and the motion is otherwise denied.

Acevedo claimed that he was injured in a motor vehicle accident on June 13, 2016, and that he thereafter obtained medical treatment or medical supplies from all of the other defendants. Those other defendants sought payment under claim number LA-000-033964240-0001, as Acevedo's assignees, for no-fault benefits under insurance policy number AO5-22815665440, as issued by the plaintiffs to Acevedo (see Insurance Law 5106[a]; 11 NYCRR 65-1.1). Acevedo timely appeared for and submitted to an examination under oath (EUO). The plaintiffs timely denied the numerous claims for benefits, beginning on March 22, 2017 (see 11 NYCRR 65-3.8[a][1]), concluding that, based on his testimony at the EUO and its own investigation, Acevedo made material misrepresentations in his initial application for the issuance of the subject insurance policy with respect to where the insured vehicle was usually garaged and maintained in order to lower the cost of obtaining the policy, and that coverage was thus vitiated.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of the facts constituting the claim, and proof of the defendant's default (see CPLR 3215[f]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]). The plaintiffs submit the affidavits of service referable to service of the summons and complaint upon Acevedo and all of the defaulting health-care defendants, along with several attorney's affirmations. As proof of the facts constituting its claims, the plaintiffs submit the affidavits of its Special Investigator Robert Larmour and its Claims Department Team Manager, Dennis Dehler, along with all of the claims invoices submitted to it by Acevedo's medical providers, a transcript of Acevedo's EUO

testimony, and the denials of claim issued by the plaintiffs. The affidavits of service establish that all of the defendants were served with process, and the attorney's affirmations establish that the defendants did not answer or appear.

Where an insured makes material misrepresentations on his or her application for insurance as to where he or she regularly garages a vehicle sought to be insured, coverage is defeated (see *Remedial Med. Care, P.C. v Infinity Prop. & Cas. Co.*, 2017 NY Slip Op 50391[U], 55 Misc 3d 130[A] [App Term, 2d, 11th & 13th Jud Dists, Mar. 31, 2017]; *Jamaica Dedicated Med. Care, P.C. v Praetorian Ins. Co.*, 2015 NY Slip Op 50756[U], 47 Misc 3d 147[A] [App Term, 2d, 11th & 13th Jud Dists, May 6, 2015]). The plaintiffs' proof establishes, prima facie, the facts underpinning their contentions, namely, that when Acevedo first applied for insurance coverage, he represented that he resided in Lancaster, Pennsylvania, and that the insured vehicle was regularly garaged there, but that he actually lived a significant amount of time in Brooklyn, New York, and kept the vehicle garaged there, where premium rates are substantially higher than for vehicles garaged in Lancaster. Larmour asserted that his personal investigation revealed that the insured vehicle was regularly kept and garaged in Brooklyn, and that Acevedo confirmed in his EUO that he resided six days per week in Brooklyn. Dehler's affidavit establishes that all of the plaintiffs' denials of claims were timely rendered, and were expressly based on the ground that Acevedo made material misrepresentations in connection with his application for insurance with respect to the where the vehicle was regularly garaged in order to reduce his insurance premium rates.

The court notes that Larmour's affidavit was executed and notarized in New Jersey, but does not include the certificate of conformity required by CPLR 2309, which is a written instrument pursuant to which a person qualified by the laws of the country or state in which an affidavit is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit has indeed been drafted, executed, and notarized in conformity with the laws of that country or state. This defect does not require the court to disregard the affidavit or deny relief to

the plaintiffs, as the defect may be cured by the submission of the proper certificate nunc pro tunc (*see Bank of New York v Singh*, 139 AD3d 486 [1st Dept 2016]).

The court further notes that, by stipulation dated May 3, 2019, the plaintiffs discontinued the action against the defendants Ahmed Medical Care, P.C., Direct Chiropractic Care, P.C., FJL Medical Services, P.C., Hands On Physical Therapy Care, P.C., and Pro-Align Chiropractic, P.C., and that, by stipulation dated September 18, 2019, the plaintiffs discontinued the action against the defendant Woodside Chemists, Inc. Hence, the disposition of the instant motion constitutes a disposition of the entire action.

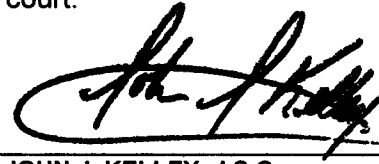
Accordingly, it is

ORDERED that the plaintiffs' motion for leave to enter a default judgment against the defaulting health-care defendants is granted, without opposition, to the extent that they are awarded judgment against the defendants Danny Acevedo, Clear Water Psychological Services, P.C., Island Ambulatory Surgery Center, LLC, Lenex Services, Inc., Lesley Anne Uy Bendigo, PT, Life Equipment, Inc., LN Medical Diagnostic, P.C., Med Equipments Services, P.C., Medical Diagnostic Services, P.C., Medical Supply Store, Inc., NY Center for Specialty Surgery, Park Ambulatory Medical Services, PLLC, Radiology Resources, P.C., and Starting Point Acupuncture, P.C., and the motion is otherwise denied; and it is,

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the defendant Danny Acevedo in connection with injuries that he sustained in a motor vehicle accident on June 13, 2016, or to reimburse the defendants Clear Water Psychological Services, P.C., Island Ambulatory Surgery Center, LLC, Lenex Services, Inc., Lesley Anne Uy Bendigo, PT, Life Equipment, Inc., LN Medical Diagnostic, P.C., Med Equipments Services, P.C., Medical Diagnostic Services, P.C., Medical Supply Store, Inc., NY Center for Specialty Surgery, Park Ambulatory Medical Services, PLLC, Radiology Resources, P.C., and Starting Point Acupuncture, P.C., for treatment they rendered or equipment and supplies they provided to him for those injuries.

This constitutes the Decision, Order, and Judgment of the court.

10/31/2019
DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
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: