

**State Farm Mut. Auto. Ins. Co. v Advanced
Orthopaedics, P.L.L.C.**

2019 NY Slip Op 33471(U)

November 20, 2019

Supreme Court, New York County

Docket Number: 151553/2019

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 2EFM

Justice

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INDEX NO. 151553/2019

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT
SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND
REHABILITATION SUPPLY CO., INC., BETHESDA PT,
P.C., JAW-SY CHEN, PHD, EXCELL CLINICAL LAB, INC.,
HARMONY PSYCHOLOGICAL, P.C., INNOVATION
ANESTHESIA & PAIN SERVICES P.C., NATURAL
APPROACH CHIROPRACTIC, P.C., REDTREE
RADIOLOGY, P.C., SABAS NY SERVICES, INC., FRANK
S. SEGRETO, M.D., SPENCER A. COLDEN, M.D.,
SUMMIT ACUPUNCURE NY, P.C., UNIVERSITY
ANESTHESIA SERVICES, P.C., and JESSICA LOPEZ,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27,
28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - DEFAULT

In this declaratory judgment action, plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") moves, pursuant to CPLR 3215, for a default judgment against defendants ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND REHABILITATION SUPPLY CO., INC., BETHESDA PT, P.C., HARMONY PSYCHOLOGICAL, P.C., INNOVATION ANESTHESIA & PAIN SERVICES P.C. a/k/a INNOVATION ANESTHESIA PAIN SERVICES, NATURAL APPROACH CHIROPRACTIC, P.C., REDTREE RADIOLOGY, P.C., FRANK S. SEGRETO, M.D., SPENCER A. COLDEN, M.D., SUMMIT ACUPUNCURE NY, P.C.; and JESSICA LOPEZ ("the

non-answering defendants”). After a review of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a motor vehicle collision (“the collision” or “the incident”) on March 5, 2018, in which defendant Jessica Lopez (“Lopez”) was allegedly injured. Doc. 24 at par. 4. At the time of the incident, Lopez was allegedly a passenger in a 2014 Audi (“the insured vehicle”) driven by nonparty Samil Gomez (“Gomez”), owned by nonparty Jasmin Caban (“Caban”), and insured in the name of Caban and nonparty Vida Café, Inc. under State Farm policy number 206115132A. Doc. 24 at par. 4.; Doc. 30. A police accident report (“the police report”) reflected that the only occupant of the insured vehicle at the time of the collision was Gomez; that there were no injuries at the scene; and that the incident occurred when Gomez attempted to change lanes and struck another vehicle. Doc. 24 at par. 4; Doc. 27.

On or about March 6, 2018, Lopez filed a claim for no-fault benefits with State Farm alleging that she was a passenger in the insured vehicle and that she was injured as a result of the collision. Doc. 28. A date stamp on the claim appears to reflect that it was received by State Farm on April 9, 2018, and it was assigned claim number 32-3558-H44. Doc. 28.

State Farm subsequently received claims by defendants ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND REHABILITATION SUPPLY CO., INC., BETHESDA PT, P.C., JAW-SY CHEN, PHD, EXCELL CLINICAL LAB, INC., HARMONY PSYCHOLOGICAL, P.C., INNOVATION ANESTHESIA & PAIN SERVICES P.C. a/k/a INNOVATION ANESTHESIA PAIN SERVICES, NATURAL APPROACH CHIROPRACTIC, P.C., REDTREE RADIOLOGY, P.C.,

SABAS NY SERVICES, INC., FRANK S. SEGRETO, M.D., SPENCER A. COLDEN, M.D., SUMMIT ACUPUNCURE NY, P.C., and UNIVERSITY ANESTHESIA SERVICES, P.C., totaling in excess of \$44,000, for treatment they rendered to defendant Lopez, and submitted the bills to State Farm as her assignees.

Although Lopez was not named in the police accident report, she filed a Report of Motor Vehicle Accident dated April 3, 2018 in which she claimed that she was injured in the collision while a passenger in a vehicle driven by Gomez. Doc. 29. A State Farm representative spoke to Gomez, who denied that Lopez was in the vehicle at the time of the collision. Additionally, the officer who wrote the police report advised a State Farm representative that there were no injuries reported at the scene and that Gomez was the sole occupant of the insured vehicle.

Given that its investigation of the incident raised questions about whether Lopez had been involved, State Farm wrote to Lopez on May 25, 2018 to demand that she appear for an examination under oath (“EUO”). Doc. 30. Counsel for Lopez requested adjournments of the EUO until June 27, and then July 17, 2018. Doc. 30. On July 17, 2018, Lopez failed to appear for her EUO and the proceeding was rescheduled for August 14, 2018. Doc. 30. Lopez failed to appear again on August 14, 2018 and her EUO was rescheduled for September 6, 2018. Doc. 30. Counsel for Lopez then requested that the EUO be adjourned until October 2, 2018. Doc. 30. On October 2, 2018, Lopez again failed to appear for her EUO. Doc. 30.

On February 12, 2019, State Farm commenced the captioned declaratory judgment action against ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND REHABILITATION SUPPLY CO., INC., BETHESDA PT, P.C., JAW-SY CHEN, PHD, EXCELL CLINICAL LAB, INC., HARMONY PSYCHOLOGICAL, P.C., INNOVATION ANESTHESIA & PAIN SERVICES P.C. a/k/a INNOVATION

ANESTHESIA PAIN SERVICES, NATURAL APPROACH CHIROPRACTIC, P.C., REDTREE RADIOLOGY, P.C., SABAS NY SERVICES, INC., FRANK S. SEGRETO, M.D., SPENCER A. COLDEN, M.D., SUMMIT ACUPUNCURE NY, P.C., UNIVERSITY ANESTHESIA SERVICES, P.C., and JESSICA LOPEZ. Doc. 1. As a first cause of action, State Farm claimed that it had a founded belief that Lopez's alleged injuries did not arise from the collision, and so it did not have a duty to pay any bills related to any treatment she had which allegedly arose from the incident. Doc. 1 at pars. 35-36. As a second cause of action, State Farm claimed that, since Lopez breached a condition precedent to coverage by failing to appear for an EUO, it was not obligated to pay any claims arising from her treatment. Doc. 1 at pars. 38-40. As a third cause of action, State Farm alleged that it had no duty to pay for Lopez's treatment since any injuries she sustained were not caused by the collision. Doc. 1 at pars. 42-43. As a fourth cause of action, State Farm alleged that it would suffer irreparable harm if a permanent stay of all arbitrations, lawsuits, and/or claims by defendants were not issued pending the determination of this action. Doc. 1 at pars. 45-46.

State Farm could not locate JAW-SY CHEN, PHD and UNIVERSITY ANESTHESIA SERVICES, P.C. and, thus, they could not be served with process. Although the remainder of the defendants were served, only EXCELL CLINICAL LAB, INC. and SABAS NY SERVICES, INC. have answered.

State Farm now moves, pursuant to CPLR 3215, for a default judgment against the non-answering defendants. In support of the motion, State Farm submits, inter alia, the summons and complaint (Doc. 25); affidavits of service (Doc. 26); the attorney affirmation of David F. Boucher, Jr., Esq. attesting to Lopez's failure to appear for an EUO as well as the non-answering defendants' failure to answer or otherwise appear in this action (Doc. 30); an affidavit by Caban attesting to

the fact that she and Lopez came to the accident scene together *after* the collision (Doc. 31); an affidavit by Gomez attesting to the fact that he was driving alone at the time of the incident and that Lopez had been involved in other automobile accidents for which she had commenced lawsuits (Doc. 32); an affidavit by Christina Mingucci, a claims specialist for State Farm, in which she states that Lopez's failure to appear for a properly requested EUO was a violation of a condition precedent to coverage under the no-fault regulations and that State Farm denied all of the bills submitted for her treatment on this ground, as well as that the police report and the affidavits of Caban and Gomez establish a founded belief that any injuries sustained by Lopez did not arise from an insured incident (Doc. 30). The motion is unopposed.

LEGAL CONCLUSIONS:

Pursuant to CPLR 3215 (f), a plaintiff moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear. *See 154 E. 62 LLC v 156 E 62nd St. LLC*, 159 AD3d 498 (1st Dept 2018); *Bank of Am. N.A. v Agarwal*, 150 AD3d 651, 652 (2d Dept 2017).

Here, the affidavits of service submitted by plaintiff establish that all defendants except JAW-SY CHEN, PHD and UNIVERSITY ANESTHESIA SERVICES, P.C. were served with the summons and complaint. The affirmation of State Farm's attorney in support of the motion establishes that, with the exception of EXCELL CLINICAL LAB, INC. and SABAS NY SERVICES, INC., the non-appearing defendants were served with process, have failed to answer, and are therefore in default. Thus, the only remaining question is whether plaintiff established the facts constituting the claim.

To set forth the facts constituting the claim in a motion for default judgment pursuant to CPLR 3215, a party must submit either a complaint verified by a party with personal knowledge of the facts of the case, or an affidavit executed by such an individual. CPLR 3215(f); *see Mullins v DiLorenzo*, 199 AD2d 218, 219-20 (1st Dept 1993). An attorney affirmation is insufficient for this purpose. *See Mattera v Capric*, 54 AD3d 827, 828 (2d Dept 2008). Since the complaint is verified by counsel, State Farm must therefore rely on the affidavits it submits in support of the motion. *See Liberty Mut. Ins. Co. v Mercer*, 2018 NY Slip Op 31284(U) (Sup Ct New York County 2018).

State Farm has adduced facts constituting the claim which entitle it to a default judgment on its first cause of action, alleging that it has a "founded belief" that the collision did not arise from an insured incident. An insurer may disclaim coverage based upon "the fact or founded belief that the alleged injury does not arise out of an insured incident." *Central Gen. Hosp. v Chubb Grp. of Ins. Co.*, 90 NY2d 195, 199 (1997). In meeting this burden, a no-fault insurer is "not required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence." *V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 25 Misc. 3d 39, 41 (App Term, 2d Dept 2009) (internal citation omitted). Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief. Circumstantial evidence may be used to prove such facts if a party's conduct "may be 'reasonably inferred' based upon 'logical inferences to be drawn from the evidence.'" *Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 (2d Dept 2005) (citation omitted).

Here, as noted previously, State Farm conducted an investigation of the collision and submits an affidavit from Mingucci in which she attests, inter alia, that the police report and the affidavits of Caban and Gomez establish that Lopez was not in the insured vehicle at the time of

the collision.¹ Additionally, Gomez attests to the fact that Lopez had been involved in prior automobile accidents and had discussed with him personal injury lawsuits she commenced as a result of the same. Doc. 32.

This Court finds that the foregoing facts are sufficient to provide State Farm with a founded belief that the medical treatment allegedly provided to Lopez in connection with the collision was not caused by the said incident. Thus, State Farm has established the facts constituting its first cause of action and it is thus entitled to a default judgment based on the said claim. Given this finding, it is not necessary for this Court to address whether Lopez's EUO was properly noticed.

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

ORDERED that the motion by plaintiff State Farm Mutual Automobile Insurance Company, pursuant to CPLR 3215, for a default judgment, is granted on its first cause of action as against defendants ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND REHABILITATION SUPPLY CO., INC., BETHESDA PT, P.C., HARMONY PSYCHOLOGICAL, P.C., INNOVATION ANESTHESIA & PAIN SERVICES P.C. a/k/a INNOVATION ANESTHESIA PAIN SERVICES, NATURAL APPROACH CHIROPRACTIC, P.C., REDTREE RADIOLOGY, P.C., FRANK S. SEGRETO, M.D., SPENCER A. COLDEN, M.D., SUMMIT ACUPUNCURE NY, P.C., and JESSICA LOPEZ; and it is further

¹ Although Mingucci's affidavit lacks a certificate of conformity (*see* CPLR 2309[c]), this is not a fatal defect and it may be remedied nunc pro tunc. *See Fredette v Town of Southampton*, 95 AD3d 940 (2d Dept 2012).

ORDERED and ADJUDGED that plaintiff State Farm Mutual Automobile Insurance Company has no contractual duty to defend, indemnify, or provide no-fault benefits to defendants ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND REHABILITATION SUPPLY CO., INC., BETHESDA PT, P.C., HARMONY PSYCHOLOGICAL, P.C., INNOVATION ANESTHESIA & PAIN SERVICES P.C. a/k/a INNOVATION ANESTHESIA PAIN SERVICES, NATURAL APPROACH CHIROPRACTIC, P.C., REDTREE RADIOLOGY, P.C., FRANK S. SEGRETO, M.D., SPENCER A. COLDEN, M.D., SUMMIT ACUPUNCURE NY, P.C., and JESSICA LOPEZ under policy number 206115132A, claim number 32-3558-H44, which it issued to Vida Café Inc. and Jasmin Caban, in any action or proceeding brought for damages arising out of personal injury or property damage as a result of the alleged accident on March 5, 2018; and it is further

ORDERED and ADJUDGED that plaintiff State Farm Mutual Automobile Insurance Company is not obligated to provide coverage for any claim or honor or pay claims for reimbursement submitted by defendants ADVANCED ORTHOPAEDICS, P.L.L.C., BARNERT SURGICAL CENTER, LLC, BAY ORTHOPEDIC AND REHABILITATION SUPPLY CO., INC., BETHESDA PT, P.C., HARMONY PSYCHOLOGICAL, P.C., INNOVATION ANESTHESIA & PAIN SERVICES P.C. a/k/a INNOVATION ANESTHESIA PAIN SERVICES, NATURAL APPROACH CHIROPRACTIC, P.C., REDTREE RADIOLOGY, P.C., FRANK S. SEGRETO, M.D., SPENCER A. COLDEN, M.D., and SUMMIT ACUPUNCURE NY, P.C., arising from the alleged accident of March 5, 2018 under New York Insurance Regulation 68; and it is further

ORDERED that plaintiff State Farm Mutual Automobile 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 that the claims against defendants JAW-SY CHEN, PHD and UNIVERSITY ANESTHESIA SERVICES, P.C. are dismissed on the ground that said defendants were never served with process; and it is further

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

ORDERED that plaintiff State Farm Mutual Automobile Insurance Company and defendants EXCELL CLINICAL LAB, INC. and SABAS NY SERVICES, INC. are to appear for a preliminary conference on February 25, 2020 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that if this matter is resolved prior to February 25, 2020, the parties shall advise chambers of this fact in writing in advance of the conference scheduled for that day; and it is further

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

11/20/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE