

**State Farm Mut. Auto. Ins. Co. v Alternative Health
Ctr., P.C.**

2020 NY Slip Op 33195(U)

September 29, 2020

Supreme Court, New York County

Docket Number: 159904/2019

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip
Op 30001(U), are republished from various New York
State and local government sources, including the New
York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Plaintiff,

INDEX NO. 159904/2019

MOTION DATE 09/04/2020

MOTION SEQ. NO. 001

- v -

ALTERNATIVE HEALTH CENTER,
P.C., ANESTHESIOLOGY AND PAIN SERVICES
CONSULTANTS, P.C., NES GEORGIA, INC., ODI
DIAGNOSTICS, LLC, REDI PHARMACY, TRINITAS
REGIONAL MEDICAL CENTER, UNIVERSITY
RADIOLOGY GROUP, P.C., BERNALDO GUTIERREZ

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35,
36, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - DEFAULT.

In this declaratory judgment action, the plaintiff insurer moves pursuant to CPLR 3215 for leave to enter a default judgment against defendants Bernaldo Liriano Gutierrez, Anesthesiology and Pain Services Consultants, P.C., ODI Diagnostics, LLC, Redi Pharmacy and Trinitas Regional Medical Center. (the non-answering medical defendants), declaring that it is not obligated to pay no-fault benefits in connection with injuries allegedly sustained by defendant Gutierrez in a motor vehicle accident, or to reimburse the non-answering medical defendants for treatment they rendered or equipment and supplies they provided to him for those injuries. The action has been discontinued as against defendants Alternative Health Center, P.C. and NES Georgia, Inc. Defendant University Radiology Group, Inc. was not served. No opposition to the motion is submitted. The motion is granted.

Defendant Gutierrez claimed that he was injured in a motor vehicle accident in Roselle, New Jersey on February 25, 2019, while driving a 2004 Mitsubishi Galant, which was insured in his name by the plaintiff. He thereafter submitted an application for no-fault benefits. He

obtained medical treatment or medical supplies from the various medical defendants. The medical defendants sought payment for no-fault benefits under insurance policy number 2269-521-32, as issued by the plaintiffs to Gutierrez, under claim number 32-7903-N09. See Insurance Law 5106(a); 11 NYCRR 65-1.1.

An investigation by the plaintiffs revealed that the police report of the accident stated that the 2004 Mitsubishi Galant vehicle is registered to Liriano Gutierrez at 1228 Green Street Apt. 2, Utica, N.Y. 135022, the policy address provided by Gutierrez. No injuries were reported at the scene. The plaintiff received a no-fault bill on behalf of Gutierrez who indicated a New Jersey address as his primary address, 1025 North Broad Street, Apt. A7, Elizabeth, N.J. 07208. The plaintiff determined that the two addresses are 280 miles apart, the vehicle had been sighted only in New Jersey since December 6, 2018, and the vehicle was involved in a prior accident on December 14, 2018. A neighbor at the Utica, New York, address was not familiar with Gutierrez or the subject vehicle. The six-month premium difference between the two addresses is \$1,602.32, Utica being lower. The plaintiff determined that this information raised a strong possibility that Gutierrez made a material misrepresentation regarding his residence and the primary garage location of the vehicle when the policy was procured, which would be considered a non-covered event under the no-fault regulations.

As a result of the investigation, the plaintiffs requested that Gutierrez appear for an examination under oath (EUO). Gutierrez appeared and testified. However, his testimony supported the plaintiff's initial conclusion that he made a material misrepresentation. The testimony revealed that he was living in New Jersey on the day he purchased the vehicle and the policy, November 29, 2018, and the vehicle had been kept primarily in New Jersey. Gutierrez claimed that he resided at the policy address in Utica since 2016, but could not provide a specific date of when he moved there, and later testified that he lived there in 2014-2015, and could not state whether a brother lived there. The lease at the Utica address was not in Gutierrez' name and he did not recognize the name on the lease. He had only one bank account, opened in New Jersey in September 2018, which was connected to a New Jersey address. He was employed in New Jersey prior to the accident and was traveling from work to home at the time. Gutierrez also drove from the New Jersey address to the EUO.

Following the EUO, the plaintiffs denied the claims for benefits (see 11 NYCRR 65-3.8[a][1]), concluding that, based on the EUO testimony and its own investigation, policyholder

Gutierrez had made a material misrepresentation regarding his residence and the primary garage location of the vehicle when the policy was procured for the purpose of lowering the cost of obtaining the policy, and that coverage was thus vitiated.

“On 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 CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011); see Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]) The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). The plaintiffs met this burden.

As proof of the facts constituting their claims, the plaintiffs submit the complaint, an affidavit of Tim Dacey, a Claims Specialist for the plaintiffs, the transcript of the EUO and the denial of claim forms. The plaintiff also submits the affidavit of Dawn Thompson, an employee in the plaintiff’s underwriting department, who states that had the plaintiff been aware of this newly discovery information at the time the policy was applied for, it would not have issued the subject policy. The subject policy was issued upon the representation that the insured resided at the vehicle was to be garaged at 1228 Green Street, Utica, New York. The plaintiffs also submit proof of service of the summons and complaint, the motion and the additional mailing required by CPLR 3215. The attorney’s affirmation establishes which defendants did not answer or appear in this action.

It is well settled that an insurer may deny coverage based upon an insured’s material misrepresentation in his or her insurance application. See Insurance Law 3105(a);(b); Liang v Progressive Casualty Ins. Co., 172 AD3d 696 (2nd Dept. 2019); Ambac Assurance Corp. v Countrywide Home Loans, Inc., 151 AD3d 83 (1st Dept. 2017); Tower Ins. Co. of N.Y. v Khan, 93 AD3d 618 (1st Dept. 2012); W.H.O Acupuncture, P.C. v Infinity Property & Casualty Co., 36 Misc3d 4 App Term, 2nd 11th & 13th Jud. Dists 2012). In particular, 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., 55 Misc. 3d 130(A) (App. Term, 2nd, 11th & 13th Jud. Dists., Mar. 31, 2017); Jamaica Dedicated Med. Care, P.C. v Praetorian Ins. Co., 47 Misc. 3d 147(A) (App. Term, 2nd, 11th & 13th Jud. Dists., May 6, 2015).

The plaintiffs' proof establishes, *prima facie*, the facts underpinning their contentions, namely, that policyholder Bernaldo Liriano Gutierrez made a material misrepresentation regarding his residence and the primary garage location of the vehicle when the policy was procured for the purpose of lowering the cost of obtaining the policy, and that coverage was thus vitiated. With the proof submitted, and in light of the applicable law, the plaintiff establishes that the defendants, as purported assignees of Gutierrez, are not entitled to no-fault benefits under article 51 of the Insurance Law, for the purported accident of February 5, 2019. Having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). Therefore, the plaintiff is entitled to a judgment so declaring.

Accordingly, it is

ORDERED that the plaintiffs' motion for leave to enter a default judgment pursuant to CPLR 3215 is granted, without opposition; and it is further,

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the defendants Bernaldo Liriano Gutierrez, Anesthesiology and Pain Services Consultants, P.C., ODI Diagnostics, LLC, Redi Pharmacy and Trinitas Regional Medical Center in connection with injuries allegedly sustained by Gutierrez in a motor vehicle accident on February 5, 2019, and claimed under policy number 2269-521-32, claim number 32-7903-N09; and it is further,

ADJUDGED AND DECLARED that all actions, proceedings or arbitrations commenced by the defendants in connection with injuries allegedly sustained by defendant Gutierrez in a motor vehicle accident on February 5, 2019, and claimed under policy number 2269-521-32, claim number 32-7903-N09; are permanently stayed, and that the defendants are enjoined from commencing any such further actions, proceedings or arbitrations; and it is further,


ORDERED that the action is discontinued and the complaint dismissed as against defendants Alternative Health Center, P.C., NES Georgia, Inc. and University Radiology Group, Inc., and it is further

ORDERED the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order.

ORDERED that the Clerk shall enter judgment accordingly.

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

9/29/2020
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER