

Liberty Mut. Ins. Co. v Thomas
2020 NY Slip Op 33270(U)
October 5, 2020
Supreme Court, New York County
Docket Number: 654092/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 654092/2019

MOTION DATE 08/17/2020

MOTION SEQ. NO. 001

- v -

KENDON THOMAS, AMRO CARE PT, P.C.,LAWRENCE
CHIROPRACTIC DIAGNOSTIC SERVICES, NORTH
SHORE HOME CARE SERVICES, INC.,AVA CUSTOM
SUPPLY INC.,OPUS PSYCHOLOGICAL SERVICES P.C.,SI
ACUPUNCTURE, PC,METRO PAIN SPECIALISTS
PROFESSIONAL CORPORATION, PROSPECT
CHIROPRACTIC PLLC,CITIMEDICAL I, PLLC,MAURO
CHIROPRACTIC P.C.,HARBOR MEDICAL GROUP
PC,ACUTUS RX, LLC,AK GLOBAL SUPPLY CORP.

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 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 JUDGMENT - DEFAULT

In this declaratory judgment action, the plaintiffs move (1) pursuant to CPLR 3215 for leave to enter a default judgment against the individual defendant, Kendon Thomas, and the non-answering healthcare defendants Amro Care PT, P.C., Lawrence Chiropractic Diagnostic Services, P.C., North Shore Home Care Services, Inc., Ava Custom Supply, Inc., Opus Psychological Services, Inc., Si Acupuncture, P.C., Prospect Chiropractic PLLC, Mauro Chiropractic, P.C. and Acutus Rx, LLC, and (2) pursuant to CPLR 3212 for summary judgment against answering health-care defendants Metro Pain Specialists Professional Corp., CitiMedical I, PLLC, Harbor Medical Group P.C., and AK Global Supply Corp. The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to Thomas, or to the health-care defendants for treatment or medical equipment supplied to Thomas, for injuries allegedly sustained in a motor vehicle accident on July 5, 2018 as Thomas failed to appear for duly scheduled Examinations Under Oath (EUOs).

Non-answering defendant Ava Custom Supply, Inc., opposes the portion of the plaintiffs' motion seeking leave to enter a default judgment as against it, and in its opposition papers, seeks to compel the plaintiff to accept the answer it filed with its opposition pursuant to CPLR 3012(d). Defendants Metro Pain Specialists Professional Corp., CitiMedical I, PLLC, and AK Global Supply Corp. oppose the portion of the plaintiffs' motion seeking summary judgment, and defendant AK Global Supply Corp. separately, submits a second opposition and cross-moves pursuant to CPLR 3012(d) to compel the plaintiff to accept its late answer. The plaintiffs' motion is granted, and the cross-motions are denied.

The plaintiff discontinued this action as against defendant Harbor Medical Group P.C., pursuant to the parties' stipulation filed August 14, 2020. As such, the plaintiff's motion for summary judgment as against that defendant is deemed withdrawn and the plaintiff's motion for summary judgment proceeds only as against defendants Metro Pain Specialists Professional Corp., CitiMedical I, PLLC, and AK Global Supply Corp.

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 defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, proof of the facts constituting the claim. While the "quantum of proof necessary to support an application for a default judgment is not exacting... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). The plaintiff has met that burden.

Defendant Thomas claimed to have suffered injury in a motor vehicle accident on July 5, 2018, while a passenger in a vehicle insured by the plaintiffs by policy number AOS22823665040. He thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiffs, the health-care defendants sought payment under claim number 10377708600-04, as assignees of the individual defendant. See Insurance Law 5106(a); 11 NYCRR 65-1.1. An investigation into the claims was commenced due to the high amount of billing received following a minor accident. The plaintiffs' scheduled an EUO for

September 17, 2018, but defendant Thomas failed to appear. He also failed to appear on three subsequent dates for a rescheduled EUO. The plaintiffs thereafter denied the defendants' claims. The plaintiffs now seek a judgment declaring that they are not required to pay the no-fault benefits as Thomas is not an eligible injured person under the terms of the subject policy.

The plaintiffs' submissions include the complaint, verified by Kelly Malone-Geard, a Claims Examiner for the plaintiffs, an affidavit of Dawn Smith, a Claims Department Team Manager in charge of the Special Investigations Unit Liaison Team for the New York State Personal Markets No-Fault Office, the denial of claim forms, reflecting the dates that various bills were submitted to the plaintiffs, the EUO scheduling notices, and the affirmation of Chuck Chang, the attorney present at the scheduled EUO attesting to the fact that defendant Kendon Thomas failed to appear, and transcripts of those EUOs, in which Mr. Chang states on the record that defendant Thomas has failed to appear.

The plaintiffs' submissions demonstrate that the initial notice for an EUO was timely mailed to the individual defendant within 15 business days of its receipt of the health-care defendants' applicable NF-3 forms, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1st Dept. 2015). They also show that the individual defendant did not appear for the initially scheduled EUO, and was provided timely notice of a rescheduled EUO, but failed to appear for those as well. The plaintiffs have thus established, *prima facie*, that, by failing to appear, the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., *supra*; Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014). Having failed to answer, the defaulting 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).

The plaintiffs' request for relief under CPLR 3212 is also granted. It is well settled that the proponent of a motion for summary judgment is entitled to that relief upon tendering sufficient evidence, in admissible form, to demonstrate the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets its burden,

it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The plaintiffs' submissions meet this burden as against defendants Metro Pain Specialists Professional Corp., CitiMedical I, PLLC, and AK Global Supply Corp.

In its opposition to the portion of the plaintiffs' motion seeking leave to enter a default judgment, defendant Ava Custom Supply Inc. seeks leave to compel the plaintiffs to accept its late answer or for leave to file a late answer pursuant to CPLR 3012(d). However, its papers are procedurally defective as they are not accompanied by a Notice of Cross-Motion. See CPLR 2214[a]; 2215; Fried v Jacob Holding, Inc., 110 AD3d 56 (2nd Dept. 2013); Phoenix Enterprises Ltd. P'ship v Ins. Co. of N. Am., 130 AD2d 406 (1st Dept. 1987). In any event, Ava fails to demonstrate its entitlement to that relief. Under CPLR 3012(d), a trial court has the discretionary power to compel acceptance of an untimely pleading "upon such terms as may be just." Emigrant Bank v Rosabianca, 156 AD3d 468, 472 (1st Dept. 2017). In determining whether to grant relief under CPLR 3012(d) a court must consider the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense. See id. Here, Ava failed to answer the complaint for 14 months after it was served by the Secretary of State. Counsel for Ava claims that its delay was due to law office failure, and argues that Ava has a potentially meritorious defense, i.e. the plaintiffs cannot establish that it timely mailed its EUO notices as required by 11 NYCRR 65-3.5(b). Considering the substantial delay in the defendants' response to the complaint, Ava's conclusory claim of law office failure as the reason for its delay, and the fact that the plaintiffs' submissions do demonstrate that it timely mailed its EUO notices, as set forth below, Ava's application for relief under CPLR 3012(d) is denied.

In their opposition to the portion of the plaintiffs' motion seeking summary judgment,, defendants Metro Pain Specialists Professional Corp., CitiMedical I, PLLC, and AK Global Supply Corp. argue that the plaintiffs' submissions fail to establish, by admissible evidence, that the EUO notices were timely. See 11 NYCRR § 65-3.5(b). This argument is without merit. First, those defendants fail to identify the plaintiffs' submissions that would be inadmissible or assert any particular legal argument regarding admissibility. Indeed, the plaintiffs' submissions, consisting of affidavits by persons having personal knowledge of the facts and the business records referenced therein, are all admissible. See GTF Mktg., Inc. v Colonial Aluminum Sales, Inc., 66 NY2d 965 (1985); Matter of Leon RR, 48 NY2d 117 (1979). Furthermore, contrary to

those defendants' contentions, the plaintiffs proof demonstrates that the EUO notices were timely sent. The plaintiffs' denial of claims form shows that they began receiving claims forms on July 31, 2018 and continued receiving claims forms through September 20, 2018, and thus the September 7, 2018 EUO notice was timely. The affidavit of Dawn Smith averring that pursuant to the plaintiffs' standard office practice of mailing the EUO notices were sent on the dates listed creates a presumption of proper mailing, which those defendants fail to rebut. See Am. Transit Ins. Co. v Lucas, 111 AD3d 423 (1st Dept. 2013).

AK Global Supply Corp.'s second opposition and cross-motion pursuant to CPLR 3012(d) to compel the acceptance of its answer is procedurally improper. Supplemental motion papers and sur-replies require leave of court, which was not sought. See CPLR 2214[c]; Leary v Bendow, 161 AD3d 420 (1st Dept. 2018); U.S. Bank Trust, N.A. v Rudick, 156 AD3d 841 (2nd Dept. 2017); Gluck v New York City Transit Auth., 118 AD3d 667 (2nd Dept. 2014). Hiring new counsel does not open the door for additional unauthorized submissions. In any event, AK Global makes the same arguments in this opposition as it does in its first, joint, opposition, and the purported cross-motion is moot. The plaintiffs retained AK Global's answer, replied to its counterclaims, and then filed a motion for summary judgment. As such, the plaintiffs' waived any objections to the untimeliness of the answer. See Rossini Excavating Corp. v Shelter Rock Builders LLC, 89 AD3d 467 (1st Dept. 2011); Phillips v League For Hard of Hearing, 254 AD2d 181 (1st Dept. 1998); Wittlin v Schapiro's Wine Co., 178 AD2d 160 (1st Dept. 1991).

Accordingly, it is,

ORDERED that, upon the parties' stipulation filed August 14, 2020 the action is discontinued, with prejudice and without costs of fees to any party, as against Harbor Medical Group P.C. and the plaintiff's instant motion for summary judgment is deemed withdrawn as against that defendant; and it is further,

ORDERED that the motion of plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company for leave to enter a default judgment pursuant to CPLR 3215, and for summary judgment pursuant to CPLR 3212 is granted in its entirety; and it is further,

ADJUDGED AND DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the defendants Kendon Thomas, Amro Care PT, P.C., Lawrence Chiropractic

Diagnostic Services, P.C., North Shore Home Care Services, Inc., Ava Custom Supply, Inc., Opus Psychological Services, Inc., Si Acupuncture, P.C., Prospect Chiropractic PLLC, Mauro Chiropractic, P.C. and Acutus Rx, LLC, Metro Pain Specialists Professional Corp., CitiMedical I, PLLC, and AK Global Supply Corp. to reimburse them for claims made under insurance policy number AOS22823665040, claim number 10377708600-04, for injuries that Kendon Thomas, or any treatment rendered or medical equipment provided to the Kendon Thomas for injuries that he allegedly sustained in the motor vehicle accident on July 5, 2018; and it is further,

ORDERED that the cross-motion of defendant Ava Custom Supply Inc. and purported cross-motion of defendant AK Global Supply Corp. pursuant to CPLR 3012(d) are denied; and it is further

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

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

10/5/2020
DATE


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

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE