

**Liberty Mut. Ins. Co. v AK Global Supply Corp.**

2020 NY Slip Op 34216(U)

December 15, 2020

Supreme Court, New York County

Docket Number: 654474/19

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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LIBERTY MUTUAL INSURANCE COMPANY,  
LIBERTY MUTUAL FIRE INSURANCE COMPANY,  
LM INSURANCE CORPORATION, and  
WAUSAU UNDERWRITERS INSURANCE COMPANY,

Index No.:  
654474/19

Plaintiffs

-against

AK GLOBAL SUPPLY CORP.,

Defendant.

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CRANE, J.:

Plaintiffs (hereinafter, Liberty Mutual or plaintiff) request a declaration that defendant is not entitled to reimbursement for medical treatment under the no-fault regulations and laws. Plaintiffs, a group of insurance companies under the Liberty Mutual Group umbrella, move for a default judgment based on defendant's failure to answer the complaint. Defendant AK Global Supply Corp. (AK), a medical supplier and assignee of insurance claims, cross-moves for an order compelling acceptance of its answer pursuant to CPLR 3012 (d) or, in the alternative, permitting it leave to serve a late answer.

AK billed plaintiff for \$20,061.55 worth of medical treatments provided to persons injured in motor vehicle accidents. An investigation led plaintiff to believe that the costs of the treatments were inflated. Suspecting fraud, plaintiff sought further information from AK. Plaintiff requested that defendant appear at scheduled examinations under oath (EUOs) and defendant did not appear.

Plaintiff states that it is not obligated to reimburse AK for the no fault claims for which plaintiff sought verification, because AK's failure to appear at the EUOs vitiates coverage. In addition to a declaratory judgment, plaintiff seeks a permanent injunction barring AK from commencing any action or proceeding to obtain reimbursement for those claims.

To obtain a default judgment, a plaintiff must produce proof of service of the summons and complaint and proof of the facts constituting the claim, the default, and the amount due (CPLR 3215 [f]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1<sup>st</sup> Dept 2016]; Siegel, NY Prac § 295 [6th ed 2020] [Westlaw]). The plaintiff must establish a prima facie case of the validity of its claims (*Joosten v Gale*, 129 AD2d 531, 535 [1<sup>st</sup> Dept 1987]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*id.*).

Plaintiff submits an affidavit of proof of service on AK via the New York State Secretary of State. Plaintiff's attorney affirmation states that defendant did not answer the complaint. The complaint itself is verified by an employee of Liberty Mutual and the attorney affirmation provides additional information about the claims.

The failure of a person eligible for no fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (*Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1<sup>st</sup> Dept 2017]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1<sup>st</sup> Dept 2014]). The no fault regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the no-fault insurer if there has not been full compliance with the conditions precedent to coverage (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411, 411 [1<sup>st</sup> Dept 2015]). To meet its prima facie burden, plaintiff must establish that it requested the EUOs in accordance with the procedures and time frames set forth in the no fault regulations (*American Tr. Ins. Co. v Longevity Med. Supply, Inc.*,

131 AD3d 841, 841 [1<sup>st</sup> Dept 2015]; *Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1<sup>st</sup> Dept 2013]).

Upon receiving a bill, the insurer can send the appropriate verification form to the claimant to be filled out and returned (11 NYCRR 65-3.5 [a]). The insurer has the option of accepting proof of claim on a form other than a prescribed form if it contains the same information as the prescribed form (11 NYCRR 65-3.5 [f]). An insurer seeking additional verification of the claims must request an EUO or independent medical examination (IME) within 15 business days of receiving the verification forms or bills submitted by the injured person's medical providers (11 NYCRR 65-3.5 [b], [d]). If any requested verification is not supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom verification was requested (11 NYCRR 65-3.6 [b]; *DTG Operations, Inc. v Excel Imaging, P.C.*, 2014 WL 12833504, \*2 [Sup Ct, NY County 2014]). Where the insurer has requested attendance at an EUO, the 30 day period for the insurer to pay or deny a claim based upon a failure to appear begins to run on the date of the second EUO nonappearance (see 11 NYCRR 65-3.8 [a] [1]; *Chapa Prods. Corp. v MVAIC*, 66 Misc 3d 16, 18 [App Term 2d Dept, 2d, 11<sup>th</sup>, & 13<sup>th</sup> Jud Dists 2019]).

Liberty does not claim to have requested or received prescribed verification forms. Liberty submits a list of bills received from AK (NYSCEF 14) and the copies of denial of claim forms refusing coverage for those bills (NYSCEF 13). The denial of claim forms bear the dates that medical services were provided, the kinds of services, the names of the insureds, the names of the injured persons, and the dates that Liberty received the bills. The records show that Liberty received the bills from March 1, 2019 through March 15, 2019. The letters requesting EUOs are dated March 15, 2019, March 22, 2019, April 1, 2019, and April 8, 2019 for EUOs to

be held on April 15, 2019 (NYSCEF 9). These EUO notices are dated within 15 business days of the dates that Liberty received the bills. The second EUO notice is dated April 23, 2019 for an EUO on May 13, 2019 (*id.*). The second EUO notice is dated within 10 calendar days of the first EUO nonappearance date. As evidence that AK did not appear for the EUOs, plaintiff's attorney submits two transcripts, one for each day of the scheduled EUO, each containing the testimony of an attorney that defendant did not appear on the scheduled date, and each certified (NYSCEF 10). In addition, each denial of claim form is dated within 30 days of the second EUO date (NYSCEF 13).

Plaintiff's evidence establishes a prima facie case that AK breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage.

Defendant objects that it did not receive the summons and complaint. It only became aware of this action while researching another action filed by plaintiff against defendant in this same court. In her affidavit, the owner of defendant states that she personally opens all the mail that comes to the office and that there would be a record of the summons and complaint if it had been received and that there is no record.

An affidavit by a process server attesting to service upon a defendant constitutes prima facie evidence of proper service (*NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1<sup>st</sup> Dept 2004]). A mere denial of service is not sufficient to rebut the presumption of proper service created by the affidavit of service via the Secretary of State (*Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431, 431 [1<sup>st</sup> Dept 2017]; *see also State Farm Mut. Auto. Ins. Co. v Dr. Ibrahim Fatiha Chiropractic, P.C.*, 147 AD3d 696, 696 [1<sup>st</sup> Dept 2017]). To controvert the presumption of proper service, a defendant must allege a nonconclusory denial of service, pointing out the deficiencies in the affidavit of service, for example, that the address is wrong or

that the process server made a misstatement in the affidavit (*see Avis Rent A Car Sys., LLC v Scaramellino*, 161 AD3d 572, 572 [1<sup>st</sup> Dept 2018]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 539 [1<sup>st</sup> Dept 2009]). Defendant's conclusory allegation of non-receipt is not sufficient to defeat the evidence of service.

Defendant objects that plaintiff fails to lay a foundation for the mailing of the EUO scheduling letters. The letters were mailed from the attorney's office and there is an affidavit of service for each letter testifying that the letter was mailed to three separate addresses of defendant (NYSCEF 9). The affidavits show that the letters were mailed.

Defendant objects that plaintiff does not lay a foundation for the creation of the list of bills (NYSCEF 14). This is correct; however, plaintiff does lay a foundation for the creation of the denial of claim forms in the affidavit of William Gang, Liberty's Claims Department Team Manager heading the Special Investigations Unit Liaison Team for the New York State Personal Markets No-Fault Office (NYSCEF 12). Gang details the record keeping and mailing practices of his office to show how the denial forms were generated and mailed (NYSCEF 12).

Defendant objects that plaintiff fails to establish a reasonable basis for requesting EUOs. The rules state that the EUO shall be conducted at a time and place reasonably convenient for the applicant (11 NYCRR 65-3.5[e]). A request for an EUO must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination (*id.*). Plaintiff appends an affidavit by an investigator in its Special Investigations Unit, explaining that plaintiff noticed improper coding of the services supplied by defendant. This led plaintiff to suspect that the bills were inflated. This is reasonable and defendant does not show that it is not reasonable.

Plaintiff's motion for a declaratory judgment is granted. Plaintiff is not entitled to injunctive relief to prevent defendant from bringing any future action or proceeding in any forum, litigation or arbitration, for the bills for which plaintiff sought verification. "A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 [2d Dept 2009]). Injunctive relief is granted only to protect the plaintiff from repeated violations, threatened or likely, of its property rights (*id.*). Liberty does not allege any justification for such a drastic remedy.

Defendant's cross motion seeks leave to compel plaintiff to accept its late answer or for leave to file a late answer pursuant to CPLR 3012 (d). A trial court has the discretionary power to compel acceptance of an untimely pleading "upon such terms as may be just" (CPLR 3012 [d]). The court considers whether the defendant has a reasonable excuse for its failure to respond to the complaint and a potentially meritorious defense (*Rivera v Banks*, 135 AD3d 621, 622 [1<sup>st</sup> Dept 2016]). In this case, defendant does not show a potentially meritorious defense to the action or a reasonable excuse for failing to timely answer (*see State Farm*, 147 AD3d at 697). The cross motion is denied.

In conclusion, it is hereby

ORDERED that the motion by plaintiffs, pursuant to CPLR 3215, granting a judgment on default against defendant AK Global Supply Corp for failure to appear or answer in this action, is partly granted to the extent that plaintiffs are granted a declaratory judgment and otherwise denied; and it is further

ORDERED and ADJUDGED that plaintiffs are not obligated to honor or pay claims for reimbursements submitted by defendant for which verification was sought and which were addressed in the instant action under the following names, policy numbers, and claim numbers:

- Sinclair, Zachary, policy AOS22814200040, claim 0370822490002;
- Maat, Arthur, policy AOS22811096070, claim 0375546190001;
- Mooklal, Stefan, policy AOS22817685240, claim 0375730910001;
- Espinoza-Gutierrez, Luis A, policy AOS22805228775, claim 0380107400001;
- Gayle, Joseph, policy AOS22814104340, claim 0382806000004;
- Bartley, Leroy, policy AOS22817593240, claim 0384529200004;
- Badri, Pearlie, policy AOS22113490470, claim 0386613980003;
- Oyster, Igor, policy AOJ23148729640, claim 0387436130002;
- Armstrong, Wayne R., policy AOS22809084240, claim 0387519890001; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within thirty (30) days of entry of this order and file proof of service with the clerk of the Court; and it is further

ORDERED that the cross motion by defendant is denied.

Dated: December 15, 2020

Hon. Melissa A. Crane

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate: MOTION IS:  GRANTED     DENIED     GRANTED IN PART     OTHER

Check if appropriate:  DO NOT POST     REFERENCE     SETTLE ORDER     SUBMIT ORDER     FIDUCIARY APPOINTMENT