

Liberty Mut. Ins. Co. v Mcdonald
2021 NY Slip Op 31447(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 650712/2020
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650712/2020

MOTION DATE 03/16/2021

MOTION SEQ. NO. 001

- v -

DEVON MCDONALD, AXIS PT PC, AZCARE INC., BURKE
PHYSICAL THERAPY PC, ENGLEWOOD ORTHOPEDICS
GROUP PC, EQUINOX PHYSICAL THERAPY PC, FAR
ROCKAWAY MEDICAL PC, GOOD LIFE ACUPUNCTURE
PC, HEAL-RITE PT PC, LONG ISLAND JEWISH MEDICAL
CENTER, M&D ELITE PHARMACY LLC, MOSES MEDICAL
SERVICES PLLC, NORTH SHORE LIJ MEDICAL PC, NSLIJ
MEDICAL PC, PATIENT CHIROPRACTIC PC, RADWA
PHYSICAL THERAPY PC, STAND UP MRI OF LYNBROOK
PC, WELLSTREAM ACUPUNCTURE

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 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

Upon the foregoing documents and for the reasons stated hereinbelow, (1) the instant motion by
plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, pursuant to
CPLR 3215, for a default judgment is granted, on the merits and on default, as against the
claimant-defendant, Devon A. McDonald, and the non-answering medical provider defendants,
namely, Axis PT PC; AZCare Inc; Englewood Orthopedics Group PC; Equinox Physical
Therapy PC; Far Rockaway Medical PC; Heal-Rite PT PC; Long Island Jewish Medical Center;
M & D Elite Pharmacy LLC; Moses Medical Services PLLC; North Shore LIJ Medical PC;
NSLIJ Medical PC; Patient Chiropractic PC; Stand Up MRI of Lynbrook PC; and Wellstream
Acupuncture PC., only (the claimant-defendant and the non-answering medical provider
defendants, collectively, "the non-answering defendants"), and is hereby denied as against the
answering medical provider defendants, namely, Burke Physical P.C.; Good Life Acupuncture
P.C.; and Radwa Physical Therapy P.C. (collectively, "the answering defendants"); and (2) the
instant cross-motion by the answering defendants is granted, and this Court hereby [a] extends
the time in which the answering defendants can answer the instant pleadings; [b] accepts the
answering defendants' joint answer, dated March 5, 2021, as timely; and [c] and compels
plaintiffs to do the same.

Background

Plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, issued an insurance policy (number AOS28118713870) to the claimant-defendant, Devon A. McDonald, which was in effect from July 27, 2018 through July 27, 2019 (NYSCEF Doc. 1).

On May 8, 2019, the claimant-defendant was allegedly injured in a motor vehicle accident and sought medical treatment and/or services from the medical provider defendants, namely, Axis PT PC; AZCare Inc; Burke Physical Therapy PC; Englewood Orthopedics Group PC; Equinox Physical Therapy PC; Far Rockaway Medical PC; Good Life Acupuncture PC; Heal-Rite PT PC; Long Island Jewish Medical Center; M & D Elite Pharmacy LLC; Moses Medical Services PLLC; North Shore LIJ Medical PC; NSLIJ Medical PC; Patient Chiropractic PC; Radwa Physical Therapy PC; Stand Up MRI of Lynbrook PC; and Wellstream Acupuncture PC. The claimant-defendant assigned his rights under the subject insurance policy to the medical provider defendants, who, in their respective capacities as the claimant-defendant's assignees under the subject insurance policy, submitted bills totaling \$24,021.61 for No-Fault reimbursement to plaintiffs. (NYSCEF Doc. 1.)

Plaintiffs investigated the claimant-defendant's residency, as the subject policy listed Allentown, Pennsylvania as his address, although the subject alleged accident occurred in Brooklyn, New York. On July 29, 2019, the claimant defendant appeared for his scheduled Examination Under Oath ("EUO") in the instant matter. Plaintiffs concluded that the claimant-defendant did not reside at the Allentown, Pennsylvania address that he listed on the subject insurance policy and that he misrepresented his address to receive a lower premium rate on the subject insurance policy. Thus, plaintiffs denied all claims. (NYSCEF Doc. 1.)

On January 24, 2020, plaintiffs commenced the instant action against defendants, seeking a judgment (1) declaring that plaintiffs have no duty to provide coverage or pay claims for No-Fault benefits that defendants submitted and, thus, are entitled to a permanent injunction and ultimate dismissal of all pending litigation and arbitration under the subject insurance policy arising out of the subject alleged accident; (2) declaring that plaintiffs are entitled to a stay and ultimate dismissal of all pending litigation and arbitrations arising out of the subject No-Fault bills that defendants submitted under the subject insurance policy, arising out of the subject alleged accident; (3) barring the medical provider defendants, in their capacities as the claimant-defendant's assignees under the subject insurance policy, from submitting any new bills to plaintiffs and/or from commencing any new litigation or arbitration for any previously-submitted bills that plaintiffs have denied; and (4) declaring that plaintiffs properly issued the denial(s) of the subject bills (NYSCEF Doc. 1, at 16-17).

Between March 2 and 9, 2020, plaintiffs served defendants with the subject pleadings (NYSCEF Doc. 7). On February 10, 2020, plaintiffs served defendants with CPLR 3215(g)(4) notices by first-class mail at defendants' addresses as they are listed on the subject summons and complaint (NYSCEF Doc. 8).

On February 8, 2021, plaintiffs moved, pursuant to CPLR 3215, for a default judgment against defendants (1) permanently staying each and every part of any arbitration or court hearing that defendants brought for No-Fault benefits arising out of the subject alleged accident; and (2)

declaring that plaintiffs' denial(s) of claims that defendants submitted for No-Fault benefits arising out of the subject alleged accident were valid (NYSCEF Doc. 3).

On March 5, 2021 (e-filed to NYSCEF on March 8, 2021), medical provider defendants Burke Physical P.C.; Good Life Acupuncture P.C.; and Radwa Physical Therapy P.C. (collectively, "the answering defendants") jointly answered the complaint with various denials and fourteen Affirmative Defenses (NYSCEF Doc. 21).

On March 8, 2021, the answering defendants jointly cross-moved, pursuant to CPLR 5015(a)(1), to vacate their default in the instant matter, and, upon said vacatur, for an order, pursuant to CPLR 3012(d), to extend their time to appear and plead in the instant matter, and to compel plaintiff to accept their answer (NYSCEF Doc. 19). The answering defendants assert, inter alia, the following: (1) their delay in appearing in the instant action was inadvertent, as the Secretary of State was experiencing a backlog and, thus, delayed in serving the pleadings upon the answering defendants, who did not receive said pleadings until about February 24, 2021; (2) their delay in serving their answer arose from their law firm's limited resources, which the COVID-19 pandemic exacerbated; and (3) plaintiffs have failed to submit sufficient "proof of the facts constituting the claim" pursuant to CPLR 3215(f) (NYSCEF Doc. 20).

In opposition to the answering defendants' joint cross-motion, plaintiffs assert, inter alia, the following: (1) even if the Secretary of State failed to serve the answering defendants immediately with the subject pleadings, plaintiffs also served all defendants pursuant to CPLR 3215(g)(4)(i) at addresses that either defendants themselves provided or were listed with the New York State Department of State Division of Corporations; (2) the answering defendants have failed to raise a reasonable excuse for their late answer, and it would prejudice plaintiffs to accept it; (3) the answering defendants failed to request an extension of time to file their Answer, instead waiting until after plaintiffs moved for a default judgment against them; (4) the answering defendants' affidavit in support of their cross-motion does not provide sufficient detail; and (5) plaintiffs have provided sufficient evidence to support their motion for a default judgment (NYSCEF Doc. 27).

Discussion

Plaintiffs have made out a prima facie case for the relief that they seek in the instant summons and complaint and have established that they are entitled to a default judgment against the non-answering defendants by complying with CPLR 3215(f) and (g) by submitting the following, among other documents: copies of the subject summons and complaint (NYSCEF Doc. 6); copies of the subject affidavits of service and CPLR 3215(g) notices (NYSCEF Documents 7-8); the July 20, 2020 affidavit of facts of Dana Lentz, an investigator in plaintiff Liberty Mutual Insurance Company's Special Litigations Unit (NYSCEF Doc. 10); and the February 8, 2021 affirmation of Asher Grossman, Esq., plaintiffs' attorney (NYSCEF Doc. 4). To date, the non-answering defendants have failed to answer the instant complaint and/or oppose or otherwise respond to the instant motion, and their time to do so has expired. Therefore, this Court will grant plaintiffs' motion for a default judgment as against the non-answering defendants only.

The answering defendants have made out a prima facie case in support of their instant cross-motion. CPLR 2001. A defendant may move for an extension of time to file an answer even

after a plaintiff has moved for a default judgment. Furthermore, New York State has a strong public policy in favor of deciding cases on the merits. Therefore, this Court will grant the answering defendants' cross-motion; extend the time in which they can answer the instant pleadings; accept their joint answer, dated March 5, 2021, as timely; and compel plaintiffs to do the same. This Court has considered plaintiffs' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated hereinabove, (1) the instant motion by plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, pursuant to CPLR 3215, for a default judgment is hereby granted, on the merits and on default, as against the claimant-defendant, Devon A. McDonald, and the non-answering medical provider defendants, namely, Axis PT PC; AZCare Inc; Englewood Orthopedics Group PC; Equinox Physical Therapy PC; Far Rockaway Medical PC; Heal-Rite PT PC; Long Island Jewish Medical Center; M & D Elite Pharmacy LLC; Moses Medical Services PLLC; North Shore LIJ Medical PC; NSLIJ Medical PC; Patient Chiropractic PC; Stand Up MRI of Lynbrook PC; and Wellstream Acupuncture PC., only (the claimant-defendant and the non-answering medical provider defendants, collectively, "the non-answering defendants"), and is hereby denied as against the answering medical provider defendants, namely, Burke Physical P.C.; Good Life Acupuncture P.C.; and Radwa Physical Therapy P.C. (collectively, "the answering defendants"); and (2) the instant cross-motion by the answering defendants is hereby granted, and this Court hereby [a] extends the time in which the answering defendants can answer the instant pleadings; [b] accepts the answering defendants' joint answer, dated March 5, 2021, as timely; and [c] and compels plaintiffs to do the same.

Accordingly, the Clerk is hereby directed to enter judgment (1) declaring that plaintiffs have no duty to provide coverage or pay claims for No-Fault benefits that the non-answering defendants submitted under the subject insurance policy (number AOS28118713870) arising out of the alleged May 8, 2019 accident; (2) permanently staying and enjoining each and every part of any arbitration or court hearing that the non-answering defendants brought for No-Fault benefits under the subject insurance policy (number AOS28118713870) arising out of the alleged May 8, 2019 accident; (3) declaring that plaintiffs' denial(s) of claims that the non-answering defendants submitted for No-Fault benefits under the subject insurance policy (number AOS28118713870) arising out of the alleged May 8, 2019 accident were valid and properly issued; (4) barring the non-answering medical provider defendants, in their capacities as the claimant-defendant's assignees under the subject insurance policy (number AOS28118713870) from submitting any new bills to plaintiffs and/or from commencing any new litigation or arbitration for any previously-submitted bills that plaintiffs have denied; and (5) awarding costs and disbursements to plaintiffs.

4/28/2021

DATE



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ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED

CASE DISPOSED

DENIED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE