

Liberty Mut. Ins. Co. v Turner
2021 NY Slip Op 32298(U)
November 9, 2021
Supreme Court, New York County
Docket Number: Index No. 654760/2020
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 654760/2020

MOTION DATE 10/29/2021

MOTION SEQ. NO. 001

- v -

KATRINA TURNER, AKAI ACUPUNCTURE PC, AKE
SERVICES INC., ATLAS PT, PC, AXIS PT PC, DAVID
ISRAEL, MD, GE DIAGNOSTIC SOLUTIONS INC., JEFF M.
ROSENBERG DC, P.C., JGA REHABILITATION
SERVICES, P.T.P.C., JP MEDICAL SERVICES PC,
MEDICAL SUPPLY DEPOT GROUP CORP., NY BEST
SUPPLY INC., ONE PEACE ACUPUNCTURE P.C., QR
MEDICAL SERVICES, PC, RICHARD DENISE CHARLES,
MD, RIDGEWOOD DIAGNOSTIC LABORATORY LLC,
RIVERSIDE MEDICAL SERVICES PC, ROYAL MEDICAL
IMAGING PC, TIME TO CARE PHARMACY INC.,
TRIBORO CHIROPRACTIC PC

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DEFAULT JUDGMENT.

In this declaratory judgment action, the plaintiffs move pursuant to CPLR 3215 for leave to enter a default judgment against defendants Katrina Turner (the individual defendant), Ake Services Inc., Atlas PT, PC, Axis PT PC, GE Diagnostic Solutions Inc., Jeff M. Rosenberg DC, P.C., JGA Rehabilitation Services, P.T.P.C., JP Medical Services PC, QR Medical Services, PC, Richard Denise Charles, MD, Ridgewood Diagnostic Laboratory LLC, Riverside Medical Services PC, Royal Medical Imaging PC, and Time to Care Pharmacy Inc. (collectively, the medical provider defendants). The plaintiffs seek a judgment declaring that they are not obligated to pay no-fault benefits in connection with injuries that the individual defendant allegedly sustained in a motor vehicle accident alleged to have occurred June 19, 2019, or to reimburse the non-answering medical provider defendants for treatment they rendered or equipment and supplies they provided to her for those injuries. The only opposition submitted is by defendant One Peace Acupuncture P.C.. However, the plaintiffs do not seek relief as against

that defendant on this motion. As such, that opposition need not be considered. The motion is granted.

The individual defendant claimed she was injured in a motor vehicle accident on June 19, 2019. She thereafter submitted an application for no-fault benefits. She obtained medical treatment or medical supplies from the various medical defendants, all in downstate New York. The medical provider defendants sought payment for no-fault benefits under insurance policy number AOS22115072675, as issued by the plaintiffs to the individual defendant, under claim number 0402282090001. See Insurance Law 5106(a); 11 NYCRR 65-1.1.

As an initial matter, the court notes that the affidavit of Denise Stojanov is defective inasmuch as it was executed and notarized in New Jersey and lack certificates of conformity, as required by CPLR 2309(c). However, this defect alone does not require the denial of the motion and may be cured by the submission of the proper certificate *nunc pro tunc*. See Wager Estate of Cordaro v Rao, 178 AD3d 434, 435–36 (1st Dept. 2019); Bank of New York v Singh, 139 AD3d 486, 487 (1st Dept. 2016). The court also cautions the plaintiffs against submitting affidavits in picture format, rather than submitting them properly in document format. While the court will consider the affidavit in the form submitted on this motion, it may not do so on future motions. In the affidavit, Stojanov, an investigator in the Special Investigative Unit (SIU) of plaintiff Liberty Mutual Insurance Company, states that she was assigned to the investigation of the claim of the individual defendant. She explains that following the submission of bills by the medical provider defendants, it was revealed that the individual defendant had a downstate cell phone number, but an upstate policy address. Further, Stojanov states, the treatment was taking place in downstate New York and the accident also occurred in downstate New York. This prompted the plaintiffs to request an Examination Under Oath (EUO) of the individual defendant.

The plaintiffs submit the transcript from the individual defendant's EUO at which she stated that her mailing address was in Franklin, New York (*i.e.*, upstate New York) but that her residence was in Brooklyn, New York at her mother's home (*i.e.*, downstate New York). The individual defendant also testified that on the date of the accident, she was driving from work in New York City to her mother's home in Brooklyn. Further, she testified that while her bank statements, insurance documents, and cell phone bill are sent to the upstate address, they are forwarded to her at the downstate address.

The plaintiffs also submits the affidavit of an underwriter. This affidavit annexes the proper certificate of conformity. In the affidavit, the underwriter states that the policy address provided by the individual defendant was the upstate New York address, and based on that, a policy was created and issued to her with a premium of \$2,711.00 and that upon discovery of the true address in downstate New York, the policy was re-rated and the premium was increased to \$6,991.00. The underwriter states that had the plaintiffs known the true address was in Brooklyn, New York, the plaintiffs would have written a policy for the individual defendant which would have been approximately \$4,280.00 more for the same vehicle at the inception of the policy.

The plaintiffs denied the defendants' claims for benefits, concluding based on, *inter alia*, the individual defendant's testimony at the EUO and the plaintiffs' own investigation, the individual defendant made material misrepresentations in her initial application for the subject insurance policy with respect to where the insured vehicle was usually garaged and maintained in order to lower the cost of obtaining the policy, thereby vitiating coverage.

"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 their burden.

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 when the policyholder first applied for insurance coverage, she represented that she resided primarily at the upstate address and that the insured vehicle was regularly garaged there. However, according to the proof submitted by the plaintiff, the car was regularly used and garaged at the downstate address, where premium rates are significantly higher. The denial-of-claim statements show that the relevant denials of coverage were expressly based on the ground that the policyholder made material misrepresentations in connection with her application for insurance with respect to the where the vehicle was regularly garaged in order to reduce insurance premium rates.

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 defendant Katrina Turner connection with injuries that she sustained in a motor vehicle accident on June 19, 2019, and claimed under policy number AOS22115072675, claim number 0402282090001, or to reimburse defendants Ake Services Inc., Atlas PT, PC, Axis PT PC, GE Diagnostic Solutions Inc., Jeff M. Rosenberg DC, P.C., JGA Rehabilitation Services, P.T.P.C., JP Medical Services PC, QR Medical Services, PC, Richard Denise Charles, MD, Ridgewood Diagnostic Laboratory LLC, Riverside Medical Services PC, Royal Medical Imaging PC, and Time to Care Pharmacy Inc. for treatment they rendered or equipment and supplies they provided to her for those injuries; and it is further

ORDERED that the Clerk shall mark the file accordingly.

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



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

11/09/2021
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED		