

Liberty Mut. Ins. Co. v Frias

2021 NY Slip Op 32386(U)

November 8, 2021

Supreme Court, New York County

Docket Number: Index No. 655415/2020

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**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, WAUSAU
UNDERWRITERS INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 655415/2020

MOTION DATE 10/29/2021

MOTION SEQ. NO. 001

- v -

OLGA FRIAS, ADJUST FOR LIFE CHIROPRACTIC PC,
ALLMED MERCHANDISE & TRADING INC, BRONX SC
LLC, COMPLETE ORTHOPEDIC SERVICES INC., DASSA
ORTHOPEDIC MEDICAL SERVICES PC, DOBBS FERRY
EMERGENCY MEDICINE PC, JOINTS IN MOTION
PHYSICAL THERAPY AND REHABILITATION PLLC,
SEDATION VACATION PERIOPERATIVE MEDICINE
PLLC, ST. JOHNS RIVERSIDE HOSPITAL, STAND-UP MRI
OF THE BRONX PC

**DECISION + ORDER ON
MOTION**

Defendants.

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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

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 Olga Frias (the individual defendant), Adjust for Life Chiropractic, PC, AllMed Merchandise & Trading Inc., Bronx SC, LLC, Complete Orthopedic Services Inc., Dassa Orthopedic Medical Services PC, Dobbs Ferry Emergency Medicine PC, Joints in Motion Physical Therapy and Rehabilitation PLLC, Sedation Vacation Perioperative Medicine PLLC, St. Johns riverside Hospital, and Stand-Up MRI of the Bronx PC (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 on December 12, 2018, or to reimburse the non-answering medical defendants for treatment they rendered or equipment and supplies they provided to her for those injuries. No opposition is submitted. The motion is granted.

The individual defendant claimed that she was injured in a motor vehicle accident on December 12, 2018. She thereafter submitted an application for no-fault benefits. She obtained medical treatment or medical supplies from the various medical defendants, all in New York. The medical defendants sought payment for no-fault benefits under insurance policy number AOJ23820147770, as issued by the plaintiffs to the individual defendant, under claim number 0389070170001. See Insurance Law 5106(a); 11 NYCRR 65-1.1.

An investigation by the plaintiffs revealed that the subject vehicle was not usually garaged at 2339 Hudson Ter., Apt. D8, Fort Lee, NJ, as represented by the individual defendant in connection with procuring the policy, but at 9 Noble Avenue, Bronxville, New York. A visit was made to the New Jersey address and it was confirmed that neither the individual defendant nor her boyfriend resided at that address. A visit was also made to the New York address; the individual defendant's vehicle was parked directly in front of the house. These facts, among others, prompted the plaintiffs to request an Examination Under Oath (EUO) of the individual defendant and her boyfriend to verify the individual defendant's residency.

On April 10, 2019, the individual defendant appeared for her EUO. She testified that (i) all of her mail is sent to the New York address and (ii) for the past two years, her boyfriend has paid her expenses and she assists him with his business. The same day, the individual defendant's boyfriend, Juan Rivera, also appeared for his EUO and testified that (i) the individual defendant resides with him at a house he rents in Bronxville, New York, (ii) the individual defendant assists him with his business and he helps her with her bills, and (iii) the individual defendant stays overnight in Bronxville, New York four or five nights a week, receives all her mail at that address, and that he financially supports her. The plaintiffs also submit the affidavit of an underwriter, in which he states that the policy address provided by the individual defendant was the New Jersey address, and based on that, a policy was created and issued to her with a premium of \$2,025.00 and that upon discovery of the true address in New York, the policy was re-rated and the premium was increased to \$3,015.00. The underwriter states that had the plaintiffs known the true address was in Bronxville, New York, the plaintiffs would have written a policy for the individual defendant which would have been approximately \$990.00 more for the same vehicle at the interception 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 New Jersey 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 New York 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. 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).

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 Olga Frias in connection with injuries that she sustained in a motor vehicle accident on December 12, 2018, and claimed under policy number AOJ23820147770, claim number 0389070170001, or to reimburse defendants Adjust for Life Chiropractic, PC, AllMed Merchandise & Trading Inc., Bronx SC, LLC, Complete Orthopedic Services Inc., Dassa Orthopedic Medical Services PC, Dobbs Ferry Emergency Medicine PC, Joints in Motion Physical Therapy and Rehabilitation PLLC, Sedation Vacation Perioperative Medicine PLLC, St. Johns riverside Hospital, and Stand-Up MRI of the Bronx PC 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.

ORDERED that this constitutes the Decision and Order of the court.

11/08/2021
DATE


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

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE