

Liberty Mut. Ins. Co. v Farquhar
2021 NY Slip Op 32815(U)
December 16, 2021
Supreme Court, New York County
Docket Number: Index No. 655117/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON

PART

37

Justice

-----X

LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 655117/2019

MOTION DATE 11/22/2021

MOTION SEQ. NO. 002

- v -

ANDRE FARQUHAR, ALEMAN CHIROPRACTIC
SERVICES, PC, ALL CITY FAMILY HEALTHCARE
CENTER, INC., ANDES CHIROPRACTIC PC, CENTER
FOR NEURORESTORATIVE MEDICINE, CHIROPRACTIC
DIAGNOSTIC EVALUATIONS PC, COSMOPOLITAN
PHYSICAL THERAPY, EXCELL CLINICAL LAB, INC.,
FAAN MEDICAL SERVICES, PC, HEAL-RITE PT PC, HMP
ORTHOPAEDICS, INSTAR MEDICAL PC, ISURPLY LLC,
LONGEVITY MEDICAL SUPPLY, INC., LR MEDICAL,
PLLC, NEW SENSE ACUPUNCTURE PC, NEW YORK
FOOT AND ANKLE PLLC, NEXTSTEP HEALING INC,
NYRX PHARMACY INC, PRC SUPPLIES INC, SEDATION
VACATION PERIOPERATIVE MEDICINE PC, SPRUCE
MEDICAL & DIAGNOSTIC, PC, TRUE HEALTH
PHARMACY INC, VAN SICLEN CHIROPRACTIC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiffs' motion for summary judgment is granted.

Background

This case revolves around the attempt of plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, to extricate themselves from paying out no-fault claims under a car insurance policy ("The Policy"), number AOS22827938240, issued to non-party Karen Humphrey and claimant-defendant Andre Farquhar covering the period from July 27, 2018, through July 27, 2019. NYSCEF Doc. No. 1.

On January 25, 2019, Mr. Farquhar was allegedly injured in a motor vehicle accident ("The Underlying Accident") while in a vehicle covered by The Policy. NYSCEF Doc. No. 1. Subsequently, Mr. Farquhar sought treatment from his co-defendants to the tune of \$44,880.62. Id.

After investigating the claims, plaintiffs requested that Mr. Farquhar appear for an Examination Under Oath (“EUO”). On April 11, 2019, Mr. Farquhar sat for an EUO, during which he had difficulty proving that the Albany address he had used to obtain The Policy was actually where he resided with his cars. NYSCEF Doc. No. 19.

Plaintiffs subsequently denied claims arising out of the Underlying Accident on the grounds that they would not have issued Mr. Farquhar The Policy for the same premium amount had he and Ms. Humphrey been honest about their address. NYSCEF Doc. No. 21.

On September 6, 2019, plaintiffs filed the instant lawsuit seeking a declaration: (1) that plaintiffs have no duty to provide coverage; (2) permanently enjoining and ultimately dismissing all pending litigation and arbitration arising out of The Underlying Accident; (3) barring the submission of any new claims arising out of The Underlying Accident; and (4) that plaintiffs’ denial of earlier bills was proper. NYSCEF Doc. No. 1.

On October 16, 2019, plaintiffs stipulated to discontinue with prejudice their complaint as against defendant New Sense Acupuncture P.C.. NYSCEF Doc. No. 3.

On October 22, 2019, defendant NYRX Pharmacy Inc., answered. NYSCEF Doc. No. 4.

On November 21, 2019, plaintiffs stipulated to discontinue with prejudice their complaint as against defendant Instar Medical, P.C.. NYSCEF Doc. No. 7.

On December 18, 2019, plaintiffs moved, pursuant to CPLR 3215, for a default judgment against Mr. Farquhar and the remaining medical defendants. NYSCEF Doc. No. 8.

On December 19, 2019, medical provider defendants All City Family Healthcare Center, Inc., Longevity Medical Supply, Inc., and LR Medical, PLLC, (collectively, “The Late-Answering Defendants”) answered with various admissions, denials, and forty affirmative defenses. NYSCEF Doc. No. 26.

On February 21, 2020, The Late-Answering Defendants cross-moved, pursuant to CPLR 5015(a)(1), for the Court to vacate their default in the instant matter and, upon vacatur, extend their time to answer. NYSCEF Doc. No. 30.

In a Decision and Order dated May 18, 2020, this Court granted plaintiffs’ motion for a default judgment against Mr. Farquhar and defendants Aleman Chiropractic Services, PC, Andes Chiropractic PC, Center for Neurorestorative Medicine, Cosmopolitan Physical Therapy PC, Excell Clinical Lab, Inc., Faan Medical Services, PC, Heal Rite PT PC, HMP Orthopaedics, Isurply LLC, New York Foot and Ankle PLLC, Nextstep Healing Inc, PRC Supplies Inc, Sedation Vacation Perioperative Medicine PC, Spruce Medical & Diagnostic, PC, True Health Pharmacy Inc., and Van Siclen Chiropractic PC. NYSCEF Doc. No. 35. In the same Decision and Order this Court denied plaintiffs’ motion for a default judgment against The Late-Answering Defendants, and granted their cross-motion.

On February 24, 2021, plaintiffs stipulated to discontinue with prejudice their complaint as against defendant Chiropractic Diagnostic Evaluations PC. NYSCEF Doc. No. 41.

On August 3, 2021, plaintiffs stipulated to discontinue with prejudice their complaint as against defendant NYRX Pharmacy Inc. NYSCEF Doc. No. 44.

On October 21, 2021, plaintiffs moved, pursuant to CPLR 3212, for summary judgment against the remaining defendants, that is The Late-Answering Defendants. NYSCEF Doc. No. 45. In support plaintiffs have submitted: the notice of motion; an affirmation in support by plaintiffs' counsel, NYSCEF Doc. No. 46; and a certification that the notice complies with the Rules of the Chief Administrator of the Courts of the State of New York submitted with a word count for the affirmation, NYSCEF Doc. No. 47.

Discussion

A "motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." CPLR 3212(b). An affirmation of "an attorney, even if [she] has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide" proof of the claim. Zuckerman v City of New York, 49 NY2d 557, 563 (1980).

Additionally, "[u]pon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." 22 NYCRR 202.8-g.

To prevail in a summary judgment motion, the movant must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993); CPLR 3212(b).

Here, the plaintiffs have failed to adhere to CPLR 3212(b) by omitting to submit a copy of the pleadings or affidavits of someone with personal knowledge of the underlying facts, instead merely submitting plaintiffs' counsel's affirmation without supporting documents. Further, plaintiffs have failed to comply with 22 NYCRR 202.8-g.

However, as the necessary affidavits have been previously submitted to NYSCEF and there appears to be no prejudice to any party from plaintiffs' counsel's lapses, this Court, in its discretion and in the interest of justice, excuses plaintiffs' failure to strictly comply with 202.8-g and CPLR 3212(b). CPLR 2001; 22 NYCRR 202.1(b). The Court trusts that counsel will not repeat this oversight.

As such, plaintiffs have made a showing sufficiently in support of summary judgment by previously submitting, inter alia: the complaint; Mr. Farquhar's EUO; and affidavits from

plaintiffs' Special Investigation Unit investigator Brian Campley, NYCEF Doc. No. 18, and Claims Department Teams Manager Dawn Smith, NYSCEF Doc. No. 22

This Court has considered The Late-Answering Defendant's arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Consequently, the motion of plaintiffs, Liberty Mutual Insurance Company and LM General Insurance Company, is granted as against All City Family Healthcare Center, Inc., Longevity Medical Supply, Inc., and LR Medical, PLLC. The Clerk is hereby directed to enter a judgment declaring that (1) that plaintiffs have no duty to provide coverage arising out of The Underlying Accident in which Mr. Farquhar was allegedly hurt on January 25, 2019; (2) permanently enjoining and ultimately dismissing all pending litigation and arbitration arising out of The Underlying Accident; (3) barring the submission of any new claims arising out of The Underlying Accident; and (4) that plaintiffs' denial of earlier bills was proper.



12/16/2021

DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE