

State Farm Mut. Auto. Ins. Co. v Gutierrez
2021 NY Slip Op 32883(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 152328/2021
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 152328/2021
MOTION SEQ. NO. 001

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

- v -

ESTERLIN GUTIERREZ, JOHANKA GUTIERREZ, ADVANCED COMPREHENSIVE LABORATORY LLC d/b/a TOPLAB, BRUNO MEDICAL SUPPLIES INC, GC PHYSICAL THERAPY P.C., JMD PHARMACY INC d/b/a JMD RX JP RX CORP, LIFELINE MEDICAL IMAGING P.C., MASOOD CHIROPRACTIC DIAGNOSTIC, P.C., MEDAID RADIOLOGY LLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, REBOUND ACUPUNCTURE P.C., RELIABLE ONE SERVICES INC, SWC CHIROPRACTIC CARE P.C. and TOP SWIFTY SUPPLY INC,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for

DEFAULT JUDGMENT

On October 26, 2020, defendant JOHANKA GUTIERREZ was allegedly in a motor vehicle accident involving a vehicle insured by plaintiff and she later sought medical treatment for injuries allegedly sustained during the collision. The underlying allegation in this declaratory judgment action is that JOHANKA GUTIERREZ and ESTERLIN GUTIERREZ (collectively "the individual defendants"), who are married, procured a policy of insurance wherein they fraudulently represented that they resided in Westchester County when, in fact, they resided in Bronx County. (NYSCEF Doc. Nos. 1-2, summons and complaint).

Plaintiff now moves this court, pursuant to CPLR 3215, for a default judgment against ESTERLIN GUTIERREZ; JOHANKA GUTIERREZ; ADVANCED COMPREHENSIVE LABORATORY LLC d/b/a TOPLAB; JMD PHARMACY INC d/b/a JMD RX; JP RX CORP; RELIABLE ONE SERVICES INC; SWC CHIROPRACTIC CARE P.C. and TOP SWIFTY SUPPLY INC ("the defaulting defendants")¹ and a declaration that plaintiff is not required to pay

¹ Although plaintiff also seeks relief against REBOUND ACUPUNCTURE P.C. and GC PHYSICAL THERAPY

no-fault benefits to the defaulting defendants since the individual defendants procured the subject policy based on material misrepresentations. (NYSCEF Doc. No. 25, *notice of motion*).

Despite being served with the motion (NYSCEF Doc. No. 59, *affidavit of service for motion*), the defaulting defendants do not oppose the application.

The following defendants have appeared in this action: BRUNO MEDICAL SUPPLIES INC; LIFELINE MEDICAL IMAGING P.C.; MASOOD CHIROPRACTIC DIAGNOSTIC, P.C.; MEDAID RADIOLOGY LLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION. (NYSCEF Doc. Nos. 19, 22, *answers*).

CPLR 3215(a) provides, in pertinent part, that when “a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her].” To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (see *PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). “[T]he ‘quantum of proof necessary to support an application for a default judgment is not exacting . . . [but] some firsthand confirmation of the facts forming the basis of the claim must be proffered.’” (*Am. Tr. Ins. Co. v Braithwaite*, 2020 NY Slip Op 32213[U], *2 [Sup Ct, NY County 2020], quoting *Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006].)

An insurer may assert a lack of coverage based on a material misrepresentation. “A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented.” (*Liberty Mut. Ins. Co. v Castillo*, 2020 NY Slip Op 34358[U], *2 [Sup Ct, NY County 2020]). “To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application.” (*Schirmer v Penkert*, 41 AD3d 688, 690-691 [2d Dept 2007].)

Here, plaintiff submits affidavits of service demonstrating that the individual defendants were served at their place of abode pursuant to CPLR 308(2) and that the remaining defaulting defendants were duly served with the pleadings via the Secretary of State. (NYSCEF Doc. No. 35, *affidavits of service*). Additional mailings were effectuated on the business entity defendants pursuant to CPLR 3515(g)(4)(i). (NYSCEF Doc. No. 36, *additional mailing*). Plaintiff also submits proof that the individual defendants are not in active military service. (NYSCEF Doc. Nos. 37, 39, *Department of Defense Manpower Data Center*).

As to the facts constituting the claim, plaintiff submits, *inter alia*, the subject insurance policy (NYSCEF Doc. No. 41, *insurance policy*); the examinations under oath of ESTERLIN GUTIERREZ, JOHANKA GUTIERREZ, as well as, JOHANKA GUTIERREZ’s mother, RAMONA LUCIANO. (NYSCEF Doc. Nos. 42-44, *EUO transcripts*). Based on his

P.C., this action was later discontinued as against said defendants. (NYSCEF Doc. Nos. 60-61, *notices of discontinuance*).

investigation, Timothy Dacey (“Dacey”), plaintiff’s claims specialist, affirms that the individual defendants misrepresented that they resided in, and that the subject vehicle would be principally garaged in, Westchester County, but that they actually resided in Bronx County. (NYSCEF Doc. No. 29, *Dacey’s affidavit*). The affidavit of Christina Ardito, plaintiff’s underwriter, confirms that the misrepresentation was material given the difference in premiums between the two locations. (NYSCEF Doc. No. 30, *Ardito’s affidavit*). Based on the foregoing, plaintiff has established the facts constituting the claim. Accordingly, it is hereby

ORDERED that plaintiff’s motion seeking a default judgment against ESTERLIN GUTIERREZ; JOHANKA GUTIERREZ; ADVANCED COMPREHENSIVE LABORATORY LLC d/b/a TOPLAB; JMD PHARMACY INC d/b/a JMD RX; JP RX CORP; RELIABLE ONE SERVICES INC; SWC CHIROPRACTIC CARE P.C. and TOP SWIFTY SUPPLY INC is granted; and it is further

ORDERED that the motion is denied as moot as against defendants REBOUND ACUPUNCTURE P.C. and GC PHYSICAL THERAPY P.C. given the notices of discontinuances; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff has no duty to pay any no-fault benefits in the form of sums, monies, damages, awards or benefits to ESTERLIN GUTIERREZ; JOHANKA GUTIERREZ; ADVANCED COMPREHENSIVE LABORATORY LLC d/b/a TOPLAB; JMD PHARMACY INC d/b/a JMD RX; JP RX CORP; RELIABLE ONE SERVICES INC; SWC CHIROPRACTIC CARE P.C. and TOP SWIFTY SUPPLY INC, their agents, employees, assignees or heirs arising out of any current or future proceeding, including without limitation, arbitrations and lawsuits seeking to recover no-fault benefits with respect to the collision that occurred on October 26, 2020, referenced in the complaint, and under policy number 2270285-F02-32; and it is further

ORDERED, ADJUDGED and DECLARED that all no-fault lawsuits, arbitrations, including uninsured motorist, awards, and claims filed by ESTERLIN GUTIERREZ; JOHANKA GUTIERREZ; ADVANCED COMPREHENSIVE LABORATORY LLC d/b/a TOPLAB; JMD PHARMACY INC d/b/a JMD RX; JP RX CORP; RELIABLE ONE SERVICES INC; SWC CHIROPRACTIC CARE P.C. and TOP SWIFTY SUPPLY INC, arising from or related to the October 26, 2020 loss referenced in the complaint and under policy number 2270285-F02-32 are hereby stayed; and it is further

ORDERED that this judgment shall have no effect as to the appearing defendants; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

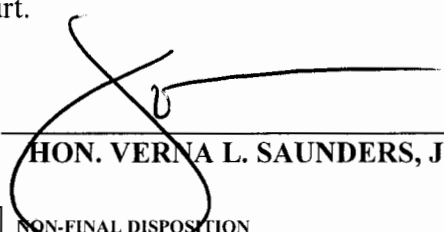
ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

ORDERED that all parties who have appeared in this action shall participate in a remote conference on February 23, 2022, details which shall be provided no later than February 22, 2022.

This constitutes the decision and order of this court.

December 22, 2021



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE