

<b>Hereford Ins. Co. v Ailin Chinese Acupuncture PC</b>
2022 NY Slip Op 33534(U)
October 14, 2022
Supreme Court, New York County
Docket Number: Index No. 156710/2022
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 156710/2022

HEREFORD INSURANCE COMPANY,

MOTION DATE 07/21/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

AILIN CHINESE ACUPUNCTURE PC, ET AL.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 73, 77, 79, 80

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff, Hereford Insurance Company (plaintiff), commenced this action seeking a declaration that it does not owe a duty to pay for No-Fault benefits arising out of an alleged December 9, 2020 motor vehicle accident involving claimants Jose Castillo Abreu (Abreu), Martha Diaz (Diaz), and Rodolfo Rodriguez Abreu (Rodriguez) (collectively, the claimants). Plaintiff now moves: 1) pursuant to CPLR 3215 for a default judgment on its claims to deny coverage based on the claimants failure to subscribe and founded belief, as against the non-appearing defendants All County, LLC, Borukhov Radiology PLLC d/b/a Highline Radiology, Cvs Rx Inc, East Coast Med Group Inc., Expert Pharmacy, Inc., Lenco Diagnostic Laboratory, Mid-Rockaway Ave Medical, PC, Next Step Healing Inc., Quality Care Rx, Inc., Sedation Vacation Periop Med PLLC, Sd Chiropractic Diagnostics, PC, Supramed, Inc., and William L. King, MD, PC (the defaulting defendants)<sup>1</sup>; 2) a declaration that plaintiff is not obligated to honor or pay claims for reimbursement arising under claim number 92399; 3) to stay all proceedings for the underlying accident involving plaintiff and the aforesaid defaulting defendants. The motion is unopposed. For the following reasons, plaintiff's motion is granted in part.

On December 9, 2020, Diaz, Rodriguez, and non-party Alvaro Castillo Abreu were passengers in a plaintiff-insured vehicle (the insured vehicle) being driven by Abreu when, while driving on the Long Island Expressway, the insured vehicle collided with another vehicle while switching lanes near a construction zone.

<sup>1</sup> Plaintiff withdrew its motion as against defendants Lima Supply Inc, and MPO MS Inc pursuant to the July 1, 2022 stipulation and as against defendants All City Family Healthcare, Asc of Rockaway Beach, Nyeeqasc, LLC, and Rockaway Asc Develoment, LLC, pursuant to the July 20, 2022 stipulation.

CPLR 3215(f) requires a movant seeking default judgment to submit the following proofs: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of the facts constituting the claim; and (3) an affidavit showing the default in answering or appearing. Here, plaintiff demonstrates its entitlement to a default judgment pursuant to CPLR 3215, as plaintiff served the summons and complaint upon the defaulting defendants, that the defaulting defendants failed to answer, and as discussed below, the meritorious nature of plaintiff's claim to deny No-Fault benefits based on failure to subscribe.

In support of its motion, plaintiff argues that is entitled to default judgment on the second cause of action because the claimants failed to subscribe their examination under oath (EUO) transcripts, which breached a condition precedent to coverage under the No-Fault Regulations. After the EUOs, plaintiff forwarded the EUO transcripts for Abreu, Diaz, and Rodriguez to subscribe them and return. Plaintiff states that despite due demand, the claimants failed to subscribe and return their EUO transcripts. Pursuant to 11 NYCRR 65-1.1, a claimant's failure to subscribe and return the EUO transcript breaches a condition of coverage and warrants denial of coverage (*Kemper Independence Ins. Co. v Cornerstone Chiropractic, P.C.*, 185 AD3d 468 [1st Dept 2020]; *Hereford Ins. Co. v Forest Hills Med., P.C.*, 172 AD3d 567 [1st Dept 2019]). Here, Abreu, Diaz, and Rodriguez breached a condition precedent to coverage under the No-Fault Regulations by failing to subscribe their EUO transcripts. Accordingly, plaintiff is entitled to a default judgment on its second cause of action to deny No-Fault benefits based on failure to subscribe.

Plaintiff also argues that the alleged December 9, 2020 collision was not a covered event and that any alleged injuries or treatment did not arise from that alleged occurrence. A No-Fault insurer "[m]ay assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]). A No-Fault insurer is "[n]ot required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter ..., by clear and convincing evidence" (*VS. Med Sews., P.C. v Allstate Ins. Co.*, 25 Misc3d 39 [App Term, 2d Dept 2009, 2nd, 11th & 13th Jud Dists]). "Circumstantial evidence is sufficient if a defendant's conduct may be 'reasonably inferred' based upon 'logical inferences to be drawn from the evidence' " (*Benzaken v Verizon Commcns. Inc.*, 21 AD3d 864, 865 [2d Dept 2005], quoting *Staples v Sisson*, 274 AD2d 779 [3d Dept 2000]).

Here, it may not be reasonably inferred from the evidence, including that a fourth passenger suffered no injuries while all others claimed extensive injuries and have undergone surgeries, that when asked why their trip to visit a friend of Abreu's was so late, Diaz testified that the friend had a flight the next day; that Diaz did not know this friend, nor believed the other passengers besides Abreu did, that Rodriguez claimed to know this friend, but did not know details about any travel, or if this friend lived in the United States, that the visit lasted only a half hour, that Diaz testified that the vehicle flipped and landed on its side, partially lifting onto two wheels, inconsistent with the testimony of the others, that the claimants were not given x-ray results at the hospital nor were they referred for specialist care, that plaintiff had a founded belief that the injuries were not causally related to the December 9, 2020 incident and/or did not arise from the accident. Thus, plaintiff is not entitled to a default judgment against the defaulting defendants on its first cause of action to deny No-Fault benefits based on founded belief.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a default judgment against the defaulting defendants, ALL COUNTY, ALLC, BORUKHOV RADIOLOGY PLLC d/b/a HIGHLINE RADIOLOGY, CVS RX INC, EAST COAST MED GROUP INC., EXPERT PHARMACY, INC., Lenco DIAGNOSTIC LABORATORY, MID-ROCKAWAY AVE MEDICAL, PC, NEXT STEP HEALING INC., QUALITY CARE RX, INC., SEDATION VACATION PERIOP MED PLLC, SD CHIROPRACTIC DIAGNOSTICS, PC, SUPRAMED, INC., and WILLIAM L. KING, MD, PC, and WILLIAM L. KING, MD, PC, is granted as to its second cause of action to deny No-Fault benefits on the basis of for failure to subscribe and it is further;

ORDERED, ADJUDGED, and DECLARED that plaintiff, Hereford Insurance Company, owes no duty to provide No-Fault reimbursements to the defaulting defendants, ALL COUNTY, ALLC, BORUKHOV RADIOLOGY PLLC d/b/a HIGHLINE RADIOLOGY, CVS RX INC, EAST COAST MED GROUP INC., EXPERT PHARMACY, INC., Lenco DIAGNOSTIC LABORATORY, MID-ROCKAWAY AVE MEDICAL, PC, NEXT STEP HEALING INC., QUALITY CARE RX, INC., SEDATION VACATION PERIOP MED PLLC, SD CHIROPRACTIC DIAGNOSTICS, PC, SUPRAMED, INC., and WILLIAM L. KING, MD, PC, in connection with the alleged incident of December 9, 2020, (Hereford Insurance Company claim number 92399), and it is further:

ORDERED, ADJUDGED, and DECLARED that plaintiff, Hereford Insurance Company, is not required to pay any sums, monies, damages, awards and/or benefits to the defaulting defendants, ALL COUNTY, ALLC, BORUKHOV RADIOLOGY PLLC d/b/a HIGHLINE RADIOLOGY, CVS RX INC, EAST COAST MED GROUP INC., EXPERT PHARMACY, INC., Lenco DIAGNOSTIC LABORATORY, MID-ROCKAWAY AVE MEDICAL, PC, NEXT STEP HEALING INC., QUALITY CARE RX, INC., SEDATION VACATION PERIOP MED PLLC, SD CHIROPRACTIC DIAGNOSTICS, PC, SUPRAMED, INC., and WILLIAM L. KING, MD, PC, including but not limited to Mandatory Personal Injury Protection No-Fault, Additional Personal Injury Protection, Bodily Injury and Property Damage Liability, and Supplemental Uninsured/Underinsured Motorist Coverage, for any treatment allegedly rendered to Jose Castillo Abreu, Martha Diaz, and Rodolfo Rodriguez Abreu in connection with the alleged incident of December 9, 2020 (Hereford Insurance Company claim number 92399), and it is further

ORDERED that the Clerk is directed to enter judgment as against the defaulting defendants, ALL COUNTY, ALLC, BORUKHOV RADIOLOGY PLLC d/b/a HIGHLINE RADIOLOGY, CVS RX INC, EAST COAST MED GROUP INC., EXPERT PHARMACY, INC., Lenco DIAGNOSTIC LABORATORY, MID-ROCKAWAY AVE MEDICAL, PC, NEXT STEP HEALING INC., QUALITY CARE RX, INC., SEDATION VACATION PERIOP MED PLLC, SD CHIROPRACTIC DIAGNOSTICS, PC, SUPRAMED, INC., and WILLIAM L. KING, MD, PC; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



10/14/2022  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

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 type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					OTHER
					REFERENCE