

Liberty Mut. Ins. Co. v Francillon
2022 NY Slip Op 33574(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 650048/2020
Judge: Dakota D. Ramseur
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

LIBERTY MUTUAL INSURANCE COMPANY, LM INSURANCE CORPORATION, Plaintiff, INDEX NO. 650048/2020 MOTION DATE 06/17/2022 MOTION SEQ. NO. 002

- v -

YVELYNE FRANCILLON, CARLINE ROUSSEAU, WADE VICTORIN, 5 BOROUGH ANESTHESIA PLLC, ADVANCED COMPREHENSIVE LABORATORY, ANDALELLA CHIROPRACTIC PC, ATLAS PHARMACY LLC, CONRAD F. CEAN MD, CONTEMPORARY ORTHOPEDICS PLLC, CORRECTALIGN CHIROPRACTIC PC, CROSSTOWN CHIROPRACTIC PC, CVS RX INC., GOTHAM SUPPLY GROUP INC., HANK ROSS MEDICAL PC, INSPIRED CHIROPRACTIC PC, JA PHYSICAL THERAPY PC, JOINT PHYSICAL THERAPY PC, KH LEE ACUPUNCTURE PC, LINDEN WEST MEDICAL PC, MALVINA DRUG CORP., METROPOLITAN MEDICAL & SURGICAL PC AKA METROPOL MEDICAL AND SURGERY, MYRTLE EXPRESS PHARMACY INC., NEXTSTEP HEALING INC., NOVA MEDICAL DIAGNOSTIC PC, NYEEQASC LLC, PREMIER ANESTHESIA ASSOCIATES PA, PROCARE HEALTH AND TECHNOLOGY, PROTECHMED INC., ROYAL MEDICAL IMAGING PC, SABAS NY SERVICES INC., SCOB LLC, UNICAST INC., WARREN STREET ORTHOPEDIC REHABILITATION PC, WEI DAO ACUPUNCTURE PC

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiffs Liberty Mutual Insurance Company and LM Insurance Corporation commenced this declaratory judgment action against individual defendants—Yvelyne Francillon, Carline Rousseau, and Wade Victorin—and various medical provider defendants over no-fault reimbursement claims arising from medical treatment the individual defendants received after an alleged motor vehicle accident in June 2019. In their complaint, plaintiffs allege that their investigation of the accident revealed that the individual defendants materially misrepresented the facts of the accident and their injuries. As such, plaintiffs seek a declaration that they are not liable for the reimbursement claims submitted to them by the medical provider defendants. In

Mot. Seq. 002, plaintiffs move pursuant to CPLR 3215 for default declaratory judgments against each defendant that failed to timely answer their complaint. The list of those defendants is as follows:

Individual Defendants

CARLINE ROUSSEAU

WADE VICTORIN

Medical Provider Defendants

5 BOROUGH ANESTHESIA PLLC

ADVANCED COMPREHENSIVE LABORATORY

ANDALELLA CHIROPRACTIC PC

CONRAD F CEAN MD

CONTEMPORARY ORTHOPEDICS PLLC

CORRECTALIGN CHIROPRACTIC PC

CROSTOWN CHIROPRACTIC PC

CVS RX INC

HANK ROSS MEDICAL PC

INSPIRED CHIROPRACTIC PC

JOINT PHYSICAL THERAPY PC

KH LEE ACUPUNCTURE PC

LINDEN WEST MEDICAL PC

MALVINA DRUG CORP

METROPOLITAN MEDICAL & SURGICAL PC aka METROPOL MEDICAL AND SURGERY

MYRTLE EXPRESS PHARMACY INC.

NOVA MEDICAL DIAGNOSTIC PC PREMIER ANESTHESIA ASSOCIATES PA

SCOB LLC

UNICAST INC.

WARREN STREET ORTHOPEDIC

WEI DAO ACUPUNCTURE PC

With respect to defendant SCOB LLC, it cross-moves pursuant to CPLR 3202 (d) for additional time to appear and plead in this matter. (NYSCEF doc. no. 61.) The Court will address the merits of the cross-motion after its discussion on plaintiffs' default-judgment motion.

Plaintiffs' Entitlement to Default Judgments

Pursuant to CPLR 3215 (f), on an application for a default judgment, the moving party must file proof of having served the summons and complaint, the facts constituting the claim, and the defendant's default. Plaintiffs have satisfied each element and are thus entitled to default judgments.

Plaintiffs submitted proof of service of process on each defaulting defendant. (See NYSCEF doc. no. 41.)

As to the facts constituting the claim, insurance providers like plaintiffs may defend against no-fault insurance claims whenever there is 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 Grp. Of Ins. Co.*, 90 NY2d 195, 199 [1997]; *Matter of Metro Med. Diagnostics, P.C. v Eagle Ins. Co.*, 293 AD2d 751, 752 [2d Dept 2002].) Here, plaintiffs assert that the alleged injuries that the individual defendants suffered did not arise out of the accident and, therefore, they are not liable on the underlying insurance policy. Specifically, plaintiffs assert that the no-fault insurance claims arise out of fraud as the individual defendants intentionally misrepresented the circumstances of the accident and their injuries.

Plaintiffs submit the affidavits of Christopher Reyes (A Liberty Mutual Senior Claim Resolution Special) and Richard Ahren as proof of the facts giving rise to the claim. From these affidavits and the supporting papers, it is clear that Wade Victorin did not provide credible testimony regarding the accident or his injuries in his Examination Under Oath (EUOs).¹ Victorin did not know where the accident occurred, could not describe the driver of the other vehicle nor any features of the vehicle itself, and placed the time of the accident at around 6:00 p.m., though both the police report and Francillon describe the accident as occurring more than two hours later. (NYSCEF doc. no. 1 at 16.) Victorin testified that neither police nor an ambulance arrived at the scene of the accident (NYSCEF doc. no. 52 at 20, transcript of Victorin’s EUO), while Francillon testified that both arrived (NYSCEF doc. no. 53 at 22, transcript of Francillon’s EUO). As to the origins of the police report, Victorin explained that James Alexis—the named insurance policyholder—later informed him that a police report had been filed. Yet Francillon provided contradictory testimony, asserting that she gave police her information *on the scene* and that they made a police report *before* any individual defendant left the scene. (*Id.* at 23.) Moreover, neither could explain why the police report listed “Victoria Wade” (as a female), as the passenger instead of, properly, Wade Victorin, who is male. Lastly, Carline Rousseau did not attend her scheduled EUO.

These facts demonstrate that plaintiffs have a ‘founded belief’ that the alleged injuries sustained by the individual defendants were not a product of the accident, but of fraud. (*See Central Gen. Hosp.*, 90 NY2d at 199.) For purposes of declaratory judgment against individual defendants Rousseau and Victorin, plaintiffs submitted the requisite proof.

Plaintiffs have also made the requisite proof against the defaulting medical provider defendants. As assignees of rights owned by the individual defendants, these defendants stand in their shoes, i.e., they take the assignment of the individual defendants’ rights but do so subject to any assertable defenses. (*See Arena Constr. Co. v J. Sackaris & Sons, Inc.*, 282 AD2d 489, 489 [2d Dept 2001]; *Long Is. Radiology v Allstate Ins. Co.*, 36 AD3d 763, 765 [2d Dept 2007].) As these claims are colored by the individual defendants’ contradictory and misleading statements to plaintiffs, these defendants are likewise not entitled to receive any payments from plaintiffs for medical services provided as a result of the accident. (*See American Alternative Ins. Corp. v Washington*, 2018 NY Slip Op 51210[U] at 6-8 [Sup. Ct., NY County 2018].)

¹ As provided by the insurance policy, policy claimants are required to appear for EUOs under oath to substantiate their claims. (*See also* 11 NYCRR §65-1.1.)

Lastly, plaintiffs have demonstrated that the above listed defendants defaulted. (See NYSCEF doc. no. 38.)

Defendant SCOB LLC's Cross-motion for Additional Time to Answer

The court exercises its broad discretion to grant defendant SCOB's motion. Several factors weigh in this direction. First, New York has a strong public policy favoring litigating claims on their merits (See *Andrews v Petriga*, 280 AD2d 374 [1st Dept 2001].) Second, defendant's proffered excuse, though perhaps weak, nonetheless is sufficient given defendant's delay in answering was relatively short. (It filed the instant cross-motion approximately one month after it was required to answer). (See *Jones v 414 Equities LLC*, 57 AD3d 65, 81-82 [1st Dept 2008].) Furthermore, such delay did not prejudice plaintiffs, either with respect to their default motion or, more generally, in the action against the remaining defendants. Plaintiffs do not suggest the delay was intentional or that it was intended to secure a litigating advantage. Lastly, Plaintiffs argue that SCOB has not proffered a meritorious excuse, yet such an excuse is not required where no default judgment has been entered. (*Nason v Fisher*, 309 AD2d 526, 526 [1st Dept 2003].) Because defendant's delay in appearing or answer was brief and unwillful, and there was no evidence that plaintiff was prejudiced, the Court grants defendant's motion. (See *Hosten v Oladapo*, 52 AD3d 658, 658-659 [2d Dept 2008].)

Accordingly, it is hereby

ORDERED that plaintiffs Liberty Mutual Insurance Company and LM Insurance Corporation's motion pursuant to CPLR 3215 for a default judgment against the above-listed non-answering defendants, except for defendant SCOB LLC, is granted; and it is further

ORDERED that plaintiffs' motion for a declaration that plaintiff validly denied all no-fault claims by the non-answering defendants stemming from the alleged occurrence is granted; and it is further

ORDERED that defendant SCOB LLC's cross-motion pursuant to CPLR 3012 (d) for an extension of time to appear and plead in this matter and compel plaintiffs to accept its answer is granted; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with a notice of entry, on all parties within ten (10) days of this order.

10/17/2022

DATE



DAKOTA D. RAMSEUR, 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