

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA,

Plaintiff,

- v -

JEFFEREY SMITH, GAIL BAKER, ACUNICA ACUPUNCTURE, P.C.,ADVANCED RECOVERY EQUIPMENT AND SUPPLIES LLC,AUTO RX, COLUMBUS IMAGING CENTER, LLC,FRANCES SARULLO, D.C., HIGHWAY RADIOLOGY ASSOCIATES LLP, KINGS MEDICAL PLUS, P.C.,LEO YANKILEVICH, M.D, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, NYH BROOKLYN, ODYSSEY INFINITE SERVICES, INC.,PUSHP R. BHANSALI, M.D., PUSHP R. BHANSALI PHYSICIAN, P.C.,UNITED NYC MEDICAL ASSOCIATES LLC,UNITED SPECIALTY PHARMACY INC.

Defendanst.

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INDEX NO. 158399/2019
MOTION DATE 3/25/2020
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 85

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 86

were read on this motion to/for JUDGMENT - SUMMARY

In this declaratory judgment action, the plaintiff insurer moves pursuant to CPLR 3215 for leave to enter a default judgment against Jefferey Smith, Gail Baker, Advanced Recovery Equipment and Supplies LLC, Auto Rx, Leo Yankilevich M.D., NYH Brooklyn, Odyssey Infinite Services Inc., United NYC Medical Associates LLC, and United Specialty Pharmacy Inc. (the non-answering defendants). The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to the individual defendant or the non-answering health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant following a motor vehicle accident on December 16, 2015, under policy number 6631F395935 (MOT SEQ 001). The plaintiff also moves pursuant to CPLR 3212 for

summary judgment seeking the same relief as against the answering defendants Columbus Imaging Center LLC, Kings Medical Plus PC, and Metro Pain Specialists Corporation (MOT SEQ 002). The answering defendants oppose the motion for summary judgment. Both motions are granted.

On December 16, 2015 Jeffrey Smith was a passenger on a bus operated by the Metropolitan Transportation Authority (MTA) when a car struck the back of the bus, causing him injury. As a result of the accident, Smith was afforded no-fault benefits by a policy issued to the MTA. Despite Smith being afforded no-fault benefits under the separate policy, a number of claims seeking reimbursement were submitted under the policy at issue in this action, which was issued to Smith's ex-wife Gail Baker. The policy contains provisions entitling no-fault insurance coverage to the policyholder's spouse and any relative, by either blood, marriage, or adoption, currently residing in the policyholder's household. At the time of the accident, Baker was residing at 15703 109th Avenue in Jamaica, New York. Smith was residing at 3715 Kings Highway in Brooklyn, New York, and had been living there for approximately three years prior to the accident.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). While the "quantum of proof necessary to support an application for a default judgment is not exacting... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

Here, the plaintiff submits, *inter alia*, the applicable affidavits of service, the insurance policy at issue, the claims submitted by the healthcare defendants, and an affidavit from Smith averring that he was afforded no-fault benefits from the MTA policy, that he did not seek benefits under the policy at issue, and that he was not married to, or residing with, Baker at the time of the accident. These submissions demonstrate, *prima facie*, that Smith, and by extension the healthcare defendants attempting to collect for services allegedly rendered to him, is not

entitled to no-fault benefits under Baker's policy as he was neither policyholder's spouse nor a relative, currently residing in the policyholder's household at the time of the accident. See Central General Hospital v Chubb Group of Insurance Companies, 90 NY2d 195 (1997); Zappone v Home Insurance Company, 55 NY2d 131 (1982).

These submissions further establish the plaintiff's entitlement to summary judgment. It is well settled that the proponent of a motion for summary judgment establishes entitlement to that relief by tendering sufficient evidence to demonstrate the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). Here, the plaintiff has met this burden as against the answering defendants. In opposition the answering defendants argue that because Smith was listed as an 'insured driver' on a declaration page within the policy, he is entitled to benefits despite not being Baker's spouse or a relative residing with her at the time of the accident. This argument is unavailing inasmuch as the plain language of the policy only affords coverage to spouse or a relative residing with the policyholder. See Metro. Prop. & Liab. Co. v Feduchka, 135 AD2d 715 (2nd Dept. 1987). Moreover, the answering defendants fail to address how they could possibly be entitled to the instant policy's no-fault benefits on Smith's behalf when Smith himself avers that he made no claims on the policy, as he received no-fault benefits under a different MTA policy.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants, Jefferey Smith, Gail Baker, Advanced Recovery Equipment and Supplies LLC, Auto Rx, Leo Yankilevich M.D., NYH Brooklyn, Odyssey Infinite Services Inc., United NYC Medical Associates LLC, and United Specialty Pharmacy Inc. is granted (MOT SEQ 001); and it is further,

ORDERED that the plaintiff's motion for summary judgment against the answering defendants, Columbus Imaging Center LLC, Kings Medical Plus PC, and Metro Pain Specialists Corporation, is granted (MOT SEQ 002); and it is further;

ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendants Advanced Recovery Equipment and Supplies LLC, Auto Rx, Leo Yankilevich M.D., NYH Brooklyn, Odyssey Infinite Services Inc., United NYC Medical Associates LLC, United Specialty Pharmacy Inc., Columbus Imaging Center LLC, Kings Medical Plus PC, and Metro Pain Specialists Corporation to reimburse them for treatment or medical equipment that they provided to Jefferey Smith for injuries that he sustained in a motor vehicle accident that occurred on December 16, 2015; and it is further,

ORDERED that the plaintiff shall serve a copy of this Decision, Order, and Judgment upon the defendants within 30 days.

This constitutes the Decision, Order, and Judgment of the court.


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

6/25/2020
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: