

Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN  
Justice

IA PART 30

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AMERIPRISE INSURANCE COMPANY,

Index No.: 600136/19  
Motion Date: 6/20/19  
Motion Cal. #: 2  
Seq. No.: 2

Plaintiff(s),

-against-

ROY KIM, ET AL,

Defendant(s).  
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The following numbered papers read on this motion by plaintiff for a default judgment against defendants Roy Kim, Anesthesia Professionals PA, Andrew J. Dowd, M.D., Bayside Wellness Physical Therapy P.C., BKLYN Chiropractic, P.C., Central Radiology, P.C., Duramed LLC, Franklin RX, Inc, Gaogui Leasing Corp, Gaon Acupuncture, P.C., Ji Ae Kim, PT, JPS Medical P.C., JWC PT P.C., Matthew Alan Wert, M.D., Newtech Chiropractic, P.C., Park West Surgical Group, LLC d/b/a Park West Medical Group, Sanford R. Wert M.D., P.C., Sky Radiology, P.C., and W Medical Care P.C. (collectively "Defaulting Defendants") and a declaratory judgment that plaintiffs are not obligated to reimburse Defaulting Defendants for alleged medical services.

PAPERS

NUMBERED

Notice of Motion-Affidavits-Exhibits..... EF 36 - 54

Upon the foregoing cited papers, it is ordered that the motion is denied.

When a defendant fails to appear or answer, a plaintiff may seek a default judgment against that defendant (CPLR 3215 [a]). "On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing" (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2011]; CPLR 3215[f]). "[A] default judgment in a declaratory judgment action will not be granted on the default and pleadings alone" as it is necessary for the plaintiff to establish a right to a declaration against a defendant (*see Levy v Blue Cross & Blue Shield of Greater New York*, 124 AD2d 900, 902 [1986]).

Here, plaintiff seeks a declaration: (1) that the alleged motor vehicle accident of August 14, 2017, was not the product of a covered event; (2) since the accident is not a covered event, plaintiff does not need to cover defendants' alleged medical services; (3) that defendant Roy Kim was not the occupant of a vehicle or a pedestrian struck by a vehicle, and therefore his injuries did not arise from the subject accident; (4) since Mr. Kim breached the fraud provisions of the policy, none of the defendants are entitled to compensation from plaintiff; and (5) a permanent injunction enjoining defendants from seeking any recovery for the subject accident from plaintiff.

In support, plaintiff submits, among other things, a copy of the insurance policy, a copy of Mr. Kim's examination under oath, dashcam footage, the affidavit of Raymond Miranda, a Collision Damage Analyst for Lange Technical Services, Ltd. (Lange), and a copy of the Collision Damage Analysis Report from Lange.

Mr. Kim states that on the date of the accident, he was parked on 159<sup>th</sup> Street near Northern Boulevard, Queens, New York, when a Honda Pilot backed into his car and then fled the scene. He avers that he was sitting in his car with the engine turned off, speaking on the phone regarding a bill. He claims that there were no cars parked in front of him, and that his car had a dashcam which recorded the accident.

The dashcam video is dark and somewhat grainy. Although it clearly depicts a vehicle striking another vehicle parked in front of Mr. Kim's vehicle, it cannot be determined from the video whether the parked vehicle subsequently struck Mr. Kim's vehicle.

Plaintiff argues that since Mr. Kim states that he was on the phone at the time of the accident, the fact that the dashcam video does not pick up any audio from Mr. Kim establishes that he was not in the vehicle at the time of the accident. However, this argument ignores a myriad of possibilities, such as that the accident may have occurred while there was a lull in the conversation, or as often happens when one is on a call with a service provider, Mr. Kim was placed on hold. The lack of audio from Mr. Kim does not establish that he was not in the vehicle at the time of the accident.

Mr. Miranda authenticates Lange's report and concludes, to a reasonable degree of scientific certainty, that the damage to Mr. Kim's vehicle was only partially related to the subject accident. He states that some of the damage to the left front bumper and fog lamp are consistent with the accident, but that damage to the radiator core support, left fender, and scrapes, scratches, deformities and abrasive markings made at a downward angle were either fabricated or intentionally induced. As with the dashcam video, Mr. Miranda's affidavit and Lange's report, which indicate that some of the damage to Mr. Kim's vehicle is consistent with the accident, does not demonstrate that a fraud occurred.

Here, accepting all of the facts that plaintiff asserts as true, they provide at best, some circumstantial evidence that a fraud may have occurred (*see Lancer Ins. Co. v Saravia*, 40 Misc3d 171, 175 [Sup Ct, Kings County 2013]). Since plaintiff has not established its right to the declaration sought, and as here, the declaratory relief requested will affect the rights of the defendants not alleged to be in default, default judgment must be denied (*see Merchants Ins. Co. of New Hampshire v Long Island Pet Cemetery, Inc.*, 206 AD2d 827, 828 [1994]).

Accordingly, the motion is denied.

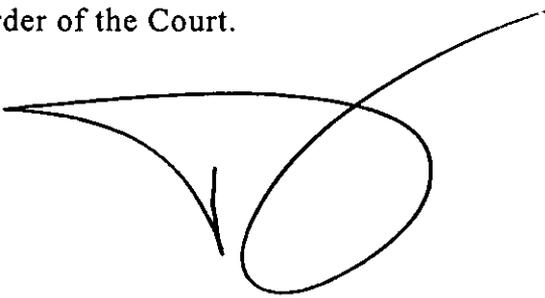
This constitutes the decision and order of the Court.

**ENTERED**

Dated: July 29, 2019

AUG 01 2019

NASSAU COUNTY  
COUNTY CLERK'S OFFICE



DICCIA T. PINEDA-KIRWAN, J.S.C.