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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2926-16T4

KELLY SIMONE OLLIVIERRE,

Plaintiff-Appellant,

v.

UNITED TAXI,

Defendant-Respondent.

Submitted February 28, 2018 – Decided March 29, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No. L-
4716-16

Spevack Law Offices, attorneys for appellant
(Robert H. Heck, on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff Kelly Ollivierre appeals from the January 12, 2017
order entered following a proof hearing, in which the trial judge
declined to award any damages as she concluded that plaintiff had
not adequately investigated the accident or the availability of

insurance. Because we find the judge did not apply the appropriate standard in conducting a proof hearing, we vacate the order and remand for further proceedings.

We discern the facts from the testimony presented at the proof hearing. On a snowy day in March 2015, plaintiff called defendant requesting a cab. After getting into the cab when it arrived at her home, she testified that the vehicle moved forward, and then backed up, striking a parked car. She described the impact as "medium" and stated that her body moved forward, then back, and her neck cracked.

Plaintiff got out of the cab and returned to her home. The following day she went to the emergency room complaining of pain in her neck, left shoulder, and lower back. After undergoing x-rays she was discharged with a diagnosis of cervical strain. A week later, plaintiff began a course of treatment with a pain management specialist and attended physical therapy sessions for four months. She also had a cervical epidural injection and a cervical medial branch block injection.

At the time of the proof hearing, plaintiff testified that she continued to have pain in her neck that radiated into her left shoulder. She said the pain caused her difficulty with daily activities, including sleeping, chores around the house, and

turning her head. She denied any prior injury or pain to her neck.

Plaintiff submitted the expert report of the treating doctor. His review of the cervical MRI films revealed several herniated and bulging discs in her cervical spine and a bulging disc in her lumbar spine. The doctor opined that her injuries were causally related to the motor vehicle accident and permanent.

Plaintiff did not own a car at the time of the accident nor did she live with anyone who had automobile insurance. She submitted unpaid medical bills of \$23,811.55. She also presented proofs of service of the complaint, entry of default, and the scheduling of the proof hearing upon United Taxi. The judge reserved on her decision.

On January 12, 2017, the trial judge placed her decision on the record. After a review of the factual testimony and medical records, the judge stated:

I find that there is in this case more questions that remain unanswered which would prevent providing for the relief as requested by the plaintiff.

In this case there was absolutely no indication in the evidence of any attempts of counsel to determine the identity of the driver of the United Taxi[,]. . . whether there was insurance coverage, who was the owner of this United Taxi, nor was there any evidence of either a police report or even a

police investigation into the accident or the happening of this accident.

This is simply a case where a plaintiff has indicated that she was involved in a car accident with a parked vehicle.

The judge reiterated that because there was no investigation into the accident to corroborate plaintiff's "testimony that there was . . . even an accident on this day and no attempt to determine who should be held responsible for this accident . . . other than the mere allegation by the plaintiff that she called United Taxi and United Taxi was the person involved."

The judge stated further that she found a discrepancy between the hospital discharge reports and the expert report. She stated: "It's difficult to imagine under the circumstances [of this accident] as described by the plaintiff . . . that there would be the injuries that she alleges."

Defendant was properly served with the complaint as well as the entry of default and date of the proof hearing. Defendant chose not to defend itself. Therefore, the uncontradicted proofs presented to the court were that plaintiff was a passenger in a car that was involved in an accident with a parked vehicle. Following the accident, plaintiff went to the emergency room and underwent a course of medical treatment. She had ongoing complaints of pain and unpaid medical bills.

When a trial court exercises its discretion to require a plaintiff to provide proof of liability as to a defaulting defendant, the plaintiff need only establish a prima facie case. Kolczycki v. City of E. Orange, 317 N.J. Super. 505, 514 (App. Div. 1999); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.2 on R. 4:43-2 (2018) (stating that "unless there is intervening consideration of public policy or other requirement of fundamental justice, the judge should ordinarily apply to plaintiff's proofs the prima facie case standard of R. 4:37-2(b) and R. 4:40-1, thus not weighing evidence or finding facts but only determining bare sufficiency").

At a proof hearing, the trial court may only deny default judgment to plaintiff if "some element of [her] cause of action [is] missing or because [her] right to recovery [is] barred by some rule of law whose applicability was evident either from the proofs or from their complaint." Heimbach v. Mueller, 229 N.J. Super. 17, 24 (App. Div. 1988). The judge did not rely on either of those circumstances to support her denial of plaintiff's claim and it is evident that those circumstances are not present here. It was erroneous for the judge to require plaintiff to conduct her own investigation as to the availability of insurance and identity of the cab's driver. Those arguments belonged to defendant, who

relinquished them in failing to answer the complaint and appear in the case.

As a result of the default, there was nothing presented to the trial judge to disprove plaintiff's testimony. Consequently, the court erred in denying an award of damages based on her own opinion that the described impact could not have caused the injuries ascribed to plaintiff in her treating physician's expert report. The judge did not state, and we cannot find, that the evidence presented by plaintiff was so inherently incredible that the trial judge could be justified in refusing to believe it.

We, therefore, vacate the order and remand to the trial court for a determination of the appropriate award of economic and non-economic damages. Because this trial judge has already opined on plaintiff's proofs, it would be appropriate for a different judge to handle the case upon remand. That judge will exercise his or her discretion as to whether a decision may be made from a review of the documents submitted at the proof hearing and the transcript.

Reversed, vacated, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION