American Tr. Ins. Co. v Cabell
2016 NY Slip Op 32352(U)
December 1, 2016
Supreme Court, New York County
Docket Number: 151071/16
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

DERRELL M. CABELL, A&E ANESTHESIA ASSOCIATES LLC, AGYAL PHYSICAL THERAPY, PLLC, DAILY MEDICAL EQUIPMENT DISTRIBUTION CENTER, INC., GARA MEDICAL CARE, P.C., LIDA'S MEDICAL SUPPLY, INC., LLJ THERAPEUTIC SERVICES, P.T. P.C., MANALAPAN SURGERY CENTER, INC., MANHATTAN BEACH PHARMACY, INC., MODERN CHIROPRACTIC P.C., OZ ACUNPUNCTURE, P.C., PROFESSIONAL CHIROPRACTIC CARE, P.C., WESTCHESTER RADIOLOGY & IMAGING, P.C., WPS CHIROPRACTIC, P.C.,

Defendants.

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Index No. 151071/16
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Plaintiff American Transit Insurance Company ("Plaintiff" or "American Transit") moves pursuant to CPLR 3215[1] for default judgments in this action against defendants A&E Anesthesia Associates, LLC, Agyal Physical Therapy, PLLC, Gara Medical Care, P.C., LLJ Therapeutic Services, P.T. P.C., Manalapan Surgery Center, Inc., Manhattan Beach Pharmacy, Inc., Modern Chiropractic, P.C., OZ Acupuncture P.C., Professional Chiropractic Care, P.C., Westchester Radiology & Imaging, P.C. and WPS Chiropractic P.C. (the "Providers").[2]

[1] CPLR 3215(a) provides in relevant part that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him."

[2] By stipulation dated September 2, 2016 (Plaintiff's Exhibit F), Plaintiff agreed to discontinue this action as against defendants Daily Medical Equipment Distribution Center, Inc. and Lida's Medical Supply, Inc.

Plaintiff does not seek any relief against defendant Derrell M. Cabell ("Mr. Cabell") since Plaintiff has been unable to serve him with the summons and complaint. However, Plaintiff seeks a declaratory judgment that American Transit is not obligated to pay any current or future claims for reimbursement submitted by Mr. Cabell's Providers under American Transit insurance policy CAP 612796 ("the Policy") regarding Claim No. 779592-05 ("Claim") in respect of an alleged accident involving Mr. Cabell on December 8, 2014.

Plaintiff alleges that the Policy that is the subject of this action was issued by American Transit to Carly Auto Corporation.[3] The Policy includes a no fault endorsement which covers an eligible insured in the amount of $50,000 for expenses resulting from a motor vehicle accident. Plaintiff alleges that the Policy was in effect on December 8, 2014 when a vehicle owned by Carly Auto Corporation was involved in an accident. Mr. Cabell allegedly was a passenger in the vehicle at the time. Plaintiff alleges that on December 29, 2014 it received a New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle Benefits form (NF-2) from Mr. Cabell through which he claimed benefits under the Policy.[4] Also on December 29, 2014, Plaintiff received a letter of representation from Mr. Cabell's attorneys, Goldin & Rivin, PLLC, dated December 26, 2014.[5] Mr. Cabell allegedly sought treatment from the Providers after the accident. Plaintiff asserts that Mr. Cabell assigned the right to collect benefits under the Policy to the Providers, who have since submitted claims to the Plaintiff thereunder.

The New York State Department of Financial Services has promulgated regulations concerning New York's no-fault laws which require insurers to include certain endorsements as

[3] See Exhibit B. Notably, the Policy is undated. Also, neither the Policy number nor the insured's name appear therein.

[4] A copy of Mr. Cabell's NF-2 has not submitted herein.

[5] Exhibit C.

part of any motor vehicle policy. As is relevant to this case, the Policy contains the following provisions as required by 11 NYCRR 65-1.1 (*see also* Insurance Law § 5103):

> No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.
>
> * * * *
>
> Upon request by the Company, the eligible injured person or that person's assignee or representative shall . . . As may reasonably be required submit to examinations under oath by any person named by the Company and subscribe to same. . . . [Exhibit B, at 15-16].

Plaintiff mailed letters to Mr. Cabell's counsel on February 25, 2015 and again on April 10, 2015 requesting that Mr. Cabell appear for an examination under oath. It is alleged that Mr. Cabell did not appear for an examination despite such notices.[6] Thereafter Plaintiff denied the Providers' claims. The denial of claim form (NF-10), which was completed by American Transit representative Lisette Ramos on May 15, 2015, cites Mr. Cabell's failure to appear for his scheduled examination as the reason for the denial.[7]

Plaintiff filed its summons and verified complaint in this action on February 9, 2016. The complaint seeks a declaratory judgment that American Transit properly denied no-fault coverage in this case due to Mr. Cabell's violation of a condition precedent to coverage by failing to appear for his examination. American Transit further seeks a declaration that the Providers are not entitled to payment of the assigned no-fault benefits for treatment rendered to Mr. Cabell as a result of his accident. American Transit's proofs of service[8] show that all of the defendants except Mr. Cabell were served within the 120 day period prescribed by CPLR 306-b. There is no record that any defendant has answered or appeared in this action.

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[6] See Affidavit of Kelley Minogue, submitted herein as Plaintiff's exhibit A. The court notes that Ms. Minogue's affidavit has not been notarized.

[7] Exhibit E, p. 4.

[8] Exhibit G.

Plaintiff filed this motion on October 4, 2016. On the October 31, 2016 return date only counsel for Plaintiff appeared and the motion was marked submitted without opposition.

An application for a default judgment must include proof of service of the summons, proof of the claim, and proof of the default. The moving papers establish that Plaintiff duly served the various Providers pursuant to CPLR 311, Business Corporation Law § 306, and Limited Liability Company Law § 303.[9] They were served with additional copies of the summons and complaint on March 25, 2016 as required by CPLR 3215(g)(4)(i)[10]. Annexed to the moving papers is an affidavit by Ms. Ramos, sworn to September 13, 2016, which sets forth the facts constituting Plaintiff's claims herein.[11] See CPLR 3215(f). Based on the foregoing, the court finds that the Providers are in default.

However, the court finds that Plaintiff is not entitled to the declaratory relief it seeks. New York's no-fault system is designed "to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists". *Hospital for Joint Diseases v*

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[9] CPLR 311(a)(1) authorizes service upon a domestic corporation by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."

Business Corporation Law 306 authorizes service of process upon a domestic corporation by service on the New York State Secretary of State as agent of the corporation.

Limited Liability Company Law 303 authorizes service of process upon a limited liability company by service on the New York State Secretary of State as agent of the limited liability company.

[10] CPLR 3215(g)(4)(i) provides that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment."

[11] Plaintiff's Exhibit A. CPLR 3215(f) provides in relevant part that "[o]n any application for judgment by default, the applicant shall file . . . proof of the facts constituting the claim . . . .Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due."

Travelers Property Cas. Ins. Co., 9 NY3d 312, 317 (2007) (*quoting Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]). As part of this system, regulations have been enacted which prescribe specific time frames for requesting and scheduling examinations under oath. Specifically, 11 NYCRR 65-3.5(a) provides that "within 10 business days after receipt" of an NF-2 form, an insurer shall forward, to the parties required to complete them, the verification forms it will require prior to payment of the initial claim. After the insurer's receipt of the completed verification forms, any additional verification (i.e. an examination under oath) required by the insurer to establish proof of the claim must be requested within 15 business days of receipt of one or more of the completed verification forms. 11 NYCRR 65-3.5(b). An insurer must affirmatively establish its compliance with these claim procedures in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for an examination. *American Transit Ins. Co. v Vance*, 131 AD3d 849 (1st Dept 2015); *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015).

In this case Plaintiff claims to have received Mr. Cabell's NF-2 form on December 29, 2014. However, with its motion papers Plaintiff merely submits a copy of Mr. Cabell's identification card and the aforementioned letter from his counsel advising Plaintiff, among other things, that it was attempting to ascertain whether the other vehicle involved in Mr. Cabell's accident carried liability coverage. The letter suggests that a copy of Mr. Cabell's no fault benefits application and related police report were enclosed therewith, yet copies were not annexed to the moving papers.

Assuming that Plaintiff did receive Mr. Cabell's NF-2 form on December 29, 2014 as claimed, there is no proof submitted that Plaintiff mailed its verification forms to the various

Providers and/or Mr. Cabell within 10 business days thereof (in this case January 12, 2015) as required by 11 NYCRR 65-3.5(a), or that any or all of the Providers responded thereto. As such Plaintiff cannot prove that it requested an examination of Mr. Cabell within the time frame mandated by 11 NYCRR § 65-3.5(b). Under *Vance*, these omissions preclude Plaintiff's request for a declaratory judgment, regardless of whether or not Mr. Cabell violated a condition precedent to coverage by failing to appear for his examination. Also precluding a declaratory judgment is that the Minogue affidavit has not been notarized and that the Policy submitted herein is undated and makes no reference to Carly Auto Corporation, the alleged insured.

Accordingly, it is hereby

ORDERED that American Transit's motion is denied with leave to renew upon proper papers within 30 days from the date of entry of this decision and order, failing which this action shall be dismissed in its entirety. In additional to addressing the issues discussed herein, any renewed motion must also include the efforts American Transit has taken to locate and serve Mr. Cabell.

This constitutes the decision and order of the court.

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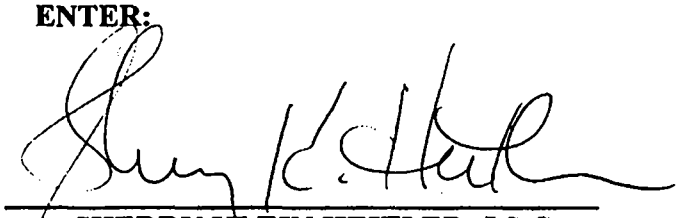

DATED: 12-1-16

SHERRY KLEIN HEITLER, J.S.C.