

American Tr. Ins. Co. v Rodriguez

2017 NY Slip Op 30426(U)

February 2, 2017

Supreme Court, New York County

Docket Number: 162117/15

Judge: Sherry Klein Heitler

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This opinion is uncorrected and not selected for official publication.

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

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 AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

ALLAN J. RODRIGUEZ, A TO Z MEDICAL CARE, P.C.,
 ARIS DIAGNOSTIC MEDICAL, PLLC, ENZO CLINICAL
 LABS, INC., GOOD POINT ACUPUNCTURE, P.C.,
 HAAR ORTHOPEDICS & SPORTS MEDICINE, P.C.,
 THE JAMAICA HOSPITAL MEDICAL CENTER
 DIAGNOSTIC AND TREATMENT CENTER CORP.,
 LAWRENCE P. KEMPF, M.D., NEW CENTURY
 PHARMACY, INC., PARK AVENUE ORTHOPEDICS,
 P.C., REGENCY HEALTHCARE MEDICAL, PLLC,
 ROCKAWAY COMPLETE CHIROPRACTICE, P.C.
 SCARPA PHARMACY & SURGICAL SUPPLIES, US
 TECH REHAB, INC., and YU LONG ACUPUNCTURE,
 P.C.,

Defendants.

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 SHERRY KLEIN HEITLER, J.S.C.

By notice of motion dated August 31, 2016, Plaintiff American Transit Insurance Company (“Plaintiff” or “American Transit”) seeks default judgments pursuant to CPLR § 3215¹ against defendant Allan J. Rodriguez (“Rodriguez”) and defendants A to Z Medical Care, P.C., Aris Diagnostic Medical, PLLC, Enzo Clinical Labs, Inc., Good Point Acupuncture, P.C., Lawrence P. Kempf, M.D., New Century Pharmacy, Inc., Park Avenue Orthopedics, P.C., Regency Healthcare Medical, PLLC, Rockaway Complete Chiropractic, P.C., US Tech Rehab, Inc., and Yu Long Acupuncture, P.C. (“Defaulting Providers”) for failing to answer or appear in this action, and summary judgment pursuant to CPLR § 3212 against defendants Haar Orthopedics & Sports

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.”

Medicine, P.C. and The Jamaica Hospital Medical Center Diagnostic and Treatment Center Corp. (“Answering Providers”). Plaintiff further seeks a declaratory judgment that it is not obligated to pay any current or future claims for reimbursement submitted by the Defaulting Providers or the Answering Providers (collectively, “Providers”) under American Transit insurance policy 612795 (“the Policy”) regarding Claim No. 778676-02 (“Claim”) in respect of an alleged accident involving Mr. Rodriguez on September 25, 2014. Plaintiff seeks no relief against defendant Scarpa Pharmacy & Surgical Supplies since it has been unable to serve it with the summons and complaint.

By stipulation dated December 16, 2016, Plaintiff agreed to discontinue this action with prejudice as against Haar Orthopedics & Sports Medicine, P.C., Park Avenue Orthopedics, P.C., and Regency Healthcare Medical, PLLC.²

This motion was fully submitted to the court on January 9, 2017. It is unopposed.

According to the moving papers the Policy was issued by American Transit to Arbee Management.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 September 25, 2014 when a vehicle owned by Arbee Management was involved in an accident. According to his New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle Benefits form (NF-2), Mr. Rodriguez claimed to be driving the vehicle at the time of the accident. Mr. Rodriguez alleged that he sustained serious injuries and as a result and sought treatment from the Providers, who in turn have sought reimbursement from the Plaintiff.

² NYSCEF Doc. 36.

³ See Exhibit B. Notably, the Policy is undated and neither the Policy number nor the insured’s name appear therein.

The Plaintiff received the NF-2 form from Mr. Rodriguez on October 22, 2014 through which he claimed benefits under the Policy. The next communication in the record is a January 13, 2015 letter of representation from Mr. Rodriguez' attorneys to Plaintiff.⁴

On February 10, 2015, Physical Exam Referrals, Inc., on behalf of the Plaintiff, wrote to Mr. Rodriguez' counsel to advise him that an independent medical examination ("IME") of Mr. Rodriguez was scheduled to take place on February 23, 2015.⁵ It is alleged that Mr. Rodriguez did not appear for that IME. Plaintiff then rescheduled the IME for March 16, 2015 and notified Mr. Rodriguez of the new date in writing.⁶ Mr. Rodriguez again failed to appear. Based on the foregoing, on April 24, 2015 Plaintiff denied all No-Fault coverage relating to the accident.⁷

DISCUSSION

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 Mr. Rodriguez pursuant to CPLR § 308(2) and the Providers pursuant to CPLR § 311, Business Corporation Law § 306, Limited Liability Company Law § 303, and Not-for-Profit Corporation Law § 306.⁸ Additional copies of the summons and complaint were mailed to the Providers as

⁴ Both the NF-2 form and the representation letter are annexed to Plaintiff's moving papers as Exhibit C.

⁵ Plaintiff's Exhibit D.

⁶ *Id.*

⁷ Plaintiff's April 24, 2015 NF-10 form (Plaintiff's Exhibit E) indicates Mr. Rodriguez' failure to appear for his IME's as the reason for the denial.

⁸ CPLR § 308(2) authorizes service upon a natural person by delivering the summons to a person of suitable age and discretion at the person's dwelling and by mailing the summons to the person to be served at his or her last known address.

CPLR § 311 authorizes service upon a domestic corporation to an agent of the corporation authorized to accept such 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.

required by CPLR § 3215(g)(4)(i)⁹. The affirmations and affidavits that are annexed to the moving papers set forth the facts constituting Plaintiff's claims herein in compliance with CPLR § 3215(f).¹⁰ Mr. Rodriguez and the Defaulting Providers have not answered the Complaint or otherwise appeared in this action. Based on the foregoing, the court finds that Mr. Rodriguez and the Defaulting Providers are in default.

However, Plaintiff has not shown its entitlement to summary judgment or to declaratory relief. 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 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]). Pursuant to Insurance Law § 5106(a) benefits must generally be paid or the claim denied within 30 days after receipt of the proof of claim. If an insurer seeks additional verification, the 30-day window is tolled until it receives the relevant information requested. Among other forms of verification, insurers are permitted to request that insureds appear for an IME pursuant to 11 NYCRR 65-1.1, which requires all New York State No-Fault policies to include the following endorsement:

Not-For-Profit Corporation Law § 306 authorizes service of process upon a Not-For-Profit corporation by service on the New York State Secretary of State as agent of the Not-For-Profit corporation.

⁹ See Affidavit of Terrell Lucas, sworn to August 11, 2016, Plaintiff's exhibit H. 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."

¹⁰ 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."

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require.

In this regard, 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 required by the insurer to establish proof of the claim, in this case an IME, must be requested within 15 business days of receipt of one or more of the completed verification forms. 11 NYCRR 65-3.5(b). “[T]he insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms.” 11 NYCRR 65-3.5(d).

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 a medical exam. *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).

The evidence provided on this motion shows that Plaintiff received Mr. Rodriguez’ NF-2 form on October 22, 2014 but concedes that it did not notice his IME until February 10, 2015, more than 90 calendar days later. There is no indication that Plaintiff mailed verification forms to the various Providers and/or Mr. Rodriguez within 10 business days of receiving the NF-2 as required by 11 NYCRR 65-3.5(a) or that Plaintiff received completed verification forms back from Mr. Rodriguez or any of the Providers that would have tolled Plaintiff’s time to request an IME. As such Plaintiff has not shown that its request to examine Mr. Rodriguez was timely. This omission

precludes Plaintiff from being able to make a *prima facie* case for summary judgment.¹¹ It also precludes Plaintiff from obtaining a declaratory judgment against Mr. Rodriguez and the Defaulting Providers, whether or not Mr. Rodriguez violated a condition precedent to coverage by failing to appear for his IME. *See Vance, supra.*

Accordingly, it is hereby

ORDERED that Plaintiff's motion for an order finding Allan J. Rodriguez, A to Z Medical Care, P.C., Aris Diagnostic Medical, PLLC, Enzo Clinical Labs, Inc., Good Point Acupuncture, P.C., Lawrence P. Kempf, M.D., New Century Pharmacy, Inc., Rockaway Complete Chiropractic, P.C., US Tech Rehab, Inc., and Yu Long Acupuncture, P.C. to be in default is granted; and it is further

ORDERED that Plaintiff's motion is otherwise denied; and it is further

ORDERED that Plaintiff shall serve a copy of this order upon all parties by first class mail within 20 days from the date of entry of this decision and order; and it is further

ORDERED that all parties appear for a conference in Part 30 on March 27, 2017 at 9:30AM.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED:

2-2-17


SHERRY KLEIN HEITLER, J.S.C.

¹¹ The "[f]ailure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see also Winegrad v NYU Med. Center*, 64 NY2d 851, 853 (1985).