

American Tr. Ins. Co. v Pierre
2017 NY Slip Op 31278(U)
June 12, 2017
Supreme Court, New York County
Docket Number: 151639/16
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

American Transit Insurance Company,

Index No.
151639/16

Plaintiff,
- v -

**DECISION
and ORDER**

Mot. Seq. 2

Alex Pierre, Aegis Sciences Corporation,
Blano Medical, P.C., Clear Water Psychological
Services P.C., Ahmed Medical Care, P.C., Han
Xu Acupuncture P.C., Holy Star Acupuncture,
P.C., Horizon PT Care, P.C., Huntington Hospital,
Jules Francois Parisien MD, Kensington Radiology
Group, P.C., Ksenia Pavlova, DO, LLJ Therapeutic
Services, P.T. P.C., Noel E. Blackman, MD, North
Shore-LIJ Medical, P.C., Phoenix Medical Services,
P.C., Pro Edge Chiropractic P.C., Skapars Health
Products Inc., Sr Wellness PT P.C., Therapeutic
Chiropractic Services, P.C., Top Tap Acupuncture, P.C.,
XVV, Inc., Queens Dart Acupuncture, P.C.,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

The action has been discontinued as against: Jules Francois Parisien, MD,
Ksenia Pavlova, DO, and Noel E. Blackman, MD.

Plaintiff moves for a default judgment pursuant to CPLR § 3215 against the
following defendants: Alex Pierre, Ahmed Medical Care, P.C., Han Xu
Acupuncture P.C., Holy Star Acupuncture, P.C., Horizon PT Care, P.C.,
Huntington Hospital, LLJ Therapeutic Services, P.T. P.C., North Shore-LIJ
Medical, P.C., Phoenix Medical Services, P.C., Pro Edge Chiropractic P.C., Sr
Wellness PT P.C., Therapeutic Chiropractic Services, P.C., Top Tap Acupuncture,

P.C., and Queens Dart Acupuncture, P.C. (the “Defaulting Defendants”) for failure to appear in this action. Plaintiff submits affidavits of service showing service upon Defaulting Defendants, and notice of additional mailing. Defaulting Defendants do not oppose.

Plaintiff also moves for summary judgment against XVV, Inc. XVV, Inc., does not oppose.

Plaintiff is not seeking relief against: Aegis Sciences Corporation, Blanco Medical, P.C., Clear Water Psychological Services P.C., Kensington Radiology Group, P.C., and Skapars Health Products Inc.

Plaintiff submits the attorney affirmation of Justin Rothman; affidavit of merit of Joann Shephard, a no-fault claims supervisor employed by Plaintiff; affidavit of Luis Campbell, the Mail Room Supervisor of Plaintiff; two affidavits from Tracy Simpson, the scheduling coordinator and supervisor at Examworks; affidavit of Mike Ficalora, the Clerical Quality Assurance Coordinator Manager at Examworks; and Chris Sesto, a chiropractor assigned to conduct the an Independent Medical Examination of Alex Pierre, on behalf of Plaintiff.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

The failure to appear for a scheduled independent medical examination is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. (See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dep't 2011]; *Hertz Corp. v. V.S. Care Acupuncture, P.C.*, 2013 NY Slip Op 30895(U), *3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A), *1 [N.Y. App. Term 2012]). “[A]

properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption.” (*American Transit Insurance Company v. Lucas*, 111 A.D. 3d 423, 424 [1st Dep’t 2011]). A presumption of mailing “may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed.” (*Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D. 679, 680 [2nd Dep’t 2001]).

Plaintiff has demonstrated entitlement to default judgment against Defaulting Defendants. Additionally, through the provided affidavits and exhibits thereto, Plaintiff has demonstrated prima facie entitlement to summary judgment against defendant XVV, Inc. As appearances for IME’s were a condition precedent to payment under the subject policy and Alex Pierre breached the requirement by failing to appear, there is no basis for coverage to defendant St. XVV, Inc, as his assignee. By failing to oppose Plaintiff’s motion for summary judgment, XVV, Inc., has failed to raise a triable issue of fact.

Wherefore, it is hereby,


ORDERED that Plaintiff’s motion for default judgment against defendants Alex Pierre, Ahmed Medical Care, P.C., Han Xu Acupuncture P.C., Holy Star Acupuncture, P.C., Horizon PT Care, P.C., Huntington Hospital, LLJ Therapeutic Services, P.T. P.C., North Shore-LIJ Medical, P.C., Phoenix Medical Services, P.C., Pro Edge Chiropractic P.C., Sr Wellness PT P.C., Therapeutic Chiropractic Services, P.C., Top Tap Acupuncture, P.C., and Queens Dart Acupuncture, P.C., is granted without opposition; and it is further

ORDERED that Plaintiff’s motion for summary judgment against defendant XVV, Inc., is granted without opposition; and it is further

ORDERED and ADJUDGED that Plaintiff owes no duty to defendants Alex Pierre, Ahmed Medical Care, P.C., Han Xu Acupuncture P.C., Holy Star Acupuncture, P.C., Horizon PT Care, P.C., Huntington Hospital, LLJ Therapeutic Services, P.T. P.C., North Shore-LIJ Medical, P.C., Phoenix Medical Services, P.C., Pro Edge Chiropractic P.C., Sr Wellness PT P.C., Therapeutic Chiropractic Services, P.C., Top Tap Acupuncture, P.C., Queens Dart Acupuncture, P.C., and XVV, Inc., to pay No-Fault claims submitted in relation to the January 13, 2015 collision referenced in the complaint involving Alex Pierre.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 12, 2017



Eileen A. Rakover, J.S.C.