

American Tr. Ins. Co. v Colon
2013 NY Slip Op 31283(U)
June 12, 2013
Supreme Court, New York County
Docket Number: 100879/12
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. LOUIS B. YORK

PART 2

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

-against-

Index No. 100879/12
Motion Date 03/20/13
Motion Seq. No. 001
Motion Cal. No.

MANUEL COLON, ADVANCED PSYCHOLOGICAL CARE, P.C., AEE MEDICAL DIAGNOSTIC, P.C., DYNASTY MEDICAL CARE, P.C., IMS R., INC., MB PRECISION CHIROPRACTIC, P.C., NORTH COAST PHYSICAL THERAPY AND REHAB, P.C., NORWIND MEDICAL, P.C., PREFERRED MEDICAL NUCLEAR IMAGING, P.C., QUIKCARE MEDICAL, P.C., RIGHT STEP PHYSICAL THERAPY, P.C., SAS MEDICAL, P.C., VITAL MERIDIAN ACUPUNCTURE, P.C.,
Defendants.

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The following papers, numbered 1 to were read on this motion for Default Jgmt.

PAPERS

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Currently, plaintiff seeks default judgment. Based on the papers plaintiff has submitted in support of this motion, default judgment is not proper against Manuel Colon because there was no attempt to serve him during non-working hours. Under CPLR section 308, a movant can utilize "nail and mail" service only after attempting, with due diligence, to serve the defendant personally. *Waterman v. Jones*, 46 AD3d 63, 65, 843 NYS2d 462,

464 (2nd Dept. 2007). Courts have found that several attempts to serve an individual is insufficient. Instead, there must be an attempt to serve the defendant during non-working hours. *Id.* at 66, 843 NYS2d at 464-65. Non-working hours do not end before 9:00 am and end at 5:00 pm, but instead take into account the time it takes an individual to commute to and from his or her workplace. See, *Serrano v Starapoli*, 9, 4 AD3d 1083, 1085, 943 NYS2d 201, 203-04 (2nd Dept 2012).

In this instance, plaintiff served the motion by mail on June 18, 2012. Prior to that, plaintiff attempted personal service at the following dates and times: 1) Tuesday, May 29, 2012 at 5:46 p.m.; 2) Tuesday, June 12, 2012 at 9:46 a.m.; and Friday, June 15, 2012 at 11:57 a.m. There were no attempts to serve the individual during non-working hours. Therefore, plaintiff has not established due diligence.

In addition, plaintiff states it served Colon on June 16. However, the Affidavit of Service does not state how the process server effectuated service - that is, the process server never states that he affixed the papers to the door. However, the remaining defendants, Advanced Psychological Care, P.C., AEE Medical Diagnostic, P.C., Dynasty Medical Care, P.C., IMS R., Inc., MB Precision Chiropractic, P.C., North Coast Physical Therapy and Rehab, P.C., Norwind Medical, P.C., Preferred Medical Nuclear Imaging, P.C., Quikcare Medical, P.C., Right Step Physical Therapy, P.C., Sas Medical, P.C., Vital Meridian Acupuncture, P.C., were served properly with the Complaint and with this motion.

Moreover, they all have defaulted on both. Finally, plaintiff has made out a prima facie case against them. Therefore, a default judgment is appropriate against these defendants.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment seeking a declaration that it is not obliged to provide a defense to, and provide coverage for defendants Advanced Psychological Care, P.C., AEE Medical Diagnostic, P.C., Dynasty Medical Care, P.C., IMS R., Inc., MB Precision Chiropractic, P.C., North Coast Physical Therapy and Rehab, P.C., Norwind Medical, P.C., Preferred Medical Nuclear Imaging, P.C., Quikcare Medical, P.C., Right Step Physical Therapy, P.C., Sas Medical, P.C., Vital Meridian Acupuncture, P.C., in the action of American Transit Insurance Company vs. Manuel Colon, Et Al, Index No. 100879/12, New York County, is granted as to the second, fourth and fifth causes of action; and it is further

ADJUDGED and **DECLARED** that plaintiff herein is not obliged to provide a defense to, and provide coverage for the above-named defendants for arbitration with respect to the August 11, 2011 incident involving Manuel Colon and litigation arising under American Transit Insurance Company's insurance policy CAP 608833; and it is further

ADJUDGED that plaintiff recovers from these defendants costs and disbursements in the sum of \$ _____ as taxed by the Clerk, and plaintiff have execution therefor; and it is further

ORDERED and **ADJUDGED** that the action as against Mr. Colon is severed and dismissed, and the caption is amended to reflect the dismissal, and the new caption shall read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No.
606170/96

- against -

**ADVANCED PSYCHOLOGICAL CARE, P.C.,
AEE MEDICAL DIAGNOSTIC, P.C., DYNASTY
MEDICAL CARE, P.C., IMS R., INC., MB PRE-
CISION CHIROPRACTIC, P.C., NORTH COAST
PHYSICAL THERAPY AND REHAB, P.C.,
NORWIND MEDICAL, P.C., PREFERRED
MEDICAL NUCLEAR IMAGING, P.C.,
QUIKCARE MEDICAL, P.C., RIGHT STEP
PHYSICAL THERAPY, P.C., SAS MEDICAL,
P.C., VITAL MERIDIAN ACUPUNCTURE, P.C.,**

Defendant.

-----X

; and it is further

ORDERED that the movant shall file a copy of this Order and Judgment with the Clerk of Trial Support and the County Clerk, both of whom are directed to mark their records accordingly.

The Court notes that plaintiff sets forth no basis for attorney's fees, which it requests in the Complaint. Plaintiff does not appear to seek attorney's fees in this motion.

Dated: 6/12/13

Enter:

 LY
Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

UNFILED JUDGMENT

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE