

American Tr. Ins. Co. v Moya
2018 NY Slip Op 32798(U)
October 29, 2018
Supreme Court, New York County
Docket Number: 155926/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 155926/2017

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION SEQ. NO. 001

Plaintiff,

- v -

GLADYS MOYA, APT PHYSICAL THERAPY, P.C., CITIMEDICAL I, PLLC, EXCEL SURGERY CENTER, L.L.C., GARDEN STATE PAIN MANAGEMENT, P.A., HEALTH AND COMFORT RX INC., HEALTHY LIVING MEDICAL AND SURGICAL PRODUCTS, INC., KAZU ACUPUNCTURE, P.C., OPTIMUM HEALTH ACUPUNCTURE, P.C., and ST. BARNABAS HOSPITAL,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied with leave to renew upon proper papers.

In this declaratory judgment action, plaintiff American Transit Insurance Company ("ATIC") moves, pursuant to CPLR 3215, for a default judgment against defendant Gladys Moya ("Moya") and her medical providers. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is denied with leave to renew upon proper papers.

FACTUAL AND PROCEDURAL BACKGROUND:

Gomez Santos ("Santos") was issued an automobile insurance policy (policy #CS B501989, claim #665812-03) by ATIC that was in effect as of March 6, 2016. (Docs. 7 at 3; 11

at 2.) On that date, defendant Gladys Moya was allegedly injured in a motor vehicle accident while in a car owned by Santos and insured by ATIC. (Doc. 7 at 6.) The policy that ATIC issued to Santos included a “no-fault endorsement” provision, which provided coverage to an insured or an “eligible injured person” in the amount of at least \$50,000 for all necessary expenses resulting from a motor vehicle accident. (Doc. 12 at 7.)

Moya sought medical treatment from several medical providers, including: APT Physical Therapy, P.C.; Citimedical I, PLLC; Excel Surgery Center, L.L.C.; Garden State Pain Management, P.A.; Health and Comfort Rx Inc.; Healthy Living Medical and Surgical Products, Inc; Kazu Acupuncture, P.C.; Optimum Health Acupuncture, P.C. (collectively “the Medical Provider Defendants”); and St. Barnabas Hospital.¹ (*Id.* at 5–9.) On April 13, 2016, ATIC received an NF-2 form from Moya, pursuant to which she made a claim for no-fault insurance benefits. (Docs. 7 at 6; 9.)

In order to verify the circumstances surrounding the motor vehicle accident and Moya’s no-fault claim, ATIC wrote to Moya on August 16, 2016 to request that she appear at an examination under oath (“EUO”). (Doc. 10 at 2–3.) The request letter stated that she was to confirm her attendance with ATIC at least two days in advance of the EUO. (*Id.* at 2.) The first EUO was scheduled for September 6, 2016. (*Id.*) However, Moya failed to appear at the EUO. (Doc. 12 at 9.)

Thereafter, ATIC made several further attempts to schedule an EUO with Moya. On September 7, 2016, ATIC sent a letter requesting that Moya appear at an EUO on October 5, 2016. (Doc. 10 at 4–5.) By letter sent October 5, 2016, ATIC rescheduled this second appointment for November 18, 2016. (*Id.* at 6–7.) Again, Moya did not appear for the EUO.

¹ Pursuant to a stipulation, ATIC discontinued its claims against St. Barnabas Hospital, which remains in the caption. (Doc. 12 at 17–18.)

(Doc. 12 at 10.) Each letter stated that Moya's failure to attend the EUO could result in the denial of her claimed benefits. (Doc. 10 at 2, 4, 6.) Then, on December 2, 2016, ATIC issued a general denial of the claim on the basis that Moya violated conditions of the insurance policy. (Doc. 11 at 2.)

On June 29, 2017, ATIC commenced the instant action against Moya and the Medical Provider Defendants by filing a summons and verified complaint. (Doc. 12 at 1–15.) The complaint alleges that Moya assigned her rights to collect no-fault benefits to the Medical Provider Defendants (*id.* at 8) and that the latter submitted claims to ATIC seeking compensation for the services they rendered to Moya (*id.* at 9). ATIC's first and only cause of action seeks a declaration that defendants are not entitled to payment of the no-fault benefits stemming from the treatment rendered to Moya stemming from the March 6, 2016 accident because Moya violated terms of the insurance policy by failing to appear for her scheduled EUOs. (*Id.* at 11–12.)

ATIC now moves, pursuant to CPLR 3215, for a default judgment against Moya and the Medical Provider Defendants. (Doc. 5.) The motion also seeks declarations that defendant Moya is not an "eligible injured person" entitled to no-fault benefits under Santos's insurance policy; that ATIC is not obligated to pay any current or future claims submitted by the Medical Provider Defendants related to the services rendered for Moya's March 6, 2016 accident because she is not an "eligible injured person" under the policy; and that ATIC is not obligated to pay any current or future claims related to the services rendered for Moya's March 6, 2016 accident under the policy's "no-fault" endorsement provision because she is not an "eligible injured person" under the policy. (*Id.* at 2.) The motion is unopposed.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” (*Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 [2d Dept 2011].) Proof of the facts constituting the claim may be provided by the plaintiff’s affidavit or by a verified complaint. (*See* CPLR 3215[f].)

Counsel for ATIC has submitted affidavits of service establishing that the summons and complaint were properly served on defendant Moya. On October 23, 2017, ATIC served Moya by delivering a copy of the summons and complaint to a person of suitable age and discretion at her last known residence. (Docs. 11 at 2; 13 at 2.) On October 26, 2017, ATIC completed process on Moya by mailing a copy of the summons and complaint to the same address. (Doc. 13 at 2.) The affidavits also establish that the Medical Provider Defendants were properly served via the Secretary of State on October 11, 2017. (*Id.* at 3–10.) Defendants were also served an additional copy of summons and complaint via mail on April 16, 2018. (Doc. 14.) Moreover, in an affirmation in support of the motion, plaintiff’s counsel represents that none of the defendants have answered or have otherwise appeared in this matter. (Doc. 7 at 9.)

Although ATIC has satisfied the first 2 elements set forth in CPLR 3215(a), this Court nevertheless denies ATIC’s motion for a default judgment in its favor because it failed to establish the facts constituting the claim. (*See* CPLR 3215[f].) Specifically, plaintiff has failed to demonstrate that it complied with the timelines set forth in 11 NYCRR § 65-3.5, which provides,

in relevant part, that “[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 days of receipt of the prescribed verification forms.” (11 NYCRR § 65-3.5[b].) “Examinations under oath (EUOs) and independent medical examinations (IMEs) are considered to be part of an insurer’s entitlement to additional verification *following receipt of a provider’s statutory claim forms.*” (*Unitrin Direct Ins. Co. v Tsatskis*, 2017 NY Misc LEXIS 1994, 2017 NY Slip Op 31115[U], *7 [Sup Ct, NY County 2017]) (emphasis added) (quotations omitted). In other words, once an insurer receives a claim form for compensation from a medical provider, the insurer must request for additional verification of the claims within fifteen days if such verification is necessary. (*See* 11 NYCRR § 65-3.5[b].) However, courts have held that “the time frames for sending additional verification requests under 11 NYCRR 65-3.5 . . . do not apply to EUOs that are scheduled before an insurance company receives a claim.” (*Unitrin Direct*, 2017 NY Slip Op at *10.)

Here, this Court determines that default judgment must be denied because ATIC has not provided proof of the dates of when it received the Medical Provider Defendants’ claims for compensation for the services they allegedly rendered to defendant Moya. The complaint in this action states that the “[Medical Provider] defendants have submitted claims to the plaintiff with an assignment of benefits from [Gladys Moya] and alleg[e] that they had rendered services that are compensable under the terms of the policy.” (Doc. 12 at 9.) Indeed, ATIC’s affirmation in support of the default judgment motion asserts the same. (Doc. 7 at 6.) Notably, however, unlike Moya’s NF-2 claim form—which ATIC can prove it received on April 13, 2016 (Doc. 9)—ATIC has omitted any mention of the dates of when it received the claims for compensation from the Medical Provider Defendants. Without proof of such receipt dates, it is impossible for this Court

to determine whether ATIC complied with the timeliness requirements of 11 NYCRR § 65-3.5, i.e., whether it requested the EUOs within fifteen days of receipt of the Medical Provider Defendants' claims.

This Court further notes that, in any event, ATIC failed to demonstrate that it timely scheduled Moya's initial EUO within fifteen days after it received the NF-2 form. Whereas the NF-2 form was received on April 13, 2016 (Doc. 9), it was not until August 16, 2016 that ATIC initially requested Moya to appear for an EUO (Doc. 10 at 2-3). (*Hertz Vehs. LLC v Significant Care, PT, P.C.*, 157 AD3d 600, 601 [1st Dept 2018] (EUO scheduling letter must be sent within fifteen days of receipt of bill pursuant to 11 NYCRR § 65-3.5[b]).) Therefore, plaintiff's motion for a default judgment must be denied.

In accordance with the foregoing, it is hereby:

ORDERED that American Transit Insurance Company's motion for a default judgment against defendants Gladys Moya, APT Physical Therapy, P.C., Citimedical I, PLLC, Excel Surgery Center, L.L.C., Garden State Pain Management, P.A., Health and Comfort Rx Inc., Healthy Living Medical and Surgical Products, Inc., Kazu Acupuncture, P.C., and Optimum Health Acupuncture, P.C. is denied, with leave to renew upon proper papers within 30 days, upon penalty of dismissal; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, counsel for plaintiff is to serve a copy of this order, with notice of entry, on all parties and on the General Clerk's Office at 60 Centre Street, Room 119; and it is further

ORDERED that this constitutes the decision and order of this Court.

10/29/2018

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE