

American Tr. Ins. Co. v Biggs
2019 NY Slip Op 31349(U)
May 13, 2019
Supreme Court, New York County
Docket Number: 152855/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 37

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AMERICAN TRANSIT INSURANCE COMPANY,

DECISION AND ORDER

Plaintiff,

Index No. 152855/2018

- against -

KEVIN BIGGS, 3RD AVE. PHYSICAL THERAPY P.C., A T P PHYSICAL THERAPY, P.C., ANDREW J. DOWD, M.D., HOME CHIROPRACTIC P.C., JSP ACUPUNCTURE P.C., PRO-ALIGN CHIROPRACTIC P.C., RALLY CHIROPRACTIC P.C., RAMAPO ANESTHESIOLOGISTS, P.C., ROCKWOOD MEDICAL HEALTH P.C., ST. JOSEPH'S HOSPITAL, TOP Q INC., TRIBOROUGH ORTHOPEDICS, P.C., WESTCHESTER RADIOLOGY & IMAGING, P.C.,

Defendants.
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ARTHUR F. ENGORON, J.:

Plaintiff American Transit Insurance Company moves, pursuant to CPLR 3215, for entry of a default judgment against defendants 3rd Ave. Physical Therapy P.C., A T P Physical Therapy, P.C., Andrew J. Dowd, M.D., Home Chiropractic P.C., JSP Acupuncture P.C., Pro-Align Chiropractic P.C., Rally Chiropractic P.C., Ramapo Anesthesiologists, P.C., Rockwood Medical Health P.C., Top Q Inc., Triborough Orthopedics, P.C., and Westchester Radiology & Imaging, P.C. (together, defendants), for their failure to answer or otherwise appear in this action. Plaintiff has not moved for relief against defendants Kevin Biggs (Biggs) and St. Joseph's Hospital. For the reasons set forth below, the motion is granted.

Background

This action arises out of an alleged motor vehicle accident that occurred on January 13, 2017 when the vehicle operated by plaintiff's insured, in which Biggs was a passenger, was involved in an accident (NY St Cts Elec Filing [NYSCEF] Doc No. 11, affirmation of plaintiff's

counsel, exhibit E [complaint], ¶ 22). On January 24, 2017, plaintiff received Biggs' NF-2 application for no-fault benefits under policy no. CS B603237, which had been issued to plaintiff's insured¹ (NYSCEF Doc No. 8, affirmation of plaintiff's counsel, exhibit B at 1). Plaintiff assigned claim no. 674890-06 to Biggs' application (NYSCEF Doc No. 7, aff of Lisette Ramos [Ramos], ¶ 19). Biggs had also assigned his rights to collect no-fault benefits to numerous health care providers, including defendants (NYSCEF Doc No. 11, ¶ 26). After Biggs failed to appear for two independent medical examinations (IMEs) scheduled for September 7, 2017 and October 5, 2017, plaintiff issued an NF-10 denial of coverage dated October 20, 2017 (NYSCEF Doc No. 10, affirmation of plaintiff's counsel, exhibit D at 1).

Plaintiff commenced this action for a judgment declaring that there is no coverage for first-party benefits available to Biggs and defendants arising out of the January 13, 2017 motor vehicle accident and that defendants are not entitled to payment for any treatment rendered to Biggs as a result of the subject accident.

Discussion

Plaintiff now moves for a default judgment. CPLR 3215 (a) reads, in part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” In order to obtain a default judgment, a moving party must submit proof of jurisdiction and of the default and “proof by affidavit made by the party of the facts constituting the claim” (*Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987] [internal quotation marks and citation omitted]; *see also* CPLR 3215 [f]). It is well settled that “a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim” shall suffice (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). In addition to meeting the additional notice

¹ The cover letter enclosed with the application for no-fault benefits is stamped “RECEIVED Jan 25, 2017 By Mail Room.”

requirements set forth in CPLR 3215 (g), the motion must be made within one year of the default (*see* CPLR 3215 [c]).

The motion is supported by the complaint, the affidavits of service, Biggs' NF-2 application for no-fault benefits, the IME scheduling notices, and the NF-10 denial of claim form to Biggs dated October 20, 2017. Plaintiff also tenders an affidavit from Ramos, a claims representative for plaintiff, describing the issuance and mailing of the denial of claim form in this action; an affidavit from Luis Campbell, plaintiff's mailroom supervisor, attesting to the standard office mailing procedures employed by plaintiff for mailing the denial of claim form in this action; an affidavit from Neil Ganz, D.C., who avers that he was ready to conduct the IMEs of Biggs on September 7, 2017 and October 5, 2017, but Biggs failed to appear; and an affidavit from Walter Distler (Distler), an employee of plaintiff's IME scheduling service, who avers that he mailed the IME scheduling notices to Biggs and his counsel.

The affidavits of service reveal that several defendants were served pursuant to Business Corporation Law § 306, in accordance with CPLR 311, and that defendant Andrew J. Dowd, M.D. was served pursuant to CPLR 308(4). Plaintiff has also submitted proof that he mailed additional copies of the summons and complaint to defendants in accordance with CPLR 3215(g). Thus, plaintiff has demonstrated both personal jurisdiction and defendants' defaults.

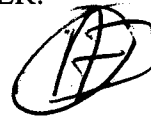
In addition, plaintiff has demonstrated that Biggs failed to appear for two scheduled IMEs. "The failure to appear for IMEs requested by the insurer . . . is a breach of a condition precedent to coverage under the no-fault policy" (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). Thus, "[a] denial premised on a breach of a condition precedent to coverage voids the policy ab initio" (*id.*). The chiropractor's affidavit attesting to Biggs' failure to appear is sufficient.

Accordingly, it is

ORDERED that the motion of plaintiff American Transit Insurance Company for entry of a default judgment against defendants 3rd Ave. Physical Therapy P.C., A T P Physical Therapy, P.C., Andrew J. Dowd, M.D., Home Chiropractic P.C., JSP Acupuncture P.C., Pro-Align Chiropractic P.C., Rally Chiropractic P.C., Ramapo Anesthesiologists, P.C., Rockwood Medical Health P.C., Top Q Inc., Triborough Orthopedics, P.C., and Westchester Radiology & Imaging, P.C. is granted. The judgment clerk is hereby directed to enter judgment in favor of plaintiff declaring that there is no coverage for first-party benefits available to Biggs and defendants arising out of an alleged January 13, 2017 Motor Vehicle Accident and that defendants are not entitled to payment for any treatment rendered to Biggs as a result of the alleged subject accident.

Dated: 5/13/2019

ENTER:



J.S.C.

HON. ARTHUR F. ENGORON