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| American Tr. Ins. Co. v Middleton |
| 2019 NY Slip Op 31950(U) |
| July 8, 2019 |
| Supreme Court, New York County |
| Docket Number: 150973/2018 |
| Judge: Gerald Lebovits |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 150973/2018

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 03/06/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

KENOSHIA MIDDLETON, DHD MEDICAL NYC, DR. CHARLES
EDWARD ROBINS, PSYCHOLOGIST, P.C.,
NEW YORK SPINE SPECIALIST, NICKY BHATIA, MD, P.C.,
STAND-UP MRI OF MANHATTAN, P.C., and
UNIVERSITY ORTHOPEDICS OF NEW YORK, PLLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29

were read on this motion for

DECLARATORY JUDGMENT

Law Office of Daniel J. Tucker (Megan Harris of counsel), for plaintiff.

The Law Offices of Michael S. Lamonsoff, PLLC (Anthony C. Sears of counsel), for defendant Kenoshia Middleton.

Gottlieb Ostrager LLP (Aaron Eitan Meyer of counsel), for defendant DHD Medical NYC.

Gerald Lebovits, J.:

This case arises out of a dispute between plaintiff, American Transit Insurance Company (American Transit), and defendant, Kenoshia Middleton, who is claiming to be an eligible injured person under a no-fault insurance policy provided by American Transit. American Transit denied Middleton coverage for failing to appear at a required independent medical examination (IME), and now seeks declaratory coverage that Middleton (and healthcare providers who treated Middleton’s injuries) are not entitled to benefits under the no-fault policy.

Background

American Transit provided a no-fault insurance policy to Dearmeet LLC. A Dearmeet vehicle operating as a cab was involved in an automobile collision on January 7, 2017. Middleton, a passenger in the vehicle, was injured in the accident. She made a claim to American Transit under Dearmeet’s no-fault policy, and assigned her rights to collect to various treating healthcare providers. The healthcare providers submitted claims to American Transit as well, seeking payment for treatment that they had provided Middleton after the collision.

American Transit requested that Middleton appear for an independent medical evaluation (“IME”). American Transit alleges that Middleton failed to appear for two scheduled IMEs.

American Transit denied coverage (both to the healthcare providers and to Middleton), because attending an IME upon request is a condition precedent to coverage under Dearmeet's no-fault insurance policy.

American Transit then brought this action against Middleton and Middleton's healthcare providers, seeking a declaration that (i) Middleton is not an eligible injured person entitled to no-fault benefits under the policy issued by American Transit; and (ii) American Transit is not obligated to honor or pay claims submitted by Middleton, or by her healthcare providers as assignees of Middleton's benefits under the policy.¹

American Transit now moves under CPLR 3212 for summary judgment on its declaratory judgment claims against defendants Middleton and DHD Medical.²

Discussion

Under CPLR 3212, "the motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]).

As required by New York Insurance Regulation 68 (11 NYCRR § 65-1.1), American Transit's no-fault policy states that a condition precedent to litigation is that the insured "has first fully complied with all the terms" of the policy. And the policy provides that to be eligible for benefits, an insured must "submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require."

Under these standard no-fault policy terms, an injured person's failure to appear "constitutes a breach of a condition precedent vitiating coverage." (*Hereford Ins. Co. v Lida's Med. Supply, Inc.*, 161 AD3d 442, 442 [1st Dept 2018].) A no-fault insurer seeking a declaratory judgment of non-coverage may establish their initial entitlement to judgment as a matter of law by demonstrating that it "it provided adequate notice, reasonably calculated to apprise [the injured person] that her appearance at an IME at a specified date and location was required," and

¹ In total, American Transit brought declaratory judgment claims against DHD Medical, P.C.; Dr. Charles Edward Robins, Psychologist, P.C.; New York Spine Specialists, LLP; Nicky Bhatia, M.D., P.C.; Stand-Up MRI of Manhattan, P.C. and; University Orthopedics of NY, PLLC. American Transit has since settled their claims against Dr. Robins, New York Spine Specialists, and Dr. Bhatia.

² American Transit also seeks default judgment under CPLR 3215 on its declaratory judgment claims against defendants Stand-Up MRI of Manhattan and University Orthopedics. American Transit's motion for default judgment is timely under CPLR 3215 (c); and American Transit has filed proof of service of the summons and complaint, an affidavit attesting to the default, and a verified complaint setting forth the facts constituting the claim, as required by CPLR 3215 (f). American Transit therefore is entitled to default judgment against these defendants.

that the injured person nonetheless failed to appear or seek to reschedule. (*Global Liberty Ins. Co. v New Century Acupuncture, P.C.*, 161 AD3d 498, 499 [1st Dept 2018].)

Here, American Transit scheduled Middleton for an IME. Middleton apparently called American Transit's designated IME provider to reschedule, but failed to appear at the rescheduled IME.

That evidence, though, does not end the inquiry. Middleton has submitted an affidavit stating that the rescheduled date for the IME conflicted with a final examination. She states that when she called to reschedule again, a woman at the number she called told her not to "contact them directly." And she further states that she assumed (incorrectly) that the woman whom she spoke to would set a new rescheduled date.

American Transit correctly notes that Middleton's affidavit does not reflect which telephone number she called or whom she spoke to. But the IME notice she received listed only one phone number — that of the IME provider's office — and directed Middleton to call that number with any questions about the IME appointment. And American Transit does not propose any alternative person that Middleton might have spoken to other than an employee at the office of the IME provider.

This court concludes that viewing this evidence in the light most favorable to Middleton, a reasonable fact-finder could determine that American Transit's IME provider made statements to Middleton — in particular, that Middleton should not contact them at the contact number that Middleton was given for them — that caused confusion that deprived Middleton of adequate notice that she had not succeeded in again rescheduling the IME.

American Transit argues that after Middleton was told over the phone not to use that contact number, she should have "asked for the correct number she should call to reschedule," and asked "to confirm that the appointment had been rescheduled." But where an injured person has used the contact number designated on the IME notice for scheduling questions, and then been told *not* to call that number to reschedule an appointment, it is not the injured person's responsibility to persevere and seek further information, beyond that given in the IME notice, on how to reschedule.

American Transit therefore has failed to establish as a matter of law that Middleton failed to comply with the IME-attendance condition of American Transit's no-fault policy. As a result, American Transit has also failed to establish as a matter of law that it is not required to honor no-fault claims brought by Middleton's healthcare providers.

Accordingly, it is ORDERED that American Transit's motion for default judgment against defendants Stand-Up MRI of Manhattan and University Orthopedics is granted; and it is further

ORDERED that American Transit's motion for summary judgment on its declaratory judgment claims against Middleton is denied; and it is further

ORDERED that American Transit's motion for summary judgment on its declaratory judgment claims against DHD Medical NYC is denied.

7/08/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE