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| American Tr. Ins. Co. v Bomba |
| 2020 NY Slip Op 31994(U) |
| June 25, 2020 |
| Supreme Court, New York County |
| Docket Number: 150912/2019 |
| Judge: Nancy M. Bannon |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

MONIQUE BOMBA, CHARLES J. PEARLMAN M.D.,
 PLLC, DHD MEDICAL, P.C., DHD MEDICAL SUNSET PARK,
 EVAN P. MONDSHINE, D.D.S., P.C., LENOX HILL
 HOSPITAL, LENOX HILL RADIOLOGY AND MEDICAL
 IMAGING ASSOCIATES, P.C., NEW YORK SPINE
 SPECIALISTS, LLP, NORTH SHORE-LIJ MEDICAL,
 P.C., PROMPT MEDICAL SPINE CARE, PLLC

Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for

JUDGMENT - DECLARATORY

In this declaratory judgment action brought pursuant to article 51 of the Insurance Law, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against defendants Monique Bomba, Charles J. Pearlman M.D., PLLC, Evan P. Mondshine, D.D.S., P.C., Lenox Hill Hospital and Lenox Hill Radiology and Medical Imaging Associates, P.C. The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the individual defendant or the health-care defendants to reimburse them for medical supplies and/or treatment rendered to the individual defendant for injuries allegedly sustained in a motor vehicle accident. No opposition is submitted. The motion is granted.

In his application for no-fault benefits, individual defendant Monique Bomba alleged, *inter alia*, that she was injured in a motor vehicle accident in Brooklyn, N.Y. on November 3, 2017, when the driver of a taxi insured by the plaintiff struck her as she rode a bicycle. She thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment, as assignees of the individual defendant, for no-fault benefits under insurance policy number MPH400648, issued

by the plaintiff to Nicholas Cab Corp. The plaintiff assigned claim number 1011380-02 to the file. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff denied benefits based upon Bomba's failure to appear for an Independent Medical Examination. This action and motion ensued. The plaintiff's motion is granted inasmuch as it has provided proof of service of the summons and complaint upon the defendants, proof of the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely moved for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st Dept 2015]), and satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

As to the facts constituting its claim in this action, the plaintiff submitted proof sufficient to demonstrate that defendant Bomba failed to appear for two properly scheduled and noticed independent medical examinations (IMEs), thereby violating a condition precedent to coverage, and creating an absolute coverage defense See Insurance Law 5106(a); 11 NYCRR 65-1.1; Mapfre Ins. Co. of N.Y. v Manoo, 140 AD3d 468, 470 (1st Dept 2016); American Tr. Ins. Co. v Lucas, 111 AD3d 423, 424 (1st Dept 2013); Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co., 35 AD3d 720 (2nd Dept 2006). The plaintiff's proof includes the summons and complaint, the subject policy, an affidavit of Cheryl Glaze, a claim representative for the plaintiff, an affidavit of Luis Campbell, the plaintiff's mail room supervisor, the denial of claim forms, two IME appointment letters, proof of mailing of the notices to defendant Bomba and proof of Bomba's failure to appear for the IMEs. The plaintiff also submits an affidavit of Dr. Evan Temken, who was to perform the examinations, and Beth Reszelbach, the IME scheduler for National Claim Evaluations, Inc., who scheduled Bomba's exam for September 4, 2018, and, when she failed to appear, rescheduled the exam to October 16, 2018, and notified her to appear for both.

By this proof, the plaintiff establishes that the defaulting defendants are not entitled to no-fault benefits under article 51 of the Insurance Law, for the purported accident of January 24, 2015. Having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). Therefore, the plaintiff is entitled to a judgment so declaring.

By a stipulation dated July 26, 2019, the plaintiff discontinued the action as against defendant New York Spine Specialists, LLP. By a stipulation dated July 25, 2019, the plaintiff discontinued the action as against defendant Prompt Medical Spine Care, PLLC. By a stipulation dated August 22, 2019, the plaintiff discontinued the action as against defendant DHD Medical. P.C..

The only remaining defendant is North Shore-LIJ Medical, P.C. While no answer was filed by this defendant, the plaintiff has not moved for leave to enter a default judgment against that defendant and the one-year time period for doing so has expired. See CPLR 3215[c]. Therefore, the complaint is dismissed as abandoned as against that defendant pursuant to CPLR 3215[c].

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 as against the defendants Monique Bomba, Charles J. Pearlman M.D., PLLC, Evan P. Mondshine, D.D.S., P.C., Lenox Hill Hospital and Lenox Hill Radiology and Medical Imaging Associates, P.C., is granted, without opposition; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to or on behalf of defendants Monique Bomba, Charles J. Pearlman M.D., PLLC, Evan P. Mondshine, D.D.S., P.C., Lenox Hill Hospital and Lenox Hill Radiology and Medical Imaging Associates, P.C., for medical supplies and/or treatment rendered to defendant Monique Bomba for injuries allegedly sustained by her in a motor vehicle accident on November 3, 2017, and filed under policy number MPH400648, issued by the plaintiff to Nicholas Cab Corp., and assigned claim number 1011380-02, and it is further,

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice and without costs, as against defendants New York Spine Specialists, LLP, Prompt Medical Spine Care, PLLC and DHD Medical. P.C., upon the parties' stipulations, and it is further,

ORDERED that the complaint is dismissed as abandoned as against defendant North Shore-LIJ Medical, P.C. pursuant to CPLR 3215[c], and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

6/25/2020

 DATE

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