

American Tr. Ins. Co. v Braithwaite
2020 NY Slip Op 32213(U)
July 7, 2020
Supreme Court, New York County
Docket Number: 155355/2019
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 -

IRENE BRAITHWAITE, ALEXANDRE GRIGORIAN,
COMPLETE SPINAL PHYSICAL THERAPY AND
CHIROPRACTIC PLLC, DR. CHARLES EDWARD ROBINS,
PSYCHOLOGIST, P.C., EXCELL CLINICAL LAB, INC,
PHOENIX MEDICAL SERVICES, P.C., PHYSICIAN
MEDICAL REHABILITATION ASSOCIATES OF PELHAM
BAY, PLLC, ROYAL REHAB INC, STAND-UP MRI OF THE
BRONX, P.C., WESTCHESTER RADIOLOGY & IMAGING,
P.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

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 the individual defendant IRENE BRATHWAITE, and healthcare defendants, ALEXANDRE GRIGORIAN, COMPLETE SPINAL PHYSICAL THERAPY AND CHIROPRACTIC PLLC, DR. CHARLES EDWARD ROBINS, PSYCHOLOGIST, P.C., EXCELL CLINICAL LAB, INC, PHOENIX MEDICAL SERVICES, P.C., PHYSICIAN MEDICAL REHABILITATION ASSOCIATES OF PELHAM BAY, PLLC, ROYAL REHAB INC, STAND-UP MRI OF THE BRONX, P.C., and WESTCHESTER RADIOLOGY & IMAGING, P.C.. The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the individual defendant or the healthcare defendants, as purported assignees of the individual defendant, for treatment they rendered or medical equipment they provided to Brathwaite for injuries allegedly sustained by her in an auto accident on August 20, 2018, on the grounds that she failed to appear for two duly scheduled Examinations Under Oath (EUOs). The plaintiff's motion is granted, without opposition.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, proof of the facts constituting the claim. While the "quantum of proof necessary to support an application for a default judgment is not exacting... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In her application for no-fault benefits, the Irene Brathwaite alleged, *inter alia*, that she was injured in a motor vehicle accident on August 20, 2018, while a passenger in a vehicle insured by the plaintiff. She thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment under claim number 1037744-02, as assignees of the individual defendant, for no-fault benefits under insurance policy number B719058, issued to Raudy Moquete. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff mailed its first notice for an EUO to be held on January 15, 2019, to the individual defendant and her attorney. Neither the individual defendant nor her attorney attended the first EUO or the second, rescheduled, EUO on February 13, 2019. The plaintiff denied the defendants' claims on February 19, 2019. The plaintiff now seeks default judgment stating that it is not required to pay the no-fault benefits as Brathwaite is not an eligible injured person under the terms of the subject policy.

The plaintiff's submissions include the complaint, verified by Uriel McLeish, an employee of the plaintiff, 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 EUO scheduling notices, proof of mailing of the notices to defendant Brathwaite at the address she provided in her application for benefits, and to her attorneys, and the EUO transcripts of January 15, 2019, and February 19, 2019, showing that the plaintiff's investigator was present on both dates but neither the Brathwaite or her attorney appeared.

The plaintiff's submissions demonstrate that the initial notice for an examination under oath (EUO) was timely mailed to the individual defendant within 15 business days of its receipt of the health-care defendants' applicable NF-3 forms, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1st Dept. 2015). They also show that the individual defendant did not appear for the initially scheduled EUO, and was provided timely notice of a rescheduled EUO, but failed to appear for that as well. The plaintiff has thus established, *prima facie*, that, by failing to appear, the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., *supra*; Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014). Having failed to answer, the defendant is "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).

Accordingly, it is,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants pursuant to CPLR 3215 is granted; without opposition, and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to individual defendant IRENE BRATHWAITE, and healthcare defendants, ALEXANDRE GRIGORIAN, COMPLETE SPINAL PHYSICAL THERAPY AND CHIROPRACTIC PLLC, DR. CHARLES EDWARD ROBINS, PSYCHOLOGIST, P.C., EXCELL CLINICAL LAB, INC, PHOENIX MEDICAL SERVICES, P.C., PHYSICIAN MEDICAL REHABILITATION ASSOCIATES OF PELHAM BAY, PLLC, ROYAL REHAB INC, STAND-UP MRI OF THE BRONX, P.C., and WESTCHESTER RADIOLOGY & IMAGING, P.C., to reimburse them for treatment they rendered or medical equipment they provided to Irene Brathwaite for injuries that she allegedly sustained in the motor vehicle accident of August 20, 2019, on claims filed under policy number B719058, issued to Raudy Moquete, and assigned claim number 1037744-02, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order.

This constitutes the Decision and Order of the court.


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

7/7/2020
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