

American Tr. Ins. Co. v Excell Clinical Lab
2020 NY Slip Op 34123(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 650965/2020
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. DEBRA A. JAMES

PART

IAS MOTION 59EFM

Justice

-----X

AMERICAN TRANSIT INSURANCE COMPANY

INDEX NO. 650965/2020MOTION DATE 07/21/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

EXCELL CLINICAL LAB as assignee of DANILO SANCHEZ,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10
were read on this motion to/for

JUDGMENT - DEFAULTORDER

Upon the foregoing documents, it is

ORDERED that the motion brought by plaintiff American Transit Insurance Company for leave to enter a default judgment against defendant Excell Clinical Lab a/a/o Danilo Sanchez is denied, without prejudice to renewal of this application by show cause order, submitting the proper papers, within thirty (30) days of service of a copy of this order with notice of entry by regular first class mail upon defendant at its last known address.

DECISION

Plaintiff American Transit Insurance Company brings this action under Insurance Law 5106 (c) for a de novo review of a master arbitrator's award of no-fault benefits. Plaintiff moves, pursuant to CPLR 3215, for leave to enter a default judgment

against defendant Excell Clinical Lab a/a/o Danilo Sanchez. Defendant has not submitted any opposition.

Background

According to the complaint, which is verified by plaintiff's counsel, defendant furnished medical services to Danilo Sanchez (Sanchez), who allegedly sustained injuries in an accident involving a motor vehicle insured by plaintiff (NY St Cts Elec Filing [NYSCEF] Doc No. 8, Adam Waknine affirmation, exhibit A, ¶ 3). The policy contained a personal injury personal protection benefits endorsement (id., ¶ 7). Sanchez assigned his rights to receive no-fault benefits to defendant (id., ¶ 3). When a dispute arose over the amount due, defendant commenced a no-fault arbitration proceeding under American Arbitration Association No. 99-18-1108-6693 (id., ¶ 4). On September 3, 2019, the no-fault arbitrator rendered an award in favor of defendant in the amount of \$6,259.50 (id., ¶ 7), and on January 14, 2020, a master arbitrator confirmed the arbitrator's determination (id., ¶ 10).

Plaintiff then commenced this action to obtain de novo review of the master arbitrator's award under Insurance Law § 5106 (c). The complaint alleges that Sanchez did not incur medically necessary services, reasonably and necessary services, or services related to the claimed motor vehicle accident (NYSCEF Doc No. 8, ¶¶ 20-22). It further alleges that defendant or Sanchez failed to establish or submit timely or complete proof of the claim or

furnish timely notice of the alleged motor vehicle accident (*id.*, ¶¶ 14-15 and 17-18).

Plaintiff now moves for default judgment on the ground that defendant failed to timely answer or otherwise appear in this action.

Discussion

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."

A party seeking a default judgment must submit proof of jurisdiction, a 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]). The moving party "need only submit sufficient evidence to enable a court to determine if the cause of action is viable" (Deutsche Bank Natl. Trust Co. v Amoah, — AD3d —, 2020 NY Slip Op 06242, *1 [2d Dept 2020]; accord Woodson v Mendon Leasing Corp., 100 NY2d 62, 71 [2003]). "[A] complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" will suffice (Beltre v Babu, 32 AD3d 722, 723 [1st Dept 2006]).

In support, plaintiff submits the complaint and an affidavit of service sworn to February 19, 2020. The affidavit shows that service of the summons and complaint was made upon "Olga Visconti,"

defendant's managing agent, on February 15, 2020 at 11:15 a.m. at 1 Ethel Rd, Edison, NJ 08817 (NYSCEF Doc No. 8 at 9). Plaintiff has established that service of process was properly effectuated and that the motion at bar was served upon defendant, and that defendant has not timely answered the complaint or appeared in this action.

However, plaintiff has failed to submit the requisite proof of the facts constituting the claim. The complaint is not verified by the party or other person with knowledge of the facts, but by counsel. "[A] complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215" (Beltre, 32 AD3d at 723). In addition, where, as is the case here, de novo review of a master arbitrator's award is sought on the ground that the services provided were not medically or reasonably necessary, the plaintiff, when moving for a default judgment, is also permitted to rely upon an expert's affirmation setting forth a peer review as proof of the facts constituting the claim (see Global Liberty Ins. Co. v W. Joseph Gorum, M.D., P.C., 143 AD3d 768, 770 [2d Dept 2016])). Plaintiff has offered neither an expert's peer review or an expert affirmation or affidavit in support of its contention that the treatment Sanchez received was medically necessary. Nor has plaintiff submitted admissible evidence that supports its allegations that defendant or Sanchez failed to furnish timely or

complete proof of the claim or timely notice of the claimed motor vehicle accident.

12/10/2020

DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☒

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE