

<b>American Tr. Ins. v Castro</b>
2021 NY Slip Op 30721(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 152116/2019
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. MELISSA ANNE CRANE **PART** **IAS MOTION 15EFM**

*Justice*

-----X

AMERICAN TRANSIT INSURANCE

Plaintiff,

- v -

CASTRO, MIGUEL

Defendant.

-----X

**INDEX NO.** 152116/2019

**MOTION DATE** 10/06/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for JUDGMENT - DECLARATORY.

Upon the foregoing documents, it is

This case arises from an automobile accident that occurred on May 16, 2018, involving defendant Miguel Castro (“assignor”). The assignor alleges that he was a passenger in the insured vehicle owned by CLL QUEENS I, that Castro sustained serious bodily injuries as a result of a collision, and submitted claims to plaintiff for no-fault benefits under the insurance policy that plaintiff issued. The assignor assigned the rights to collect no-fault benefits to co-defendants/medical providers. Plaintiff commenced an action on or about February 27, 2019, by a Summons and Complaint, seeking a declaratory judgment against the assignor, in addition to numerous co-defendants/medical providers.

First, this action has been discontinued against defendant Herschel Kotkes, M.D., P.C., (*see e-doc 26*).

The court now moves for default judgment pursuant to CPLR 3215 against the following non-answering defendants: CLEAR WATER PSYCHOLOGICAL SERVICES, P.C., INTERDEPENDENT ACUPUNCTURE PLLC, NEWARK IMAGING CORP., and RUTLAND

MEDICAL, P.C. Plaintiff also moves for summary judgment against the answering defendant ARCADIA ACUPUNCTURE, P.C., who opposes the summary judgment motion.

A summary judgment movant carries the initial burden of tendering sufficient, admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once a movant meets its initial burden, the burden then shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The failure to appear for a scheduled independent medical examination is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio (*See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). The mandatory personal injury endorsement provides that the eligible injured person shall submit to an independent medical examination (herein “IME”) by physicians when, and as often as, the insurer may reasonably require (*see* 11 NYCRR 65–1.1).

Plaintiff has demonstrated *prima facie* entitlement to summary judgment against the answering defendant ARCADIA ACUPUNCTURE, P.C., and also against the non-answering defendants. The affidavit of Lynn Hershmann, employee of Independent Physical Exam Referrals (“IPER”), establishes timely and properly mailing of the IME notices to defendant and counsel. The affirmation of Dr. Marc Silverman, MD, the doctor assigned to conduct the assignor’s IMEs, attests to the assignor’s non-appearance at scheduled IMEs, and the office practices and procedure of checking-in to the doctor’s office had the assignor appeared. As appearances for IMEs are a condition precedent to payment under the policy, and Miguel Castro breached the requirement by failing to appear, there is no basis for coverage to the answering

defendants, as assignees. Further, plaintiff has included an affidavit of no-fault claims representative, Cheryl Glaze, who handled the no-fault claims; and an affidavit of mail room supervisor of American Transit Insurance Company, Luis Campbell, who attests to the mailing of denial of claim forms, explanation of benefits, and verification requests.

Although defendant ARCADIA ACUPUNCTURE, P.C., argues that summary judgment is premature because discovery is not yet complete, plaintiff proves its prima facie case via affidavits and on its papers. Defendant fails to raise a triable issue of fact that (1) the IME notices were not timely and properly mailed; and (2) that the affirmation of Michael Silverman MD does not establish that the assignor failed to appear at two IMEs, as required under no-fault law.

Accordingly, it is

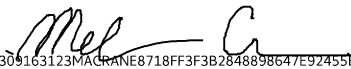
**ORDERED** that the court grants plaintiff, American Transit Insurance Company's motion for summary judgment against defendants ARCADIA ACUPUNCTURE, P.C.; and it is further

**ORDERED** that plaintiff American Transit's motion for default judgment against non-answering defendants CLEAR WATER PSYCHOLOGICAL SERVICES, P.C., INTERDEPENDENT ACUPUNCTURE PLLC, NEWARK IMAGING CORP., and RUTLAND MEDICAL, P.C. is granted without opposition; and it is further

**ADJUDGED AND DECLARED** that defendant Miguel Castro is not an eligible injured person entitled to no-fault benefits under American Transit insurance policy CAP 615011, Claim No 1028607-04; and it is further

**ADJUDGED AND DECLARED** that defendants ARCADIA ACUPUNCTURE, P.C. INTERDEPENDENT ACUPUNCTURE PLLC, NEWARK IMAGING CORP., and RUTLAND

MEDICAL, P.C. are not entitled to no-fault coverage for the motor vehicle accident that occurred on May 16, 2018, involving individual defendant Miguel Castro, for claims submitted under American Transit policy number CAP 615011, Claim No 1028607-04, as referenced in the complaint, and plaintiff American Transit has no duty to provide, pay, honor, or reimburse any claims in any current or future proceedings, including without limitation arbitrations and/or lawsuits, seeking to recover no-fault benefits arising out of the May 16, 2018 accident.

  
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3/9/2021  
 DATE

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 MELISSA ANNE CRANE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: