

<b>American Tr. Ins. Co. v Medina</b>
2017 NY Slip Op 32096(U)
October 6, 2017
Supreme Court, New York County
Docket Number: 153006/2016
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 47

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

PASCUAL U. MEDINA, CAPITAL CHIROPRACTIC,  
P.C., CHIROPRACTIC TESTING SERVICES OF NEW  
YORK, P.C., DANIEL P. KLEIN, MD, ENZO CLINICAL  
LABS, INC., GARDEN STATE PAIN MANAGEMENT,  
P.A., JAMAICA AVENUE CHIROPRACTIC, P.C., JMSK  
MEDICAL DIAGNOSTICS, P.C., LOTUS REHAB P.T.  
P.C., MARK MCMAHON, M.D., MONTY MEDICAL  
P.C., PRECISION IMAGING OF NEW YORK, P.C.,

Defendants.

Index No: 153006/2016

DECISION AND ORDER

Motion Sequence: 001

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memo of Law annexed	2
Reply Affidavits/Affirmations/Memos of Law annexed	3

**ERIKA M. EDWARDS, J.:**

Plaintiff American Transit Insurance Company ("American Transit") now moves, by notice of motion, filed on May 19, 2017, for a default judgment in its favor, pursuant to CPLR §3215, against Defendants Pascual U. Medina ("Medina"), Chiropractic Testing Services of New York, P.C., Daniel P. Klein, M.D., Enzo Clinical Labs, Inc., Garden State Pain Management, P.A., Jamaica Avenue Chiropractic, P.C., Lotus Rehab P.T. P.C., Mark McMahon, M.D., and Precision Imaging of New York, P.C. (collectively "Defaulting Defendants") for their failure to

answer or appear in this action. American Transit also moves for summary judgment in its favor against Defendants Capital Chiropractic, P.C., JMSK Medical Diagnostics, P.C., and Monty Medical P.C. (collectively "Answering Defendants"). Defendants Capital Chiropractic, P.C. and JMSK Medical Diagnostics, P.C. oppose the motion for summary judgment. For the reasons set forth herein, American Transit's motion is GRANTED in its entirety.

Plaintiff American Transit commenced this action on April 8, 2016, for a judgment declaring that it owes no duty to pay any No-Fault benefits arising out of an alleged motor vehicle accident involving individual defendant Medina which occurred on June 14, 2015. Medina was driving a vehicle that was insured by American Transit. The vehicle's insurance policy included the mandatory no-fault endorsement. The complaint alleges that after American Transit received notice of the accident, it attempted to investigate and subsequently requested that Medina appear for an Independent Medical Examination ("IME"). Despite due demand, Medina failed to appear for his scheduled IME on two occasions. Those failures to appear violated provisions in the No-Fault Regulations and violated conditions precedent to coverage for all No-Fault claims submitted by Medina and the medical provider defendants as his assignees.

American Transit argues that Medina's failure to comply with American Transit's request for an IME breached a condition precedent to coverage under the policy and voided the contract. American Transit further argues that it is entitled to deny payment to both Medina and the medical provider defendants as his assignees. Also, American Transit argues that it is entitled to summary judgment in its favor against Answering Defendants since no issue of fact can be resolved in Answering Defendants' favor. Defendants Capital Chiropractic, P.C. and JMSK

Medical Diagnostics, P.C. argue that there are triable issues of fact that prevent summary judgment in American Transit's favor.

Pursuant to CPLR 3215, American Transit has demonstrated that Defaulting Defendants were properly served with the summons and complaint, that Defaulting Defendants failed to answer or appear in this action, that the time to do so has long since passed, and that American Transit's claims are meritorious. As such, American Transit's motion for default judgment against Pascual U. Medina, Chiropractic Testing Services of New York, P.C., Daniel P. Klein, M.D., Enzo Clinical Labs, Inc., Garden State Pain Management, P.A., Jamaica Avenue Chiropractic, P.C., Lotus Rehab P.T. P.C., Mark McMahon, M.D., and Precision Imaging of New York, P.C is granted.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden,

then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Here, American Transit has made a prima facie showing that it requested an IME in accordance with the procedures and time frames set forth in the no-fault implementing regulations and that Medina failed to appear for an IME (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]). Defendants’ Capital Chiropractic, P.C. and JMSK Medical Diagnostics, P.C. arguments in opposition are without merit and fail to raise an issue of fact. As such, American Transit’s motion for summary judgment in its favor against Answering Defendants is granted.

Accordingly, it is hereby

**ORDERED** that Plaintiff American Transit Insurance Company's motion for default judgment against Defendants Pascual U. Medina, Chiropractic Testing Services of New York, P.C., Daniel P. Klein, M.D., Enzo Clinical Labs, Inc., Garden State Pain Management, P.A., Jamaica Avenue Chiropractic, P.C., Lotus Rehab P.T. P.C., Mark McMahon, M.D., and Precision Imaging of New York, P.C. is granted; and it is further

**ORDERED** that the Clerk is directed to enter default judgment in favor of Plaintiff American Transit Insurance Company as against Defendants Pascual U. Medina, Chiropractic Testing Services of New York, P.C., Daniel P. Klein, M.D., Enzo Clinical Labs, Inc., Garden

State Pain Management, P.A., Jamaica Avenue Chiropractic, P.C., Lotus Rehab P.T. P.C., Mark McMahon, M.D., and Precision Imaging of New York, P.C.; and it is further

**ORDERED** that Plaintiff American Transit Insurance Company's motion for summary judgment in its favor as against Defendants Capital Chiropractic, P.C., JMSK Medical Diagnostics, P.C., and Monty Medical P.C. is granted and the Clerk is directed to enter judgment accordingly; and it is further

**ADJUDGED and DECLARED** that Pascual U. Medina is not an eligible injured person entitled to no-fault benefits under American Transit Insurance Company insurance policy CAP 613565, Claim No.: 783024-02; and it is further

**ADJUDGED and DECLARED** that American Transit Insurance Company is not obligated to honor or pay claims for reimbursement submitted by Chiropractic Testing Services of New York, P.C., Daniel P. Klein, M.D., Enzo Clinical Labs, Inc., Garden State Pain Management, P.A., Jamaica Avenue Chiropractic, P.C., Lotus Rehab P.T. P.C., Mark McMahon, M.D., Precision Imaging of New York, P.C., Capital Chiropractic, P.C., JMSK Medical Diagnostics, P.C., and Monty Medical P.C. as assignees of Pascual U. Medina, under American Transit Insurance Company insurance policy CAP 613565, Claim No.: 783024-02, nor is American Transit Insurance Company required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under American Transit Insurance Company insurance policy CAP 613565, Claim No.: 783024-02 from the alleged accident of June 14, 2015, involving Pascual U. Medina as Pascual U. Medina is not an eligible injured person as defined by the Policy and/or New York State Regulation 68; and it is further

**ADJUDGED and DECLARED** that Plaintiff American Transit Insurance Company is not required to provide, pay, or honor any current or future claim for no-fault benefits under the Mandatory Personal Injury Protection endorsement under American Transit Insurance Company insurance policy CAP 613565, Claim No.: 783024-02, nor is American Transit Insurance Company required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under American Transit Insurance Company insurance policy CAP 613565, Claim No.: 783024-02 from the alleged accident of June 14, 2015, involving Pascual U. Medina as Pascual U. Medina is not an eligible injured person as defined by the Policy and/or New York State Regulation 68; and it is further

This constitutes the decision and order of the court.

Date: October 6, 2017



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HON. ERIKA M. EDWARDS, J.S.C.