

American Tr. Ins. Co. v Casas Sosa

2013 NY Slip Op 31588(U)

July 12, 2013

Sup Ct, NY County

Docket Number: 154202/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: _____
Justice

PART 61

Index Number : 154202/2012
AMERICAN TRANSIT INSURANCE
vs
SOSA, JAVIER CASAS
Sequence Number : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/12/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
AMERICAN TRANSIT INSURANCE CO,

Plaintiff,

-against-

JAVIER CASAS SOSA, BELLEVUE HOSPITAL
CENTER, CORNELL MEDICAL PC, DR STEVEN
M YAGER DPM FACFAS, HUA YI ACUPUNCTURE
PC, INNOVATIVE ORTHOPEDIC & SPINE,
ASSOCIATES OF NEW YORK PLLC, NEXRAY
MEDICAL IMAGING PC, YAN Z CHIROPRACTIC PC,

Defendants.
-----X

DECISION AND
ORDER
Index No. 154202/2012

HON. ANIL C. SINGH, J.:

Plaintiff moves for default judgment against defendants Javier Casas Sosa, Cornell Medical, P.C., Hua Yi Acupuncture, P.C., Innovative Orthopedic and Spine Associates of New York, PLLC, Nexray Medical Imaging, P.C., and Yan Z Chiropractic, P.C. Plaintiff moves, pursuant to CPLR § 3212, for summary judgment against Bellevue Hospital Center and Dr. Steven M. Yager seeking a determination that the defendants are not entitled to no-fault insurance coverage. Defendant, Steven M. Yager, opposes the motion.

Plaintiff has provided affidavits of service regarding the summons and complaint and the present motion for each of the defendants.

The only defendants to have filed an answer are Bellevue Hospital Center (hereinafter Bellevue) and Dr. Steven M. Yager (hereinafter Yager).

Plaintiff is the no-fault insurance carrier for Halder Sudeb. Defendant Javier Casas Sosa

(hereinafter Sosa) was allegedly injured in an automobile accident involving Halder Sudeb. The other defendants provided medical care to Mr. Sosa and received an assignment of rights to collect no-fault benefits from him.

Plaintiff, in its complaint, seeks a declaratory judgment that it is not required to provide no-fault coverage to Sosa or his assigns.

The basis for Plaintiff's denial of no fault benefits is that Sosa failed to appear for properly scheduled Independent Medical Examinations (IME). On October 25, 2011, Plaintiff sent a letter to Sosa requesting that he attend an IME on November 29, 2011. On November 30, 2011, after Sosa missed the IME the day before, a letter was sent to Sosa requesting that he attend an IME on December 15, 2011 (*See* Affidavit of Lynn Hershman). According to the affirmation of Dr. Marvin Winell, Plaintiff failed to attend either of the scheduled IMEs.

New York State Insurance Department Regulation 68 (11 NYCRR § 65-1.1) provides, in relevant part: "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage ... The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require."

Therefore, absent any other considerations, Plaintiff properly denied no-fault payments to defendants because Mr. Sosa failed to submit to medical examinations as required by Plaintiff insurer.

Defendant, Yager, argues that Plaintiff has failed to provide proof in admissible form sufficient to eliminate all material issues of fact. Yager opines that the "'affidavit' of Ms. Hershman is defective and cannot serve to establish that a notice for physical examination was

mailed” because there is no recitation that the statements are made under penalty of perjury. Defendant contends that, because the affirmation of Dr. Winell is undated, it is unclear that it was executed after the dates of the scheduled physical examinations. Defendant argues that, because Dr. Winell identified an office procedure and referred to his records and notes, his documentation and his written correspondence to Plaintiff should be in evidence and that without these documents Plaintiff cannot establish that there are no material issues of fact and the motion should be denied.

Defendant’s arguments are without merit. CPLR § 2309(b) provides that “An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.” “There is no specific form of oath required in this State” *Collins v. AA Trucking Renting Corp.*, 209 A.D.2d 363 (1st Dep’t 1994).

Ms. Hershman’s affidavit states that she was “duly sworn” and is notarized, with the notary reciting that the affidavit was “sworn to before me this 23rd day of October, 2012.” As such, her affidavit meets the requirement that an oath or affirmation be administered in a form calculated to awaken the conscience, and this Court takes notice of her affidavit.

As to the argument that it is unclear as to when Dr. Winell’s affidavit was executed relative to the scheduled dates of the physical examinations, this argument is unavailing. It is clear from the use of the past tense in the affidavit that it was executed after the dates of the scheduled examinations.

Regarding the argument that Dr. Winell is relying upon his office procedures, notes and records and that these should therefore be produced, this argument is without merit. Dr. Winell

clearly states that his affirmation is based upon personal knowledge.

Yager further contends that Plaintiff did not properly provide Sosa's attorney with notice of the physical examinations. However, there is no evidence that Sosa had an attorney at the time the notices were sent.

In conclusion, Plaintiff has provided evidence in admissible form sufficient to eliminate any question of fact. Plaintiff has shown that Mr. Sosa failed to appear for properly scheduled medical examinations, a condition precedent to payment of no-fault benefits to him or his assigns. Therefore, summary judgment is warranted. Plaintiff has further shown that the summons, complaint, and the present motion were served upon each of the defendants.

Therefore, upon the sworn affidavits of Luis Campbell, Lynn Hershman, and Alisha Sukhoo and the affirmation of Dr. Marvin Winell, and all other papers submitted in support of and opposition to the motion, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted on default against defendants Javier Casas Sosa, Cornell Medical, P.C., Hua Yi Acupuncture, P.C., Innovative Orthopedic and Spine Associates of New York, PLLC, Nexray Medical Imaging, P.C., and Yan Z Chiropractic, P.C.; and it is further

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted against defendants Bellevue Hospital Center and Dr. Steven M. Yager; and it is further

ORDERED and ADJUDGED that Plaintiff, AMERICAN TRANSIT INSURANCE CO, does not owe no-fault coverage for JAVIER CASAS SOSA or the coverage providers named as defendants in this action as a result of Mr. Sosa's 9/14/2011 motor vehicle accident; and it is further

ORDERED and ADJUDGED that none of the defendants or their assigns are entitled to first-party no-fault benefits.

The foregoing constitutes the decision and order of the court.

Date: 7/12/13
New York, New York

ACS
Anil C. Singh
**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**