

American Tr. Ins. Co. v Ash

2013 NY Slip Op 32268(U)

September 12, 2013

Sup Ct, NY County

Docket Number: 155731/12

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN A. MADDEN
Justice

PART 11

American Transit Ins. Co.

Plaintiff,

- v -

MEGAN C. ASH, et al

Defendant.

INDEX NO.

155731/12

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits _____

Replying Affidavits _____

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is consolidated for determination with motion seq #002 and the consolidated motions are determined in accordance with the annexed decision, order and judgment.*

Dated: September 19, 2013

HON. JOAN A. MADDEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

INDEX NO. 155731/12

-against-

MEAGAN C. ASH, ADELAIDA M. LAGA, PT,
ALLEVIATION MEDICAL SERVICES, P.C., CHARLES
DENG ACUPUNCTURE, P.C., DELTA DIAGNOSTIC
RADIOLOGY, P.C., DOSHI DIAGNOSTIC IMAGING
SERVICES, P.C., JCC MEDICAL, P.C., NEW WAY
MEDICAL SUPPLY CORP., STEVEN W. WINTER, MD,
P.C., T & J CHIROPRACTIC, P.C., VELOCITY
CHIROPRACTIC, P.C., VLADENN MEDICAL
SUPPLY CORP.,

Defendants.

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment"; Proposed Judgment, and any supporting documents on the NYSCEF system.

JOAN A. MADDEN, J.:

This is an for declaratory relief as to no-fault insurance coverage. In motion sequence no. 001, plaintiff moves for an order pursuant to CPLR 3215 granting a default judgment against defendants Megan C. Ash, Steven W. Winter, MD, P.C., and Velocity Chiropractic, P.C, based on said defendants' failure to appear and answer. Plaintiff also moves for an order pursuant to CPLR 3212 granting summary judgment against the eight answering defendants Adelaida M. Laga PT, Alleviation Medical Services, P.C., Charles Deng Acupuncture, Delta Diagnostic Radiology, P.C., JCC Medical P.C., New Way Medical Supply, Corp., T & J Chiropractic, P.C. and Vladenn Medical Supply Corp.¹ In motion sequence no. 002, plaintiff moves by order to

12 155731

¹Plaintiff's counsel states that the matter has been discontinued as to defendant Doshi Diagnostic Imaging Services, P.C.

show cause for an order staying all pending and future actions and arbitration proceedings involving defendants with respect to the October 17, 2011 accident.² None of the defaulting defendants opposes the motion. The eight answering defendants oppose both motions.

The portion of plaintiff's motion for a default judgment against the non-appearing defendants, Megan C. Ash, Steven W. Winter, MD, P.C., and Velocity Chiropractic, P.C. is granted in the absence of opposition.

As to plaintiff's motion for summary judgment against the eight answering defendants, a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp, 70 AD3d 508, 510 (1st Dept 2010). Once such showing is made, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212 (b); see Zuckerman v. City of New York, *supra* at 562.

Plaintiff has established prima facie entitled to judgment as a matter of law against the eight answering defendants. In support of the motion, plaintiff submits an attorney's affirmation; the pleadings; the affidavits of service; the notices sent by National Claim Evaluations, Inc. scheduling IME appointments for December 20, 2011, January 31, 2012 and February 14, 2012; defendant Ash's application for no-fault benefits; an affidavit of Ronnie McLaughlin, an employee of National Claim Evaluations, Inc. as to the mailing of the IME notices; an affidavit

²Motions 001 and 002 are consolidated for determination.

of Luis Campbell detailing plaintiff's mailing procedures; an affidavit from Iris Hernandez, a No-Fault Examiner for plaintiff; and an affidavit from Dr. Eric Littman stating that defendant Ash was scheduled to appear for an IME on December 20, 2011, January 31, 2012 and February 14, 2012, and she "failed to attend the IME" on each of those dates. Plaintiff also submits its Denial of Claim Form dated February 27, 2012, denying defendant Ash's claim for non-fault benefits, for the following reason: "Due to claimant's failure to show for scheduled IME appointments with Dr. Littman on 12/20/11, 01/31/12 and 02/14/12, all benefits are denied effective 07/08/11."

The foregoing documents establish that the notices of the IMEs were mailed to defendant Ash and she failed to appear on all three scheduled dates, December 20, 2011, January 31, 2012 and February 14, 2012. The failure to appear for an IME is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such breach voids the policy ab initio. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept), lv app den 17 NY3d 705 (2011); Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co, 35 NY3d 720 (2nd Dept 2006). Since it is undisputed that defendant Ash failed to appear for the three scheduled IMEs, plaintiff had a right to deny the claims of the defendant medical providers, based on breach of a condition precedent to coverage. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, *supra*. Plaintiff therefore has met its burden on the motion and the burden shifts to the answering defendants, to raise a triable issue of material fact.

In opposing the motion, the answering defendants do not dispute that Ash failed to appear for the IME on the three scheduled dates or that she never objected to the IME requests. Rather, the answering defendants argue that: 1) discovery is outstanding; 2) plaintiff fails to prove the

existence of a justiciable controversy as plaintiff has not demonstrated that the answering defendants submitted any claims pertaining to the underlying accident; 3) plaintiff fails to prove entitlement to judgment as a matter of law, as plaintiff has not established that in accordance with the no-fault regulations, it timely requested the IMEs or timely denied the answering defendants' claims; and 4) plaintiff fails to submit admissible evidence establishing that the IME appointment letters were timely and properly mailed to Ash, and that she failed to attend the IMEs.

Contrary to the answering defendants' argument, plaintiff has identified a justiciable controversy, by submitting an affidavit from its no-fault examiner, Iris Hernandez, stating that defendant Ash I "sought no-fault benefits" from the "Megan C. Ash Provider Defendants," which include all defendants named in this action. Hernandez also states that defendant Ash "assigned" her "rights to collect no-fault benefits to the Provider Defendants," and that the "Provider Defendants have submitted no-fault billing to Plaintiff . . . for services that were rendered to Megan C. Ash." Notably, in their answer, defendants "admit upon information and belief they were properly assigned the right to collect [some of] the No-fault benefits alleged herein."

The affidavit of Ronnie McLaughin detailing the procedures for mailing the IME notices, is sufficient to show that such notices were mailed to defendant Ash. Defendants object that the mailing was to zip code 11236, and not 11206, as stated in defendant Ash's application for non-fault benefits. At oral argument, the court took judicial notice that the correct zip code for 2 Paerdegat 8th Street, Brooklyn, NY is 11236, the zip code used in plaintiff's mailing.

The affidavit of Dr. Eric Littman, the physician retained to perform the IMEs, sufficiently

shows that defendant Ash did not appear for the IME on either December 20, 2011, January 31, 2012 or February 14, 2012. Dr. Littman specifically states that "I can say with certainty that Megan C. Ash never appeared for the above IME(s) on the dates(s) set forth above" and that "I make all of the above statements based upon personal knowledge and under penalties of perjury." While the answering defendants additionally object that plaintiff has not established that it timely denied their claims, a timely denial is not required. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra.

The answering defendants also object that the motion is premature, since they have not conducted discovery. However, the absence of discovery does not require denial of plaintiff's motion, as defendants fail to show that facts essential to oppose the motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d 418 (1st Dept 2009); Bank of America, N.A. v. Tatham, supra.

The court has considered the balance of the answering defendants' arguments, and finds that they are likewise without merit. Thus, in the absence of an issue of material fact, plaintiff is entitled to summary judgment against the answering defendants, Adelaida M. Laga PT, Alleviation Medical Services, P.C., Charles Deng Acupuncture, Delta Diagnostic Radiology, P.C., JCC Medical P.C., New Way Medical Supply, Corp., T & J Chiropractic, P.C. and Vladenn Medical Supply Corp.

In view of the foregoing determinations, plaintiff's separate motion (motion sequence no. 002) for an order staying all pending and future actions and arbitrations proceedings involving

defendants with respect to the October 17, 2011 accident, is granted. Defendants' arguments in opposition are without merit.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment against defendants Megan C. Ash, Steven W. Winter, MD, P.C., and Velocity Chiropractic, P.C. (motion seq. no. 001) is granted in the absence of opposition; and it is further

ORDERED that plaintiff's motion for summary judgment against defendants Adelaida M. Laga PT, Alleviation Medical Services, P.C., Charles Deng Acupuncture, Delta Diagnostic Radiology, P.C., JCC Medical P.C., New Way Medical Supply, Corp., T & J Chiropractic, P.C. and Vladenn Medical Supply Corp. (motion seq. no. 001), is granted; and it is further

ORDERED that plaintiff's motion for an order staying all pending and future actions and arbitration proceedings involving defendants with respect to the October 17, 2011 accident (motion seq. no. 002), is granted; and it is further

ORDERED that the action has been discontinued as against defendant Doshi Diagnostic Imaging Services, P.C.; and it is further

ORDERED, ADJUDGED AND DECLARED that defendants Megan C. Ash, Adelaida M. Laga PT, Alleviation Medical Services, P.C., Charles Deng Acupuncture, Delta Diagnostic Radiology, P.C., JCC Medical P.C., New Way Medical Supply, Corp., Steven W. Winter, MD, P.C., T & J Chiropractic, P.C., Velocity Chiropractic, P.C., and Vladenn Medical Supply Corp., are not entitled to no-fault coverage or benefits for the motor vehicle accident that occurred on October 17, 2011, involving defendant Megan C. Ash, and American Transit Insurance Company

policy CAP 612529 and Claim No. 764684-03; and it is further

ORDERED, ADJUDGED AND DECLARED that all pending and future no-fault actions and arbitration proceedings brought by defendants Megan C. Ash, Adelaida M. Laga PT, Alleviation Medical Services, P.C., Charles Deng Acupuncture, Delta Diagnostic Radiology, P.C., JCC Medical P.C., New Way Medical Supply, Corp., Steven W. Winter, MD, P.C., T & J Chiropractic, P.C., Velocity Chiropractic, P.C., and Vladenn Medical Supply Corp., as assignees of Megan C. Ash, relating to the October 17, 2011 collision, are permanently stayed.

DATED: September 12, 2013

ENTER:

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.



J.S.C.

12 155731