

American Tr. Ins. Co. v Tavarez
2016 NY Slip Op 31601(U)
August 15, 2016
Supreme Court, New York County
Docket Number: 651583/15
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

JOSE B. TAVAREZ, ES CHIROPRACTIC P.C.,
FAR EAST ACUPUNCTURE, P.C., FOREST TOTAL
MEDICAL P.C., GRAY MEDICAL, INC., HELLENIC
MEDICAL P.C., KAMARA SUPPLIES, INC., MEDICAL
IMPRESSIONS DIAGNOSTIC P.C., METROPOLITAN
MEDICAL CARE, P.C., MIDDLE VILLAGE
DIAGNOSTIC IMAGING P.C., SOM ANESTHESIA
P.C., STATE MEDICAL SUPPLY, INC., SUNRISE
MEDICAL LABORATORIES, INC., SURGICARE OF
MANHATTAN, LLC, and UNIVERSITY ORTHOPEDICS
OF NEW YORK, PLLC,

Defendants.

-----X
SHERRY KLEIN HEITLER, J.S.C.

Index No. 651583/15
Motion Sequence 001

DECISION AND ORDER

In this declaratory judgment action, plaintiff American Transit Insurance Company (“Plaintiff” or “American Transit”) moves pursuant to CPLR 3215¹ for default judgments against all defendants except Gray Medical Inc.² and Kamara Supplies, Inc.³ for failing to answer or otherwise appear in this action. Plaintiff further seeks a declaratory judgment that defendant Jose B. Tavarez (“Tavarez”) is not entitled to motor vehicle no-fault benefits under American Transit insurance policy CAP 613461 (“the Policy”) regarding Claim No. 774932-03 (“Claim”) and that American Transit is not obligated to pay any claims for reimbursement submitted under the Policy and the

¹ CPLR 3215(a) provides in relevant part that “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.”

² A stipulation of discontinuance and release as to Gray Medical, Inc. was filed on September 9, 2015 (Exhibit F).

³ A stipulation of discontinuance and release as to Kamara Supplies, Inc., which has withdrawn its opposition hereto, was filed on July 29, 2016.

Claim by Mr. Tavarez' health care providers, defendants ES Chiropractic P.C., Far East Acupuncture P.C., Forest Total Medical P.C., Hellenic Medical, P.C., Medical Impressions Diagnostic P.C., Metropolitan Medical Care P.C., Middle Village Diagnostic Imaging, P.C., SOM Anesthesia P.C., State Medical Supply, Inc. Sunrise Medical Laboratories, Inc., Surgicare of Manhattan, LLC, and University Orthopedics of New York, PLLC ("the Providers"). The motion is unopposed by these defendants.

The Policy that is the subject of this action was issued by American Transit to NY Auto Services, LLC.⁴ It includes a no fault endorsement which provides coverage to an eligible insured in the amount of \$50,000 for expenses resulting from a motor vehicle accident. The Policy was in effect on January 1, 2014 when a vehicle owned by NY Auto Services, LLC was involved in a motor vehicle accident. Defendant Tavarez was allegedly driving the vehicle at the time of the accident and submitted a claim to Plaintiff under the Policy in the form of an Application for Motor Vehicle No-Fault Benefits (NF-2). Plaintiff received the NF-2 on January 24, 2014.⁵ According to Plaintiff, Mr. Tavarez assigned his rights to collect no-fault benefits to various health care entities, including the Providers (moving affidavit, ¶ 13).

The Policy contains the following conditional provisions in conformity with 11 NYCRR 65-

1.1 (*see also* Insurance Law § 5103):

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. [Exhibit B at 15-16].

⁴ Exhibit B.

⁵ Exhibit C.

By letter dated December 16, 2014, at the address provided by Mr. Tavarez on his NF-2 form, Plaintiff requested that Mr. Tavarez appear for an independent medical examination (IME) on January 15, 2016. It is undisputed that Mr. Tavarez did not attend the scheduled IME. By letter dated January 16, 2015 Plaintiff rescheduled the IME for February 12, 2016. Again Mr. Tavarez did not appear.⁶ Thereafter Plaintiff denied Mr. Tavarez' claim. Plaintiff's denial of claim form (NF-10), which is dated March 5, 2015, recites Ms. Tavarez' failure to appear for his IME's as the reason for the denial.⁷

Plaintiff commenced this action by filing a summons and verified complaint on May 8, 2015. The complaint asserts a cause of action for declaratory relief against Mr. Tavarez and the Provider defendants on the ground that Mr. Tavarez violated a condition precedent to coverage by failing to appear for the scheduled IME's. Plaintiff therefore claims it is entitled to a declaration that it properly denied all no-fault coverage under the Policy for any and all first party benefits and that the Providers are not entitled to payment of the assigned no-fault benefits arising out of the January 1, 2014 accident.

Copies of the summons and verified complaint were personally served upon Mr. Tavarez on July 1, 2015 and upon the Providers on June 17, 2016, June 25, 2016, July 9, 2016, respectively. On July 20, 2015 defendant Hellenic Medical, P.C. filed and served a Notice of Appearance but to date has not filed an answer. On September 9, 2015, Plaintiff's claims against Gray Medical, Inc. were discontinued. On September 24, 2015 Plaintiff's claims against Kamara Supplies, Inc. were discontinued.

An application for a default judgment must include proof of service of the summons, proof of the claim, and proof of the default. Here, the moving papers establish that Plaintiff duly served

⁶ Exhibit D.

⁷ Exhibit E.

Mr. Tavarez pursuant to CPLR 308(2) and the Providers pursuant to CPLR 311, Business Corporation Law § 306, and Limited Liability Company Law § 303.⁸ The defendants were served with additional copies of the summons and complaint on March 7, 2016 as required by CPLR 3215(g)(3)(i) and CPLR 3215(g)(4)(i)⁹. The verified complaint sets forth the facts constituting Plaintiff's claims herein. See CPLR 3215(f).¹⁰ Based on the foregoing, the court finds that defendants ES Chiropractic P.C., Far East Acupuncture P.C., Forest Total Medical P.C., Hellenic Medical, P.C., Medical Impressions Diagnostic P.C., Metropolitan Medical Care P.C., Middle Village Diagnostic Imaging, P.C., SOM Anesthesia P.C., State Medical Supply, Inc., Sunrise

⁸ CPLR 308(2) provides that personal service upon a natural person can be made by "delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business"

CPLR 311(a)(1) authorizes service upon a domestic corporation by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."

Business Corporation Law 306 authorizes service of process upon a domestic corporation by service on the New York State Secretary of State as agent of the corporation.

Limited Liability Company Law 303 authorizes service of process upon a limited liability company by service on the New York State Secretary of State as agent of the limited liability company.

⁹ See exhibit H.

CPLR 3215(g)(3)(i) provides in relevant part that "when a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence"

CPLR 3215(g)(4)(i) provides that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment."

¹⁰ CPLR 3215(f) provides in relevant part that "[o]n any application for judgment by default, the applicant shall file . . . proof of the facts constituting the claim Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due."

Medical Laboratories, Inc., Surgicare of Manhattan, LLC, and University Orthopedics of New York, PLLC are in default.

However, the court finds that Plaintiff is not entitled to the declaratory relief it seeks. New York's no-fault system is designed "to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists". *Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 317 (2007) (quoting *Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]). As part of this system, regulations have been enacted which prescribe specific time frames for requesting and scheduling IME's. Specifically, 11 NYCRR 65-3.5(a) provides that "within 10 business days after receipt" of an NF-2 form, an insurer shall forward, to the parties required to complete them, the verification forms it will require prior to payment of the initial claim. Under 11 NYCRR 65-3.5(b), "[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms" and under 11 NYCRR 65-3.5(d), "[i]f the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms."

An insurer must affirmatively establish its compliance with these claim procedures in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for a medical examination. *American Transit Ins. Co. v Vance*, 131 AD3d 849 (1st Dept 2015); *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015).

Here the moving papers show that Plaintiff received Mr. Tavarez' NF-2 form on January 24, 2014 and that Plaintiff waited almost a year before attempting to schedule an IME. Plaintiff also

claims to have received bills from each of the Providers related to Mr. Tavaréz' claim, but the moving papers do not contain copies thereof or proof as to when they were received. Accordingly, Plaintiff has not submitted proof that its first IME request was timely scheduled in compliance with 11 NYCRR 65-3.5, and it is hereby

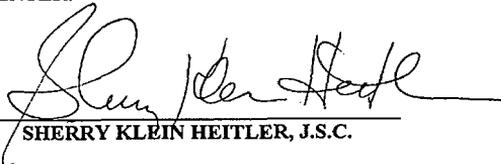
ORDERED that American Transit's motion is denied with leave to renew within 30 days from the date of entry of this decision and order upon proof of proper service thereof, failing which this action shall be dismissed in its entirety.

This constitutes the decision and order of the court.

ENTER:

DATED:

Aug 15, 2014



SHERRY KLEIN HETTLER, J.S.C.