

Amerian Tr. Ins. Co. v Spencer
2020 NY Slip Op 33641(U)
November 3, 2020
Supreme Court, New York County
Docket Number: 157741/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

REBECCA SPENCER, AZCARE INC, BIG APPLE MED
EQUIPMENT INC, CUSTOM RX PHARMACY
LLC, ELMWOOD PARK MEDICAL GROUP PC, METRO
PAIN SPECIALISTS P.C., MOLNAR MEDICAL SERVICES,
PC, NEW YORK FOOT AND ANKLE PLLC, NEW YORK
MEDICAL ALLIANCE, P.C., OPTIMUM HEALTH
CHIROPRACTIC, PLLC, PRIMAVERA ACUPUNCTURE,
P.C., RAPID IMAGING LLC, SHORE PARKWAY
CHIROPRACTIC P.C., WELLNESS PHYSICAL THERAPY
REHABILITATION P.L.L.C., YOU FIRST PHARMACY INC,

Defendant.

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**DECISION + ORDER ON
MOTION**

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

were read on this motion to/for

JUDGMENT - DECLARATORY

Upon the foregoing documents, plaintiff's request for a declaratory judgment on default as against the claimant-defendant and certain medical provider defendants is granted in part, on default and on the merits, and denied in part, solely as moot, and plaintiff's request for summary judgment as against certain other medical provider defendants is granted in part, on default and on the merits, and denied in part, solely as moot, for the reasons stated hereinbelow.

Background

On December 14, 2018, the claimant-defendant, Rebecca Spencer, a pedestrian, was apparently struck by a vehicle that plaintiff, American Transit Insurance Company, insured. The claimant-defendant submitted a claim to plaintiff as a purported eligible injured person under the subject insurance policy. The claimant-defendant allegedly sought services from the medical provider defendants, AZCare Inc.; Big Apple Med Equipment Inc; Custom Rx Pharmacy LLC; Elmwood Park Medical Group PC; Metro Pain Specialists P.C.; Molnar Medical Services, PC; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Primavera Acupuncture, P.C.; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; and You First Pharmacy Inc. The claimant-defendant assigned her rights to collect No-Fault benefits to the medical provider defendants who then, in their capacities as the claimant-defendant's assignees under the subject insurance policy, submitted claims to plaintiff

for reimbursement for services that they allegedly provided to the claimant-defendant arising out of the subject alleged accident. On March 21 and April 18, 2019, the claimant-defendant failed to appear for a scheduled and rescheduled Independent Medical Examination (“IME”). Thus, plaintiff denied all coverage to all defendants. (NYSCEF Doc. 1).

On August 5, 2019, plaintiff commenced the instant action against the claimant-defendant and the medical provider defendants seeking a judgment declaring that the claimant-defendant and the medical provider defendants are not entitled to No-Fault coverage, first party coverage, and/or first party No-Fault benefits under the subject insurance policy arising out of the subject alleged December 14, 2018 accident, as the claimant-defendant breached a condition of the subject insurance policy by failing to appear for the scheduled and rescheduled IME (NYSCEF Doc. 1).

On October 15, 2019, medical provider defendants Molnar Medical Services, P.C. and Elmwood Medical Group, P.C. jointly answered the instant complaint with various admissions, denials, and twelve Affirmative Defenses (NYSCEF Doc. 2).

Pursuant to a stipulation dated October 21, 2019, plaintiff discontinued the instant action as against medical provider defendant Primavera Acupuncture, P.C., only (NYSCEF Doc. 3).

On July 28, 2020, medical provider defendant Big Apple Med Equipment, Inc. answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 7).

Plaintiff now moves (1) pursuant to CPLR 3215, for a declaratory judgment on default as against the claimant-defendant and certain medical provider defendants, namely, AZCare Inc; Custom Rx Pharmacy LLC; Metro Pain Specialists P.C.; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; and You First Pharmacy Inc; (2) pursuant to CPLR 3212, for summary judgment in its favor against medical provider defendants Big Apple Med Equipment Inc.; Elmwood Park Medical Group PC; and Molner Medical Services, PC (the “answering medical provider defendants”); (3) for a judgment declaring that the claimant-defendant is not an eligible injured person entitled to No-Fault benefits under the subject insurance policy; and (4) for a judgment declaring that plaintiff is not obligated to honor or pay any current and/or future claims for reimbursements that the medical provider defendants submit and/or will submit as the claimant-defendant’s assignees under the subject insurance policy and/or under the subject insurance policy’s Mandatory Personal Injury Protection endorsement, arising out of the subject alleged December 14 2018 accident. Plaintiff does not here seek relief as against medical provider defendant Primavera Acupuncture, P.C. pursuant to the October 21, 2019 stipulation of discontinuance and release as against that medical provider defendant, only (NYSCEF Doc. 9).

Pursuant to a September 13, 2020 stipulation, plaintiff withdrew the instant motion as against medical provider defendant Metro Pain Specialists PC, only (NYSCEF Doc. 23).

Pursuant to an October 6, 2020 stipulation, plaintiff discontinued the instant action as against medical provider defendants Elmwood Park Medical Group PC and Molnar Medical Services, PC, only (NYSCEF Doc. 24).

Discussion

Plaintiff's Request for a Declaratory Judgment on Default

Plaintiff has established that it is entitled to a declaratory judgment on default as against the claimant-defendant and medical provider defendants AZCare Inc; Custom Rx Pharmacy LLC; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; and You First Pharmacy Inc, by complying with CPLR 3215(f) by submitting, inter alia, the following: a copy of the subject pleadings; copies of the subject affidavits of service; the September 2, 2020 affidavit of Matteo Sandusky, Esq., Assistant Managing Attorney for plaintiff's No-Fault Legal Department, stating that plaintiff mailed the CPLR 3215(g) notice to defendants on July 15, 2020; and the September 3, 2020 affirmation of Ethan A. Rothschild, plaintiff's attorney.

To date, the claimant-defendant and the aforementioned medical provider defendants have failed to answer the instant complaint and/or oppose or otherwise respond to the instant motion, and their time to do so has expired. Thus, plaintiff is entitled to a declaratory judgment on default as against the claimant-defendant and medical provider defendants AZCare Inc; Custom Rx Pharmacy LLC; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; and You First Pharmacy Inc.

Plaintiff's Request for Summary Judgment

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

Plaintiff has tendered sufficient evidence to demonstrate that there are no material issues of fact in this matter by submitting the subject pleadings (NYSCEF Doc. 17); correspondence scheduling and rescheduling the claimant-defendant's subject IME (NYSCEF Doc. 15); and plaintiff's subject denial of claim form (NYSCEF Doc. 16), among other documents. Plaintiff discontinued the instant action as against medical provider defendants Elmwood Park Medical Group PC and Molnar Medical Services, PC (NYSCEF Doc. 24). Medical provider defendant Big Apple Med Equipment, Inc. has failed to oppose or otherwise respond to the instant motion. Thus, plaintiff is entitled to summary judgment, on the merits and on default, as against medical provider defendant Big Apple Med Equipment, Inc.

Conclusion

Thus, for the reasons stated herein, the request of plaintiff, American Transit Insurance Company, for a declaratory judgment on default is hereby granted in part, on default and on the merits, as against the claimant-defendant, Rebecca Spencer, and medical provider defendants AZCare Inc; Custom Rx Pharmacy LLC; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; and You First Pharmacy Inc, and is hereby denied as against medical provider defendant Metro Pain Specialists, P.C., solely as moot pursuant to the September 13, 2020 stipulation withdrawing the instant motion as against that medical provider defendant, only. Plaintiff's request for summary judgment in its favor is hereby granted in part, on default and on the merits, as against medical provider defendant Big Apple Med Equipment, Inc., and is hereby denied as against medical provider defendants Elmwood Park Medical Group PC; and Molner Medical Services, PC. solely as moot pursuant to the October 6, 2020 stipulation of discontinuance and release as against those two medical provider defendants.

Accordingly, the Clerk is hereby directed to enter judgment declaring that (1) the claimant-defendant, Rebecca Spencer, and medical provider defendants AZCare Inc; Custom Rx Pharmacy LLC; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; You First Pharmacy Inc; and Big Apple Med Equipment, Inc. are not entitled to No-Fault coverage, first party coverage, and/or first party No-Fault benefits under the subject insurance policy arising out of the subject alleged December 14, 2018 motor vehicle accident, as the claimant-defendant breached a condition of the subject insurance policy by failing to appear for the scheduled and rescheduled Independent Medical Examination; (2) the claimant-defendant is not an eligible injured person entitled to No-Fault benefits under the subject insurance policy; and (3) plaintiff is not obligated to honor or pay any current and/or future claims for reimbursement that medical provider defendants AZCare Inc; Custom Rx Pharmacy LLC; New York Foot and Ankle PLLC; New York Medical Alliance P.C. d/b/a North Bronx Faculty Practice Corporation; Optimum Health Chiropractic, PLLC; Rapid Imaging LLC; Shore Parkway Chiropractic P.C.; Wellness Physical Therapy Rehabilitation P.L.L.C.; You First Pharmacy Inc; and Big Apple Med Equipment, Inc. submit and/or will submit in their capacities as the claimant-defendant's assignees under the subject insurance policy and/or under the subject insurance policy's Mandatory Personal Injury Protection endorsement, arising out of the subject alleged December 14, 2018 motor vehicle accident; and awarding costs and disbursements to plaintiff.

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11/3/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

