

American Tr. Ins. Co. v Butler
2020 NY Slip Op 30630(U)
March 2, 2020
Supreme Court, New York County
Docket Number: 161049/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON

PART IAS MOTION 42EFM

Justice

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INDEX NO. 161049/2018

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 01/17/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

JEFFREY BUTLER, AGYAL PHYSICAL THERAPY, PLLC, ATLANTIC DIAGNOSTICS, ATLAS PHARMACY LLC, ATLAS RADIOLOGY P.C., CP ACUPUNCTURE, P.C., FIVE BOROUGH SUPPLY INC, GALMAR DIAGNOSTIC MEDICAL, P.C., GARA MEDICAL CARE, P.C., GEN CEL DIAGNOSTICS, HILLSIDE FAMILY CHIROPRACTIC P.C., J&M ANESTHESIA LLC, JI, YONG SUK, MANALAPAN SURGERY CENTER, MMA PHYSICAL THERAPY, P.C., NEW YORK PAIN MANAGEMENT GROUP, PLLC, NORTH SHORE UNIVERSITY HOSPITAL, PSYCHOLOGY HELP P.C., QUALITY ORTHOPEDICS AND COMPLETE JOINT CARE P.C., REHAB CARE PHYSICAL THERAPY P.C., ROBERT P LUCA D.C., ROLAND CHIROPRACTIC, PC, SUFFICIENT CHIROPRACTIC CARE, PLLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - DECLARATORY

In this action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Jeffrey Butler (the individual defendant) Agyal Physical Therapy PLLC, Atlantic Diagnostics, Atlas Radiology PC, CP Acupuncture PC, Five Borough Supply, Inc., Galmar Diagnostic Medical PC, Gara Medical Care PC, Gen Cel Diagnostics, Hillside Family Chiropractic PC, J&M Anesthesia LLC, Yong Suk Ji, Manalapan Surgery Center, MMA Physical Therapy PC, New York Pain Management Group PLLC, North Shore University Hospital, Psychology Help PC, Quality Orthopedics and Complete Joint Care PC, Rehab Care Physical Therapy PC, Robert P Luca DC, Roland Chiropractic PC, and Sufficient Chiropractic Care PLLC (the non-answering health-care defendants). The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to the individual defendant or the non-answering health-

care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on March 13, 2018, as the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). The plaintiff also moves pursuant to CPLR 3212 for summary judgment against the answering defendant Atlas Pharmacy LLC, seeking the same declaratory relief as against it. No opposition was submitted. The motion for default judgment is denied without prejudice. The motion for summary judgment is denied.

The court notes that the plaintiff withdrew this motion as against defendants MMA Physical Therapy PC and Roland Chiropractic, and accepted their answer as timely, pursuant to the parties' stipulation filed January 14, 2020, attached. As such, the term "non-answering defendants" as used hereafter shall exclude said parties.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept. 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987) (internal citations omitted); see also Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting...some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

Here, plaintiff submits, *inter alia*, the individual defendant's completed NF-2 form, dated March 29, 2018, an EUO verification request sent on June 11, 2018 scheduling an EUO on July 12, 2018, a notice rescheduling the EUO to August 10, 2018, and verification that the individual

defendant failed to appear for both scheduled EUOs. These submissions fail to establish that the initial notice for the EUO was timely mailed to the individual defendant within 15 business days of its receipt of a relevant claim form, such as the NF-2 or an NF-3, as required by 11 NYCRR 65-3.5(b), as the initial EUO request was sent over two months after the plaintiff's receipt of the NF-2 form. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017).

Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (see 11 NYCRR 65-1.1; see also Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 [1st Dept. 2015]; Allstate Ins. Co. v. Pierre, 123 AD3d 618 [1st Dept. 2014]), to establish that an EUO was properly noticed, a plaintiff must supply sufficient evidence to determine whether EUO requests served on an individual defendant were subject to the timeliness requirements of 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b) (see Mapfre Ins. Co. of N.Y. v Manoo, 140 AD3d 468 [1st Dept. 2016]) and, if so, whether the requests had been served in conformity with those requirements. See National Liab. & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015). Here, the plaintiff did not provide copies of any completed NF-3 forms that it may have received from any of the health service provider defendants after its receipt of the NF-2 form or any other evidence reflective of the dates on which plaintiff had received any such verification forms. As such, the plaintiff has not met its *prima facie* burden showing that the EUOs were properly noticed within the prescribed timeframe, such that coverage was vitiated by the individual defendant's failure to attend. See Kemper Indep. Ins. Co. v. Adelaida Physical Therapy, P.C., *supra*.

The plaintiff's motion for summary judgment is denied for the same reason. It is well settled that on a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). As the plaintiff fails to meet its burden establishing that the EUOs were properly noticed, the plaintiff cannot establish the absence of any material, triable issues of fact, and the motion must be denied regardless of the sufficiency of the opposing papers. See Alvarez v Prospect Hosp., *supra*.

Accordingly, it is,

ORDERED that, upon the parties' stipulation filed January 14, 2020, attached, the plaintiff's instant motion for default judgment is withdrawn as against defendants MMA Physical Therapy PC and Roland Chiropractic PC; and it is further,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants Jeffrey Butler (the individual defendant) Agyal Physical Therapy PLLC, Atlantic Diagnostics, Atlas Radiology PC, CP Acupuncture PC, Five Borough Supply, Inc., Galmar Diagnostic Medical PC, Gara Medical Care PC, Gen Cel Diagnostics, Hillside Family Chiropractic PC, J&M Anesthesia LLC, Yong Suk Ji, Manalapan Surgery Center, New York Pain Management Group PLLC, North Shore University Hospital, Psychology Help PC, Quality Orthopedics and Complete Joint Care PC, Rehab Care Physical Therapy PC, Robert P Luca DC, and Sufficient Chiropractic Care PLLC (the non-answering health-care defendants) is denied without prejudice to renewal upon proper papers; and it is further

ORDERED that the plaintiff's motion for summary judgment as against Atlas Pharmacy LLC, is denied, and it is further

ORDERED that the parties shall appear for a preliminary conference on May 6, 2020, at 2:30 p.m.

This constitutes the Decision and Order of the court.

3/2/2020
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

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