

American Tr. Ins. Co. v Randolph

2012 NY Slip Op 31666(U)

June 14, 2012

Supreme Court, Nassau County

Docket Number: 012755/11

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 14

AMERICAN TRANSIT INSURANCE COMPANY,

X

Plaintiff,

-against-

Index No.: 012755/11
Motion Sequence...01, 02
Motion Date...03/23/12

VICTOR T. RANDOLPH, AZURE ACUPUNCTURE,
P.C., EMPIRE CITY LABORITIES, INC., EXCEL
IMAGING, P.C., FISS CHIROPRACTIC, P.C., FIVE
BORO PSYCHOLOGICAL AND LICENSED
MASTER SOCIAL WORK SERVICES, PLLC.,
GAETANE PHYSICAL THERAPY, P.C., LINDEN
MEDICAL CARE, P.C., M&M MEDICAL, P.C., SAS
MEDICAL, P.C., UNITED MEDICAL OFFICES OF
LONG ISLAND, P.C., WESTCAN CHIROPRACTIC,
P.C., WIOLLA MEDICAL SUPPLY, INC.,

Defendants.

X

Papers Submitted:

- Notice of Motion (Mot. Seq. 01).....X
- Order to Show Cause (Mot. Seq. 02).....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Supplemental Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the branch of the Plaintiff, AMERICAN
TRANSIT INSURANCE COMPANY's ("American Transit") motion (Mot. Seq. 01),

seeking an order pursuant to CPLR § 3215 against the Defendants, VICTOR T. RANDOLPH, AZURE ACUPUNCTURE, P.C., EMPIRE CITY LABORITIES, INC., EXCEL IMAGING, P.C., FISS CHIROPRACTIC, P.C., GAETANE PHYSICAL THERAPY, P.C., LINDEN MEDICAL CARE, P.C., M&M MEDICAL, P.C., SAS MEDICAL, P.C., UNITED MEDICAL OFFICES OF LONG ISLAND, P.C. and WESTCAN CHIROPRACTIC, P.C. (hereinafter collectively referred to as “Defaulting Defendants”), ordering, adjudging and decreeing that the Defaulting Defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on January 22, 2011 based upon the Defendant, VICTOR T. RANDOLPH’s failure to attend properly scheduled IME’s; and the branch of the Plaintiff’s motion (Mot. Seq. 01), seeking an order pursuant to CPLR § 3212, against the Defendants, FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER SOCIAL WORK SERVICES, PLLC. and WIOLLA MEDICAL SUPPLY, INC., ordering, adjudging and decreeing that said Defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on January 22, 2011, based upon similar grounds, is decided as hereinafter provided.

The Plaintiff also moves by Order to Show Cause (Mot. Seq. 02), seeking: (i) an order pursuant to CPLR § 1003, granting the Plaintiff leave to serve the complaint on Synergy First Medical Group, PLLC and Shaker Hills Medical Diagnostic, P.C., upon the grounds that the absence of said proposed additional defendants will prevent complete

relief from being accorded between the parties and inequitably affect the interests of the Plaintiff in the above-entitled proceeding; (ii) an order pursuant to § 2201, staying any and all arbitrations and any and all lawsuits that have been brought in courts of competent jurisdiction, pending the outcome and determination of this action; and (iii) an order pursuant to § 6301, granting the Plaintiff a preliminary injunction, enjoining the Defendants from commencing, prosecuting or proceeding on any arbitrations or, commencing, prosecuting or proceeding on any lawsuits pending in any court of competent jurisdiction, pending the outcome and determination of this action. The Order to Show Cause is decided as hereinafter provided.

At the heart of this action is a motor vehicle accident that occurred on January 22, 2011. The Plaintiff, American Transit, provided a policy of insurance to its insured, Njie Ousman, under policy number BYA800141. The policy of insurance included a no-fault endorsement which provided coverage to an insured or an eligible injured person in the amount of at least \$50,000.00 for all necessary expenses resulting from a motor vehicle accident. The policy was in effect on January 22, 2011. (See Affirmation in Support of Motion, ¶¶ 26-27)

The Defendant, Victor T. Randolph, was involved in the subject motor vehicle accident and made claims as a purported eligible injured person under the policy of insurance issued by the Plaintiff, American Transit. (*Id.* at ¶ 28) It appears from a review of the motion papers that the Defendant, Victor T. Randolph, sought no-fault

benefits in connection with the accident on January 22, 2011 from the corporate Defendants. The corporate Defendants will be collectively referred to herein as the "Provider Defendants". Victor T. Randolph ultimately assigned his rights to collect no-fault benefits to the Provider Defendants. According to the Plaintiff's counsel, the Provider Defendants have commenced actions against the Plaintiff or have the right to commence actions and/or arbitrations against the Plaintiff for purportedly overdue no-fault benefits. (*See* Affirmation in Support of Motion, ¶¶ 29-32) The Plaintiff, in turn, commenced the instant action seeking a default judgment against all the non-appearing Defendants and summary judgment as against the appearing Defendants. Further, the Plaintiff also seeks a declaratory judgment against all of the named Defendants.

The Court will first address the Plaintiff's motion seeking a default judgment as against the non-appearing Defendants.

A party may seek a default judgment against a defendant who fails to make an appearance. *See* CPLR § 3215 (a). On an application for a default judgment, the moving party must present proof of service of the summons and complaint, affidavits setting forth the facts constituting the claim, the default, and the relief requested. The moving party must also make a prima facie showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987)

Based upon the documentation submitted in support of the motion for a default judgment, it appears that the Plaintiff caused the summons and complaint to be

served upon the Provider Defendants via the Secretary of State pursuant to Business Corporations Law § 306. (See Affidavits of Service, attached to the Plaintiff's Notice of Motion as Exhibit "2") The Plaintiff failed to attach, however, an affidavit of additional mailing pursuant to CPLR § 3215 (g) (4) (i). While the Plaintiff attempts to cure this defect in its Reply Affirmation, additional evidence in admissible form submitted for the first time in a Reply will not be considered by this Court.

In any event, the additional evidence attached to the Plaintiff's Reply Affirmation is plainly insufficient. The Plaintiff attached an Affidavit of Service (Exhibit "2") to the Reply Affirmation purporting to comply with CPLR § 3215 (g) (4), indicating that the Provider Defendants were mailed a copy of the summons and complaint. The deficiency in the Affidavit is that it fails to attach a notice advising the corporations that service of the summons and complaint was previously made pursuant to BCL § 306. Further, the Affidavit fails to show that the mailing was completed at least twenty (20) days before the Plaintiff's application for the default judgment. To the contrary, the Affidavit states that the summons and complaint was mailed to the Provider Defendants on July 29, 2012, a date which has yet to occur. (See Affidavit of Service, dated July 29, 2012, attached to the Plaintiff's Reply Affirmation as Exhibit "2") In light of the foregoing deficiencies, the branch of the Plaintiff's motion seeking a default judgment as against the Provider Defendants, Azure Acupuncture, P.C., Empire City Laborities, Inc., Excel Imaging, P.C., Fiss Chiropractic, P.C., Gaetane Physical Therapy, P.C., Linden

Medical Care, P.C., M&M Medical, P.C., SAS Medical, P.C., United Medical Offices of Long Island, P.C. and Westcan Chiropractic, P.C., is **DENIED**.

The Plaintiff also failed to attach to its moving papers an Affidavit of Service indicating that service of the summons and complaint was effectuated upon the individual Defendant, Victor T. Randolph. The Plaintiff's counsel also attempts to cure said defect in its Reply Affirmation by attaching an Affidavit of Service thereto. The Plaintiff cannot establish its entitlement to a default judgment by attaching evidence to its reply papers to cure defects contained within the Plaintiff's moving papers. *North Acupuncture, P.C. v. State Farm Ins. Co.*, 836 N.Y.S.2d 487 (App.Term 2d & 11th Jud. Districts); *Canter v. East Nassau Med. Group*, 270 A.D.2d 381 (2d Dept. 2000). Accordingly, the branch of the Plaintiff's motion seeking a default judgment as against the Defendant, Victor T. Randolph, is **DENIED**.

The Plaintiff's motion also seeks summary judgment, pursuant to CPLR § 3212, as against the Provider Defendants, Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro") and Wiolla Medical Supply, Inc. ("Wiolla"). Summary judgment is sought based upon the Defendant, Victor T. Randolph's failure to appear at Independent Medical Examinations ("IME") for which he was allegedly properly noticed. The Plaintiff's counsel states that Victor T. Randolph was mailed notices regarding the scheduled IME's to an address that was listed on his application for benefits. (See Affirmation in Support of Motion, ¶ 34; see also IME Letters attached to

the Plaintiff's Notice of Motion as Exhibit "4") The Plaintiff contends that it may deny an insured's claim retroactively to the date of loss for a claimant's failure to attend IME's, citing to *Stephen Fogel Psychological, P.C. v. Progressive Cas. Co.*, 35 A.D.3d 720 (2d Dept. 2006).

The Plaintiff is required to establish, *prima facie*, that it mailed the IME notices to Victor T. Randolph and that he failed to appear for the IMEs. (*Id.* at 721) In support of the motion, the Plaintiff submitted the affidavit of Luis Campbell, the mail room supervisor for the Plaintiff. Campbell sets forth the mailing procedures utilized by the Plaintiff. Campbell also states that "based on these procedures, the correspondences were mailed on the dates set forth in the letters". (*See* Campbell Affidavit, ¶ 10). The Plaintiff also submitted the Affidavit of Sandra Joseph, a no-fault examiner for the Plaintiff. Joseph, in her affidavit, sets forth the Plaintiff's procedures in connection with denial of claim forms. She further states in her affidavit that the request for additional verification, as attached to the Plaintiff's motion, is a true and accurate copy of the document she generated in duplicate form. (*See* Joseph Affidavit, ¶ 8) Joseph states that a timely denial was issued, printed, placed in an envelope, sealed, placed in the mail bin and then collected by Luis Campbell for mailing. (*Id.* at ¶¶ 16-17).

In further support of the Plaintiff's contention that the notices were mailed to Victor T. Randolph is an affidavit from Lynn Hershman, establishing that the IME notices were in fact mailed to him, along with affidavits from the IME doctors confirming

that Victor T. Randolph failed to appear on the scheduled IME dates. (See Affidavits of Lynn Hershman, Dr. Michael Russ, Milot Thalrose and Brian Wolin, attached to the Plaintiff's Notice of Motion)

Based upon the evidence in admissible form submitted by the Plaintiff, it has established, *prima facie*, that IME notices were mailed to the Defendant, Victor T. Randolph, and that he failed to appear for them. *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 A.D.3d 547, 547-548 (2006); *Hospital for Joint Diseases v. Nationwide Mut. Ins. Co.*, 284 A.D.2d 374, 375 (2001). Notably, the affidavits of Campbell and Joseph fail to specify the claimant by name. The statements in the affidavits generally reference the notices and denial claim form that were presumably sent to Victor T. Randolph. Notwithstanding, the evidence submitted by the Plaintiff is sufficient to satisfy its *prima facie* burden that the Plaintiff was notified of the IME's and failed to appear for same.

The burden now shifts to the appearing Defendants, Five Boro and Wiolla, to raise an issue of fact. First, with respect to the denial of the claim submitted by Five Boro, counsel states that the denial is fatally defective in that it omitted numerous items of requested information. Counsel for the Defendant, Five Boro, cites to several cases that support its argument that a timely denial is required for a valid condition precedent defense. Second, counsel also argues that the denial of Five Boro's claim is defective as the denial states that the bills were denied on the ground that the services were not medically necessary. The Plaintiff failed to deny the claim based upon the ground that

Victor T. Randolph failed to appear for scheduled IME's, thereby, only preserving the defense of medical necessity. (See Denial of Claim Form, dated June 14, 2011, attached to the Defendants' Opposition to the Notice of Motion as Exhibit "B")

Next, with respect to the denial of claim submitted by the Defendant, Wiolla, counsel contends that the denial of claim form is similarly defective in that it fails to state that Victor T. Randolph failed to appear for scheduled IME's. Rather, the denial of claim form explicitly states that the Defendant failed to appear for scheduled Examinations Under Oath. (See Denial of Claim Form, dated May 16, 2011, attached to the Defendants' Opposition as Exhibit "C")

Counsel for the Defendants, Five Boro, and Wiolla, also states that the Plaintiff's denial of Wiolla's claim is also defective as untimely. Specifically, counsel states that the Plaintiff received the bill on March 9, 2011 and denied it on May 16, 2011, more than thirty (30) days after its receipt of the claim.

Counsel further contends that should the Court entertain the Plaintiff's purportedly un-preserved defenses, the Plaintiff still failed to prove that the IME letters were timely and properly mailed, that the claimant failed to appear and that the claimant willfully refused to attend IME's or never appeared.

In support of its argument, counsel for the Defendants, Five Boro and Wiolla, contends that Victor T. Randolph was not residing at the address listed on the IME letters at the time the IME letters were sent to him. Counsel submitted a

Supplemental Opposition, annexing thereto an Affidavit from Victor T. Randolph wherein he states that he did not receive any of the IME notices as indicated by the Plaintiff. According to Randolph's Affidavit, he received medical services from Five Boro and Wiolla. At the time of the accident, Randolph resided at the address listed on the IME notices, 91 Boerum Street, Apt. 11K, Brooklyn, NY 11206. However, Randolph states in his affidavit that in or about the end of January, 2011 or beginning of February, 2011, he moved to 30 Manhattan Avenue, Apt. 2A, Brooklyn, NY 11206. Randolph also states that had he received the letters requesting his appearance at medical examinations, he would have attended them. (See Randolph Affidavit, dated February 9, 2012, attached to the Defendants' Supplemental Opposition as Exhibit "C")

In Reply to the Defendant, Five Boro and Wiolla's opposition, the Plaintiff's counsel states that there were a few reasons as to why the bills were denied from said providers but that "the within declaration of non-coverage, however, seeks said declaration based upon the failure of Defendant Randolph to appear [for] his IME's". (See Reply Affirmation, ¶ 7) Citing to *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dept. 2011), counsel for the Plaintiff avers that an insurer may retroactively deny claims on the basis of the defendants' assignors' failure to appear for [IME's] requested by plaintiff, even though the plaintiff initially denied the claims on the ground of lack of medical necessity.

Based upon the record contained herein, questions of fact exist concerning the Defendant, Victor T. Randolph's receipt of the IME notices and whether he knowingly and willfully failed to attend any scheduled examinations. Counsel for the Defendants, Five Boro and Wiolla, submitted sufficient evidence tending to show that eligible injured person, Victor T. Randolph, did not reside at the address listed on the IME notices and that had he received said notices, he would have appeared for any scheduled examination. Accordingly, the Plaintiff did not meet its "heavy" burden of proving willful and avowed obstruction on the part of the Defendant, Victor T. Randolph, as a matter of law, thus precluding the Plaintiff's motion for summary judgment. *Ingarra v. General Acc./PG Ins. Co. of N.Y.*, 273 A.D.2d 766, 767 (2000); *Tleige v. Troy Pediatrics*, 237 A.D.2d 772, 773-774 (1997); *Wolford v Cerrone*, 184 A.D.2d 833, 833-834 (1992).

The Court will next address the Plaintiff's Order to Show Cause seeking (i) leave to serve the complaint upon Synergy First Medical Group, PLLC ("Synergy First") and Shaker Hills Medical Diagnostic, P.C. ("Shaker Hills"), (ii) an order staying any and all arbitrations and any and all lawsuits that have been brought in courts of competent jurisdiction, and (iii) an order granting the Plaintiff a preliminary injunction, enjoining the Defendants from commencing, prosecuting or proceeding on any arbitrations or lawsuits pending in any court of competent jurisdiction, pending the determination of this action.

With respect to the Plaintiff's request seeking leave to serve the complaint upon additional parties, counsel for the Plaintiff contends that the absence of Synergy First and Shaker Hills will prevent complete relief from being accorded between the parties in this proceeding and that the Plaintiff may be inequitably affected if a judgment was entered in this action. According to the Plaintiff, the Defendant, Victor T. Randolph, also received medical services from Synergy First and Shaker Hills. (See Plaintiff's Affirmation in Support of Order to Show Cause, ¶¶ 11-12) Based upon said services, Synergy First and Shaker Hills subsequently commenced arbitration proceedings against the Plaintiff, American Transit, in connection with the accident on January 22, 2011. (See Arbitration Request Form, attached to the Plaintiff's Order to Show Cause as Exhibit "4") The Plaintiff's counsel contends that Synergy First and Shaker Hills would not be prejudiced by the amendment of the complaint.

Permission to amend pleadings should be "freely given". See CPLR § 3025 (b). The decision to allow or disallow the amendment is committed to the court's discretion. *Murray v. City of New York*, 43 N.Y.2d 400, 404-405 (1977). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side..." *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957 (1983)

It appears from the documentation presented that the alleged facts in the amended complaint, annexed to the Plaintiff's Order to Show Cause as Exhibit "5", if proven true, could subject Synergy First and Shaker Hills to liability. The amendment

sought by the Plaintiff is not palpably improper or insufficient as a matter of law. Accordingly, the branch of the Plaintiff's Order to Show Cause seeking leave to serve the amended complaint as annexed to its moving papers upon Synergy First and Shaker Hills, is **GRANTED**.

The Plaintiff's Order to Show Cause also seeks a stay of all arbitrations and lawsuits. "The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay". *Matter of Liberty Mut. Ins. Co. v. Morgan*, 11 A.D.3d 615, 616 (2d Dept. 2004). "A court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources". *Zonghetti v Jeromack*, 150 A.D.2d 561, 563 (2d Dept. 1989).

Here, the Plaintiff's counsel submits that there is a question whether certain conditions precedent to coverage were violated, to wit, the Defendant, Victor T. Randolph's attendance at scheduled IME's, and thus, it has the right to have this issue determined prior to the matter being arbitrated. (*See Plaintiff's Affirmation in Support of Order to Show Cause*, ¶¶ 40-42)

With respect to the pending arbitration proceedings commenced by some of the named Defendants herein, the Plaintiff failed to seek a stay of arbitration within twenty (20) days after service upon it of the arbitration notice or demand pursuant to CPLR § 7503 (c). The Plaintiff is not alleging that the parties' agreement to arbitrate is at

issue. In such cases, the twenty (20) day limitation is essentially treated as a statute of limitations. *See Matter of Steck (State Farm Ins. Co.)*, 89 N.Y.2d 1082 (1996). The Court finds, in its sound discretion, that the facts presented in this case do not warrant a stay of all proceedings pending the determination of this action.

Moreover, nowhere in the Plaintiff's papers does it state what arbitrations it seeks to stay. There are no index numbers or AAA numbers set forth in order for this Court to issue a stay even if a stay was warranted. The Court cannot and will not stay hypothetical cases. Likewise, the Court will not render an advisory opinion with respect to future arbitrations that may be filed.

Finally, the Plaintiff's request for a preliminary injunction, enjoining the Defendants from commencing, prosecuting or proceeding on any arbitrations or lawsuits is also **DENIED** based upon its failure to demonstrate, by clear and convincing evidence, a likelihood of success on the merits, irreparable injury, or that a balancing of the equities favors the movant's position. The affidavit of Victor T. Randolph establishes that his nonappearance at any scheduled IME's was neither willful nor intentional. In fact, the Defendant indicated that he would have attended the IME's had he received the notices.

Accordingly, it is hereby

ORDERED, that the branch of the Plaintiff's motion (Mot. Seq. 01), seeking an order pursuant to CPLR § 3215 against the Defendants, VICTOR T. RANDOLPH, AZURE ACUPUNCTURE, P.C., EMPIRE CITY LABORITIES, INC.,

EXCEL IMAGING, P.C., FISS CHIROPRACTIC, P.C., GAETANE PHYSICAL THERAPY, P.C., LINDEN MEDICAL CARE, P.C., M&M MEDICAL, P.C., SAS MEDICAL, P.C., UNITED MEDICAL OFFICES OF LONG ISLAND, P.C. and WESTCAN CHIROPRACTIC, P.C., ordering, adjudging and decreeing that said Defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on January 22, 2011 based upon the Defendant, VICTOR T. RANDOLPH's failure to attend properly scheduled IME's, is **DENIED**; and it is further

ORDERED, that the branch of the Plaintiff's motion (Mot. Seq. 01), seeking an order pursuant to CPLR § 3212, against the Defendants, FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER SOCIAL WORK SERVICES, PLLC. and WIOLLA MEDICAL SUPPLY, INC., ordering, adjudging and decreeing that said Defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on January 22, 2011, based upon the Defendant, VICTOR T. RANDOLPH's failure to attend properly scheduled IME's, is **DENIED**; and it is further

ORDERED, that branch of the Plaintiff's Order to Show Cause (Mot. Seq. 02), seeking an order pursuant to CPLR § 1003, granting the Plaintiff leave to serve the complaint on Synergy First Medical Group, PLLC and Shaker Hills Medical Diagnostic, P.C., upon the grounds that the absence of said proposed additional defendants will prevent complete relief from being accorded between the parties and inequitably affect

the interests of the Plaintiff in the above-entitled proceeding, is **GRANTED**; and it is further

ORDERED, that the Plaintiff shall serve a copy of the Amended Summons and Complaint, as annexed to its moving papers as Exhibit "5", upon Synergy First Medical Group, PLLC and Shaker Hills Medical Diagnostic, P.C. in accordance with the CPLR, and upon all appearing Defendants, by serving their counsel pursuant to CPLR § 2103 (b) (1), (2) or (3), within twenty (20) days of the date of this Order; and it is further

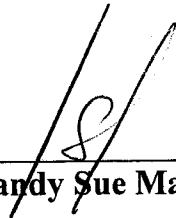
ORDERED, that the branch of the Plaintiff's Order to Show Cause (Mot. Seq. 02), seeking an order (i) pursuant to § 2201, staying any and all arbitrations and any and all lawsuits that have been brought in courts of competent jurisdiction, pending the outcome and determination of this action and (ii) pursuant to § 6301, granting the Plaintiff a preliminary injunction, enjoining the Defendants from commencing, prosecuting or proceeding on any arbitrations or, commencing, prosecuting or proceeding on any lawsuits pending in any court of competent jurisdiction, pending the outcome and determination of this action, is **DENIED**; and it is further

ORDERED, that Plaintiff's counsel shall serve a copy of this Order upon the Defaulting Defendants by certified mail, return receipt requested, and all appearing parties or their counsel, by regular mail. **PROOF OF SERVICE MUST BE FILED WITH THE COURT**; and it is further

ORDERED, that the parties are directed to appear for a Preliminary Conference (*See* 22 NYCRR § 202.12) at the Preliminary Conference Part, located on the lower level of the Nassau County Supreme Court on **August 2, 2012 at 9:30 a.m.** This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
June 14, 2012



Hon. Randy Sue Marber, J.S.C.

ENTERED
JUN 15 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE