

American Transit Ins. Co. v Miah

2012 NY Slip Op 32275(U)

July 30, 2012

Sup Ct, Nassau County

Docket Number: 014519/11

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.: 014519/11
Motion Sequence...01
Motion Date...05/15/12

MOHAMMAD J. MIAH,
UMMAH MEDICAL DIAGNOSTIC,
PC, 31ST ST MEDICAL SERVICES, P.C.,
A.W. CHIROPRACTIC, P.C.,

Defendants.

Papers submitted: X
Notice of Motion.....X

Upon the foregoing papers, it is ordered that the unopposed motion by the Plaintiff, AMERICAN TRANSIT INSURANCE COMPANY, seeking an order pursuant to CPLR § 3215, granting it a default judgment against the Defendants, UMMAH MEDICAL DIAGNOSTIC, PC., 31ST ST MEDICAL SERVICES, P.C. and A.W. CHIROPRACTIC, P.C., due to their failure to answer the Plaintiff's summons and complaint or otherwise appear in the action, is **DENIED**.

The Plaintiff commenced this action seeking a declaration that the Defendants are not entitled to reimbursement for medical services purportedly billed to the Plaintiff

pursuant to the No-Fault laws of New York's Insurance Law based upon MOHAMMAD J. MIAH's failure to satisfy a condition precedent of the insurance policy.

The Plaintiff alleges that it provided an insurance policy to MOHAMMAD J. MIAH, which included a No-Fault coverage for an amount of at least fifty thousand dollars (\$50,000.00) "for all necessary expenses resulting from a motor vehicle accident". (See Plaintiff's Complaint, attached to the Plaintiff's Notice of Motion as Exhibit "1" at ¶¶ 10-11) On November 24, 2010, MOHAMMAD J. MIAH was allegedly involved in a motor vehicle accident and sought No-Fault coverage from the Defendants, UMMAH MEDICAL DIAGNOSTIC, PC., 31ST ST MEDICAL SERVICES, P.C. and A.W. CHIROPRACTIC, P.C.. (*Id.* at ¶¶ 12-13) The Plaintiff further alleges that MOHAMMAD J. MIAH assigned his right to collect No-Fault benefits to the provider Defendants. The Plaintiff asserts that MOHAMMAD J. MIAH's claim was denied because he failed to attend an Independent Medical Examination ("IME"), which is a condition under the policy to receive coverage. (*Id.* at ¶¶ 24-26)

By So-Ordered Stipulation dated May 15, 2012, the Plaintiff discontinued the action against MOHAMMAD J. MIAH. The stipulation also states that MOHAMMAD J. MIAH admits that he did not appear for the scheduled IME's as set forth in the Plaintiff's moving papers.

Pursuant to CPLR § 3215, a plaintiff can make an application for a default judgment against a defendant who fails to answer or otherwise appear in the action. Pursuant

to CPLR § 3215 (f), an applicant for a default judgment must provide “proof of service of the summons and complaint”, “proof by affidavit by the party of the facts constituting the claim” and proof of the default.

Pursuant to § 306 (b) of the Business Corporation Law, service upon a domestic corporation can be made by delivery of two copies of the summons and complaint on the Secretary of State.

Under CPLR § 3215 (g) (4) (i), when a default judgment is sought against a corporation served pursuant to § 306 (b) of the Business Corporation Law, an additional service must be made by first class mail to the defendant’s last known address at least twenty (20) days before the entry of Judgment. In addition, CPLR § 3215 (g) (4) (ii) provides that the additional service “shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision”.

In the instant case, the Plaintiff submitted in support of its motion the Affidavit of Dennis Seales, an employee of AMERICAN TRANSIT INSURANCE COMPANY. Mr. Seales stated that he was the employee assigned the claim. Although he states that he has knowledge of the facts constituting this claim, nothing in his Affidavit supports the Plaintiff’s claim that MOHAMMAD J. MIAH failed to appear for the scheduled IME’s. His affidavit is only a description of his job functions as a claims examiner. (*See Seales’ Affidavit in Support*, sworn to on February 21, 2012, attached to the Plaintiff’s Notice of Motion as Exhibit “4”). The Plaintiff also submitted an Affidavit by Luis Campbell, the

mailroom supervisor at AMERICAN TRANSIT INSURANCE COMPANY, attesting that he is familiar with the mailing procedures. (*See Campbell's Affidavit in Support*, sworn to on February 21, 2012, attached to the Plaintiff's Notice of Motion as Exhibit "4") This Affidavit also fails to establish that Mr. Campbell has personal knowledge of the essential facts supporting the Plaintiff's claim. Both Affidavits appear to be comprised of blanket, generic statements that can essentially be used to support any motion.

The Court will not consider the Affidavits of Mr. Seales and Mr. Campbell as they fail to establish, through personal knowledge, the facts constituting the Plaintiff's claim. *See Blam v. Netcher*, 17 A.D.3d 495 (2d Dept. 2005) Moreover, the complaint is not verified by the Plaintiff or any representative thereof. A motion for leave to enter a default judgment will be denied where the plaintiff fails to submit either an affidavit of the facts supporting the claim or a complaint verified by a party with personal knowledge of the facts. *See DeVivo v. Sparago*, 287 A.D.2d 535 (2d Dept. 2001) Further, the Stipulation where MOHAMMAD J. MIAH purportedly admitted that he did not appear for IME's was signed by Defendant's counsel. This stipulation does not displace the need for an Affidavit from the Plaintiff setting forth the facts constituting the Plaintiff's claim as required by CPLR § 3215 (f).

The Plaintiff also submitted an Affidavit by Lynn Hershman, an employee of Independent Physical Exam Referrals, Inc., stating that she mailed two notices for a Medical Examination to MOHAMMAD J. MIAH. According to Ms. Hershman, she served a notice

on MOHAMMAD J. MIAH on May 23, 2011 advising him that a Medical Examination was scheduled for June 6, 2011. When she received notice of his non-appearance, she served another notice by mail on June 8, 2011 advising him that the examination was rescheduled for June 20, 2011. (*See* Hershman's Affidavit in Support, sworn to on June 22, 2011, attached to the Plaintiff's Notice of Motion as Exhibit "4") Finally, the Plaintiff submitted an Affidavit by Michael Russ, M.D. stating that MOHAMMAD J. MIAH failed to appear at the Medical Examinations scheduled for June 6, 2011 and June 20, 2011. (*See* Dr. Russ' Affidavit in Support, sworn to on March 13, 2012, attached to the Plaintiff's Notice of Motion as Exhibit "4")

CPLR § 3215 requires proof of the facts constituting the plaintiff's claim by an Affidavit made "by the party". The Affidavits submitted by Ms. Hershman and Dr. Russ are inadequate to establish proof of the facts constituting the Plaintiff's claim because they are not parties to this action and they are not employed by the Plaintiff.

A copy of the summons and complaint was served on the Defendants, UMMAH MEDICAL DIAGNOSTIC, P.C., 31ST ST MEDICAL SERVICES, P.C. and A.W. CHIROPRACTIC, P.C. on October 13, 2011 by delivering two copies of the summons and complaint upon the Secretary of State. The Plaintiff also mailed another copy of the Summons and Complaint to the Defendants on October 26, 2011 by first class regular mail to each Defendant's last known address. (*See* the Affidavits of Service, attached to the Plaintiff's Notice of Motion as Exhibit "2") However, these Affidavits do not indicate that

the Defendants were provided with notice that service was being made pursuant to BCL § 306 (b), and thus are not in compliance with CPLR § 3215 (g) (4) (ii).

Accordingly, it is hereby


ORDERED, that the unopposed motion by the Plaintiff, seeking a default judgment against the Defendants, UMMAH MEDICAL DIAGNOSTIC, PC., 31ST ST MEDICAL SERVICES, P.C. and A.W. CHIROPRACTIC, P.C., is **DENIED**; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon the Defendants by certified mail, return receipt requested, and by regular mail to the Defendant's last known address within twenty (20) days of the date of this order; 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 **September 19, 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 decision constitutes the decision and order of the Court.

DATED: Mineola, New York
July 30, 2012



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

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ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE