

American Tr. Ins. Co. v Medina
2012 NY Slip Op 33940(U)
April 13, 2012
Supreme Court, New York County
Docket Number: 109001/2011
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

Index Number 109001/2011

Mot. Seq. No. 001

-against-

EDWIN MEDINA, CITY MEDICAL DIAGNOSTICS
P.C., CLEARVIEW OF BROOKLYN MEDICAL P.C.,
DORSI MEDICAL SUPPLY INC., GORDON C.
DAVIS MEDICAL P.C., SP CHIROPRACTIC P.C.,
ST. JOSEPHS PHYSICAL THERAPY P.C., THE
BROOKDALE HOSPITAL MEDICAL CENTER
AND ZION ACUPUNCTURE P.C.,
Defendants.

DECISION AND ORDER

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For the Plaintiff:
Law Offices of James F. Sullivan, P.C.
By: Giovanna Tuttolomondo, Esq.
52 Duane St., 7th fl.
New York, NY 10007
(212) 374-0009

For the Defendants:
no appearance

E-filed papers considered in review of this motion for a default judgment:

Papers	Document Number:
Notice of Motion	1
Tuttolomondo affirmation and annexed exhibits A-D	2

PAUL G. FEINMAN, J.:

Plaintiff, American Transit Insurance Company (ATIC), moves pursuant to CPLR 3215 for entry of a default judgment against defendants, Edwin Medina, City Medical Diagnostics P.C., Clearview of Brooklyn Medical P.C., Dorsi Medical Supply Inc., Gordon C. Davis Medical P.C., SP Chiropractic P.C., St. Josephs Physical Therapy P.C., The Brookdale Hospital Medical Center and Zion Acupuncture P.C. For the reasons which follow, the motion, although

unopposed, is denied as to defendant Medina, and granted as to the rest of the defendants.

Plaintiff commenced this action on August 4, 2011, by filing a summons and complaint, seeking a judgment declaring: 1) defendant Medina is not an eligible injured person entitled to no-fault benefits under the ATIC insurance policy; 2) ATIC is not required to pay any current or future claim for no-fault benefits under the "Mandatory Personal Injury Protection" endorsement under the policy; and 3) ATIC is not obligated to pay claims for reimbursements submitted by defendant medical providers, or any claims arising from any arbitration and/or lawsuit seeking to recover no-fault benefits under this policy (Doc. 2, ex. B, Summons and complaint). Plaintiff also requests costs and disbursements under this action, including attorney's fees. When defendants failed to respond, plaintiff brought the instant motion for a default judgment pursuant to CPLR 3215.

CPLR 3215 (f) requires: 1) proof of service of a summons and either a complaint or CPLR 305 (b) notice; 2) proof of the claim, including the amount due if it is a money claim; and 3) proof of default. Under 50 USCA Appendix § 521 and New York Military Law § 303 (3), a party seeking a default judgment against an individual defendant must submit proof that defendant was not in military service at the time of default. CPLR 3215 (g) (4) provides that when a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to BCL § 306, an affidavit shall be submitted that additional service has been made upon the defendant corporation at its last known address with notice that service is being made pursuant to BCL § 306.

As to proof of default, plaintiff submits an affirmation by attorney Giovanna Tuttolomondo, stating that the defendants did not answer or respond to the summons and

complaint (Doc. 2, Tuttolomondo affirm.). As to proof of claim, plaintiff submits an affidavit of Cheryl Glaze, a claim representative for plaintiff who supervised the handling of the claim at issue (Doc. 2 at ¶ 1–3, ex. A, Glaze affid.). Glaze alleges that under the policy at issue, claimants must submit to a medical exam by the ATIC's physician, or a physician acceptable to ATIC, and that Medina failed to appear for the required medical exam and therefore breached the policy and New York Insurance Regulation 68 (*id.* at ¶ 14–16). Glaze further alleges that as a result of this breach, Medina is not entitled to any coverage under the policy and that the corporate defendants (medical providers) are not entitled to payment of the claims they have submitted (*id.* at ¶ 17–22).

Plaintiff provides sufficient proof of service with respect to the corporate defendants by service upon the New York State Secretary of State pursuant to BCL § 306 (b) (Doc. 2, ex. C, Affids. service). Plaintiff also provides proof of service for defendant Brookdale Hospital Medical Center, a not-for-profit entity, by including an affidavit showing that service was made upon Brookdale's Risk Management Coordinator and a stipulation to adjourn signed by both plaintiff's attorney and Brookdale Hospital's attorney (Doc. 2, ex. C, Beirne affid.; Stipulation to adjourn). Plaintiff also attaches an affidavit of service stating that additional notice was mailed to all defendants pursuant to CPLR 3215 (g) (4) (Doc. 2, ex. D, Kelly affid.).

Plaintiff also provides sufficient proof of service as to Medina, the individual defendant, pursuant to CPLR 308 (2), by submitting an affidavit stating that the summons was delivered to a person of suitable age and discretion at Medina's dwelling place, which was followed by mailing the same to Medina's last known address within 20 days.

However, as stated above, to obtain a default judgment against an individual defendant, plaintiff must include an affidavit attesting that the defendant was not in military service at the time of default (50 USCA Appendix § 521; New York Military Law § 303 [3]). A non-military affidavit based solely on an inquiry made at the time the summons and complaint were first served is inadequate; rather, the affiant must attest that the defendant was not in military service at the time plaintiff seeks a default judgment (*see Citibank, N.A. v McGarvey*, 196 Misc 2d 292 [Civ Ct, Richmond County 2003]). In the case at bar, the non-military affidavit with respect to Medina asserts that the relevant inquiry was made at the time of service of the summons and complaint, not at the time of default (Doc. 2, ex. C, Beirne affid.; Doc. 2, ex. D, Tuttolomondo affid.).

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment against defendant Medina is denied without prejudice to renew upon the submission of appropriate papers; and it is further

ORDERED that the plaintiff's motion for a default judgment against defendants City Medical Diagnostics P.C., Clearview of Brooklyn Medical P.C., Dorsi Medical Supply Inc., Gordon C. Davis Medical P.C., SP Chiropractic P.C., St. Josephs Physical Therapy P.C., The Brookdale Hospital Medical Center, and Zion Acupuncture P.C. is granted; and it is further

ADJUDGED and DECLARED that plaintiff American Transit Insurance Company is not obligated to honor or pay claims for reimbursement submitted by defendants City Medical Diagnostics P.C., Clearview of Brooklyn Medical P.C., Dorsi Medical Supply Inc., Gordon C. Davis Medical P.C., SP Chiropractic P.C., St. Josephs Physical Therapy P.C., The Brookdale

Hospital Medical Center, and Zion Acupuncture P.C. under insurance policy CAP 608189, Claim No. 756895-06 arising out Edwin Medina's November 29, 2009 accident; and it is further

ORDERED that the complaint is severed and continued as against the individual defendant Edwin Medina.

This constitutes the decision and order and judgment of the court.

Dated: April 13, 2012
New York, New York

Saul H. Finerman
J.S.C.

(2012 Pt 12 D&O_109001_2011_001_SG)