

American Tr. Ins. Co. v Bernard

2013 NY Slip Op 34217(U)

April 18, 2013

Supreme Court, Bronx County

Docket Number: 22190/12E

Judge: Jr., Alexander W. Hunter

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A**

-----X

American Transit Insurance Company,

Index No.: 22190/12E

Plaintiff,

Decision and Order

-against-

Ivan Bernard, Alliance Anesthesiology Associates,
P.L.L.C., Baiher Acupuncture P.C., Clinton Place
Medical, P.C., Effective Care P.T. P.C., Gentle Care
Medical Services, P.C., Orthopedic Specialist of
Greater New York, Premier Surgical Services P.C.,
Socrates Medical Health P.C., St Anthony Medical
& Diagnostic P.C.,

Defendants.

-----X

HON. ALEXANDER W. HUNTER, JR.

Plaintiff American Transit Insurance Company's ("American Transit") motion for an order pursuant to C.P.L.R. 3215, granting plaintiff a default judgment against individual defendant Ivan Bernard ("Bernard") and defendants Baiher Acupuncture P.C., Clinton Place Medical, P.C., Effective Care P.T. P.C., Gentle Care Medical Services, P.C., Orthopedic Specialist of Greater New York, Premier Surgical Services P.C., Socrates Medical Health P.C., St Anthony Medical & Diagnostic, P.C. ("Providers") (collectively, "defaulting defendants"), is granted. Plaintiff's motion for a declaratory judgment that 1) defendant Bernard is not an eligible injured person entitled to no-fault benefits under American Transit insurance policy BX A209384, Claim No. 648323-05 (the "subject policy"); 2) American Transit is not obligated to pay claims for reimbursement submitted by Providers, as assignees of defendant Bernard; and 3) American Transit is not obligated to pay any current or future claims for no-fault benefits under the subject policy with respect to defendant Bernard and the alleged injuries he sustained in the December 8, 2009 motor vehicle accident is granted. Plaintiff's motion for an order, permanently staying any and all pending and future no-fault benefit suits and arbitration proceedings brought by defaulting defendant with respect to the motor vehicle accident that occurred on December 8, 2009, is granted.

On December 8, 2009, defendant Bernard allegedly sustained personal injuries in a motor vehicle accident. Thereafter, plaintiff received an application for no-fault benefits under the subject policy with respect to the motor vehicle accident. Providers allegedly administered medical treatment, therapy and/or medical supplies to defendant Bernard. In addition, Providers each received an assignment of benefits from Bernard for the right to recover no-fault benefits pursuant to the subject policy. Consequently, Providers submitted claims to plaintiff regarding services purportedly provided to Bernard.

The subject policy and Insurance Regulation 68 provide that “[n]o action shall lie against the Company [American Transit] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage. As a condition precedent to the disbursement of any no-fault benefits, the eligible injured person must submit to a medical examination by a physician of American Transit’s choosing when and as often as American Transit may require.

Plaintiff submits an affidavit of merit from Iris Hernandez, a claim representative employed by American Transit. Ms. Hernandez asserts that defendant Bernard failed to appear for properly requested and scheduled medical examinations on February 24, 2010, March 10, 2010, April 24, 2012, and May 8, 2012. Based upon defendant Bernard’s failure to appear for a medical examination, a condition precedent to payment under the subject policy, plaintiff maintains that Bernard is not entitled to receive no-fault benefits.

The failure to appear for an independent medical examination requested by an insurer is a breach of the insurance policy, which entitles an insurer to deny claims submitted by medical providers. See, **Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559 (1st Dept. 2011); Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 2012 NY Slip Op 50271(U) (1st Dept. 2012).** Where there is a failure to comply with the terms of an insurance policy, there is no right to assign benefits because there is no right to benefits. See, **New York & Presbyt. Hosp. v. Country-Wide Ins. Co., 17 N.Y.3d 586 (2011).** As such, Providers have no right to no-fault benefits assigned to them by Bernard because he does not have a right to receive such benefits under the subject policy due to his breach. Furthermore, plaintiff is entitled to deny any claims submitted by Providers with respect to defendant Bernard.

On September 18, 2012, plaintiff commenced the instant action seeking a declaratory judgment against defendants. Plaintiff seeks an order declaring that 1) defendant Bernard is not an eligible injured person entitled to no-fault benefits and 2) American Transit is not obligated to reimburse Providers for any past and future claims submitted in connection with defendant Bernard. Plaintiff also seeks an order staying any and all pending and future no-fault benefit lawsuits and arbitration proceedings brought by defendants.

Plaintiff’s counsel asserts that defaulting defendants were served with a copy of the summons and verified complaint and to date, defaulting defendants have failed to appear in this action or request an extension of time to answer. As such, plaintiff’s counsel argues that a default judgment should be entered against defaulting defendants. Plaintiff does not seek a default judgment against defendant Alliance Anesthesiology Associates, P.L.L.C.

C.P.L.R. 3215(f) provides that a party moving for a default judgment “shall file proof of service of the summons and complaint...and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party....Where a verified complaint has been served, it may be used as the affidavit of facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party’s attorney.”

In support, plaintiff submits copies of the affidavits of service indicating service of process on defaulting defendants. The affidavit of service indicates that defendant Bernard was served with the summons and verified complaint by affixing copies of each to the door of his dwelling place on October 1, 2012 at 8:09 P.M. and by mailing same to his residence on October 3, 2012. The process server made three previous attempts at service on September 27, 2012 at 1:59 P.M., September 28, 2012 at 11:33 A.M., and October 1, 2012 at 8:09 P.M. Orthopedic Specialist of Greater New York was served pursuant to C.P.L.R. 311 by personal delivery of a copy of the summons and verified complaint to an authorized agent on October 5, 2012 at 4:51 P.M. Defendants Baiher Acupuncture P.C., Clinton Place Medical, P.C., Effective Care P.T. P.C., Gentle Care Medical Services, P.C., Premier Surgical Services P.C., Socrates Medical Health P.C., St Anthony Medical & Diagnostic P.C. were served pursuant to Business Corporation Law § 306 by delivery of two copies of the summons and verified complaint to the Secretary of State on October 22, 2012 at 9:30 A.M. Additional copies of the summons and verified complaint were mailed to defaulting defendants pursuant to C.P.L.R. 3215(g) on December 10, 2012. Ms. Hernandez's affidavit of merit also details the facts constituting plaintiff's claim as well as the default of Bernard and Providers.

Based upon the foregoing, this court finds that plaintiff has submitted the requisite proof necessary for the entry of a default judgment against defaulting defendants.

Accordingly, it is hereby,

ORDERED that plaintiff's motion for the entry of a default judgment against defaulting defendants is granted; and it is further

ADJUDGED and DECLARED that defendant Bernard is not an eligible injured person entitled to no-fault benefits under the subject policy; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to pay claims for reimbursement submitted by Providers, as assignees of defendant Bernard, under the subject policy nor is plaintiff required to pay or reimburse any claims in any current or future proceeding, including but not limited to arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the subject policy in connection with defendant Bernard and the alleged injuries he sustained in the December 8, 2009 motor vehicle accident; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to pay any current or future claims for no-fault benefits under the Mandatory Personal Injury Protection endorsement under the subject policy nor is plaintiff required to pay or reimburse any claims in any current or future proceeding, including but not limited to arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the subject policy in connection with defendant Bernard and the alleged injuries he sustained in the December 8, 2009 motor vehicle accident; and it is further

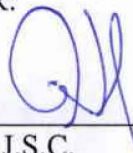
ORDERED that any and all pending and future no-fault benefit lawsuits and arbitration

proceedings brought by defaulting defendants with respect to the December 8, 2009 motor vehicle accident is permanently stayed; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on defendants and file proof thereof with the clerk's office.

Dated: April 18, 2013

ENTER:



J.S.C.

ALEXANDER W. HUNTER JD