

American Transit Ins. Co. v Perez

2014 NY Slip Op 30474(U)

February 25, 2014

Sup Ct, New York County

Docket Number: 109131/11

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. EILEEN A. RAKOWER

PRESENT: _____

Justice

PART 15

Index Number : 109131/2011
AMERICAN TRANSIT INSURANCE

vs.

PEREZ, ANTONIO

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-7

Answering Affidavits — Exhibits _____ | No(s). 8

Replying Affidavits _____ | No(s). 9

Upon the foregoing papers, it is ordered that this motion is

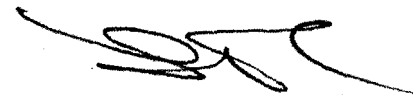
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/25/2017



J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
 PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

AMERICAN TRANSIT INSURANCE COMPANY,

INDEX NO. 109131/11

MOTION DATE _____

Plaintiff,

- v -

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

ANTONIO PEREZ, JAIME TORRES, AAA
 PHARMACY, INC., ATLANTIC CHIROPRACTIC, P.C.,
 DIGGETT CHIROPRACTIC, P.C., DOWNTOWN
 BRONX MEDICAL ASSOCIATES, P.C.,
 EASTCHESTER PRECISION MEDICAL P.C., EAST
 PEARL ACCUPUNCTURE P.C., HEALTHWORX
 MEDICAL, P.C., INTEGRATIVE PAIN MEDICINE
 P.C., LINCOLN MEDICAL AND MENTAL HEALTH
 CENTER, LONGEVITY MEDICAL SUPPLY, INC.,
 METRO HEALTH PRODUCTS INC., MULTI-
 SPECIALITY PAIN MANAGEMENT P.C., NEW
 MILLENIUM PSYCHOLOGICAL SERVICES, P.C.,
 NEW YORK CITY HEALTH AND HOSPITALS
 CORPORATION, SMART REHAB PT. P.C.
 SOCRATES MEDICAL HEALTH P.C., DINDO K.
 ZAYAS PT,

Defendants.

UNFILED JUDGMENT

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The following papers, numbered 1 to _____ were read on this motion for/to

J.S.C.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-7

Answer — Affidavits — Exhibits _____

8

Replying Affidavits _____

9

Cross-Motion: Yes No

This case arises from an automobile accident on January 24, 2011 where defendants Antonio Perez (“Perez”) and Jaime Torres (“Torres”) allegedly received personal injuries. Plaintiff American Transit Insurance Company commenced this action by Summons and Complaint filed on August 8, 2011 seeking a declaration that Perez and Torres are not eligible insured persons entitled to no-fault benefits under American Transit Insurance Company insurance policy CAP 609248 (“the Policy”), due to alleged breach of contract by failing to appear for properly requested and scheduled medical examinations.

By Order dated September 24, 2012, this Court granted Plaintiff’s motion for default judgment against Perez, Torres, and co-defendants Atlantic Chiropractic, P.C., Diggett Chiropractic, P.C., Downtown Bronx Medical Associates, P.C., Eastchester Precision Medical P.C., East Pearl Acupuncture P.C., Healthworx Medical, P.C., Integrative Pain Medicine P.C., Longevity Medical

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

Supply, Inc., Smart Rehab PT, P.C., Socrates Medical Health, P.C., and Dindo K. Zayas, PT (the "Defendants") for failure to answer or appear in this action.

Plaintiff did not seek a default judgment against defendants Lincoln Medical and Mental Health Center and New York City Health and Hospitals Corporation, AAA Pharmacy, Metro Health Products Inc., Multi-Speciality Pain Management, P.C., New Millenium Psychological Services, P.C., and New York City Health and Hospitals Corporation.

Plaintiff now moves for an Order, pursuant to CPLR 3212, for summary judgment against defendant New Millenium Psychological Services, P.C. ("New Millenium"). New Millenium opposes and submits the attorney affirmation of Oleg Rybak.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

- (b) as may reasonably be required submit to examinations

under oath by any person named by the Company and subscribe the same.

The failure to attend duly scheduled medical exams voids the policy ab initio. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dep't 2011].

Plaintiff submits the Affidavit of Merit of Chevan Douglas, a claim represented employed by Plaintiff, which attests to Perez and Torres' failure to appear for properly requested and scheduled examinations under oath ("EUOs"). Plaintiff also provides the affidavit of Angela Denny, a supervisor in Plaintiff's legal department, which attests to the generation and issuance of the EUO scheduling letters, the affidavit of Luis Campbell, Plaintiff's mail room supervisor, which attests to the mailing of the EUO scheduling letters, and the affidavits of Patrick Shea and Patrick Carr which attest to Perez and Torres' failure to appear for the scheduled EUOs.

Here, through the provided affidavits and exhibits thereto, Plaintiff has demonstrated prima facie entitlement to summary judgment. As appearances for examinations under oath were a condition precedent to payment under the subject policy and Perez and Torres breached the requirement by failing to appear, there is no basis for coverage to defendant New Millenium, as their assignee. In opposition, defendant New Millenium fails to raise a triable issue of fact.

Wherefore, it is hereby **ORDERED** that summary judgment be granted in favor of Plaintiff and against defendant New Millenium Psychological Services, P.C. This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ORDERED that Plaintiff's motion for summary judgment against defendant New Millenium Psychological Services, P.C., is granted; and it is further

ORDERED and ADJUDGED that Plaintiff owes no duty to defendant New Millenium Psychological Services, P.C., to pay No-Fault claims submitted in relation to the January 24, 2011 collision referenced in the complaint involving defendants Antonio Perez and Jaime Torres.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: FEBRUARY 25, 2014



J.S.C.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Check one: FINAL DISPOSITION

X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE