

American Transit Ins. Co. v Smith

2015 NY Slip Op 30562(U)

April 16, 2015

Sup Ct, New York County

Docket Number: 15084/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No. 15084/2014

-against-

DECISION/ORDER

SHAWN O. SMITH, C & R QUALITY CARE MEDICAL,
P.C., CITY CHIROPRACTIC, P.C., DAMIEN OPEN MRI
P.C., E.C. ADVANTAGE ACUPUNCTURE, P.C.,
ENHANCED PHYSICAL THERAPY SOLUTIONS, P.C.,
MAXFORD INC., MERRYMOUNT CHIROPRACTIC, P.C.,
METROPOLITAN MEDICAL & SURGICAL P.C.,
OCEAN VIEW MEDICAL CARE, P.C., PEARL MEDICAL
P.C., STAND UP MRI OF BROOKLYN, P.C., SURE WAY
NY INC and TOTAL PSYCHIATRIC MEDICAL
SERVICES, P.C.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff commenced the instant action against defendants seeking a declaratory judgment
that there is no coverage as to the defendant Shawn O. Smith (“Smith”) or his medical provider
defendants. Plaintiff now moves for an order (1) pursuant to CPLR § 3215 granting it a default
judgment against defendants Smith, C & R Quality Care Medical P.C., City Chiropractic, P.C.,
Damien Open MRI P.C., E.C. Advantage Acupuncture, P.C., Enhanced Physical Therapy

Solutions, P.C., Merrymount Chiropractic, P.C., Metropolitan Medical & Surgical P.C., Ocean View Medical Care, PC., Pearl Medical P.C., Stand Up MRI of Brooklyn, P.C., Sure Way NY Inc. and Total Psychiatric Medical Services, P.C. (collectively referred to herein as “defaulting defendants”); and (2) pursuant to CPLR § 3212 granting it summary judgment against defendant Maxford Inc. (“Maxford”). Defendants C & R Quality Care Medical, P.C., City Chiropractic, P.C., E.C. Advantage Acupuncture, P.C., Enhanced Physical Therapy Solutions, P.C. and Merrymount Chiropractic, P.C. (collectively referred to herein as “moving defendants”) move by separate notice of motion for an order pursuant to CPLR § 3012(d) granting them an extension of time to appear and/or compelling plaintiff to accept their untimely answer. For the reasons set forth below, plaintiff’s motion is denied and moving defendants’ motion is granted.

The relevant facts are as follows. Defendant-assignor Smith was allegedly involved in a motor vehicle accident on March 28, 2013. Subsequent to the accident, plaintiff received a New York Motor Vehicle No-Fault Insurance Law application for Motor Vehicle No-Fault Benefits (NYS Form NF-2) dated April 24, 2013 from Smith claiming no-fault benefits under plaintiff’s policy. Plaintiff alleges that pursuant to its rights under the no-fault regulations it thereafter sought verification of Smith’s claim by requesting that he attend an Independent Medical Examination (“IME”). Plaintiff further alleges that Smith failed to attend his duly scheduled IMEs and it disclaimed coverage on this ground.

As an initial matter, the moving defendants’ motion to extend their time to answer is granted without opposition. In its opposition papers, plaintiff states that it “will accept the moving defendants’ late answer.” Thus, moving defendants are directed to answer or otherwise respond to plaintiff’s complaint as described below.

However, plaintiff's motion for summary judgment is denied. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, plaintiff has failed to present sufficient evidence demonstrating the absence of any material issues of fact. The failure to appear for a duly scheduled IME is a breach of a condition precedent to coverage under the no-fault policy. *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dept 2011) . Accordingly, in a no-fault declaratory judgment action a no-fault insurer makes out its *prima facie* entitlement to summary judgment by "establishing that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that defendants' assignors did not appear." *Id.* at 560; *see also Advanced Medical, P.C. v. Utica Mutual Insurance Co.*, 23 Misc.3d 141(A) (N.Y. App. Term 2nd, 11th and 13th districts 2009).

In the present case, plaintiff has failed to make a *prima facie* showing that it properly requested IMEs in accordance with the no-fault regulations and that Smith failed to appear for these duly scheduled IMEs as it presents confusing and contradictory evidence relating to the scheduling of Smith's IMEs. Plaintiff contends that it properly mailed several notices to Smith requesting that he attend an IME but Smith continuously failed to appear for an IME. However,

plaintiff's evidence submitted in support of this assertion is inconsistent and contradictory and fails to establish as a matter of law that Smith failed to appear for duly scheduled IMEs. As an initial matter, according to the affidavit of plaintiff's claim representative Joann Shepherd ("Sheperd"), Smith failed to appear for two IMEs with Dr. Michael Russ ("Dr. Russ") on June 5, 2013 and July 1, 2013. However, according to the affidavit of Lynn Hershman ("Hershman"), an employee of Independent Physical Exam Referrals, Inc., the IME requests letter sent to Smith, on behalf of plaintiff, requested that Smith attend an IME on June 5, 2013 and June 19, 2013. There is no mention of a July 1, 2013 date. Moreover, according to the unsworn affirmation of Dr. Russ, Smith was scheduled to appear before him on July 23, 2013 and June 19, 2013. Again these dates do not correlate to the dates mentioned in either the Shepherd or Hershman affidavits. Additionally, plaintiff presents even more contradictory evidence by presenting the court with an affidavit of an employee in the office of Dr. R. G. Lamfranchi, P.C. and Dr. Lanfranchi himself attesting that plaintiff was scheduled to attend an IME with Dr. Lanfranchi on June 20, 2013 and July 11, 2013 but failed to appear on either of those dates. Based on these confusing and at times contradictory pieces of evidence, this court cannot find as a matter of law that plaintiff properly requested IMEs in accordance with the no-fault procedures and that Smith failed to appear for said IMEs. Indeed, without knowing the exact dates Smith was supposed to attend an IME, it is impossible to determine whether the IMEs were properly requested pursuant to the time-frames set forth in the no-fault regulations.

Additionally, based on the foregoing, plaintiff's motion for a default judgment is also denied. On a default motion, the moving party must not only establish the default but it must "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). In the instant action, this court has already determined that plaintiff has failed to make a prima facie showing that Smith failed to appear for duly scheduled IMEs. Thus, it would be inappropriate to grant a declaratory judgement against the defaulting defendants at this time.

Accordingly, plaintiff's motion is denied and moving defendants' motion is granted and it is hereby

ORDERED that moving defendants are to appear, answer or move with respect to plaintiff's complaint within fourteen (14) days from the date this order is entered.

Dated: 4/16/15

Enter: _____ *PK*

J.S.C.
CYNTHIA S. KERN
J.S.C.