

American Tr. Ins. Co. v Rodriguez

2016 NY Slip Op 31535(U)

August 4, 2016

Supreme Court, New York County

Docket Number: 652264/2015

Judge: Kathryn E. Freed

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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: IAS PART 2

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

NORIN YAIR RODRIGUEZ, BURT M.
GREENBERG, M.D., P.C., CONCIERGE
COMPOUNDING PHARMACEUTICALS,
INC., NORTH SHORE-LONG ISLAND
JEWISH HEALTH SYSTEM, INC. d/b/a
NORTH SHORE LIJ MEDICAL P.C.,
NORTH SHORE UNIVERSITY HOSPITAL,
Defendants.

-----X
KATHRYN E. FREED, J.S.C.

**DECISION, ORDER AND
JUDGMENT**

Index No. 652264/2015
Mot. Seq. No. 001

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS | NUMBERED |
|--|------------------|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED..... | 1, 2 (Exs. A-H), |
| ANSWERING AFFIDAVIT..... | No |
| REPLY AFFIDAVIT.. .. | No |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff American Transit Insurance Company (“American Transit”) moves for an order: (1) pursuant to CPLR 3215, granting it a judgment on default against individual defendant Norin Yair Rodriguez (“Rodriguez”) and co-defendants Burt M. Greenberg, M.D., P.C., Concierge Compounding Pharmaceuticals, Inc., North Shore-Long Island Jewish Health System, Inc. d/b/a North Shore LIJ Medical P.C., and North Shore University Hospital (“medical providers”), for failure to appear or answer in this action; (2) granting American Transit a declaratory judgment that Rodriguez is not an eligible injured person entitled to no-fault benefits under American Transit policy BTC B404287, Claim No. 657848-05 (“subject claim”); (3) granting

American Transit a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by the medical providers under the subject claim as assignees of Rodriguez, nor is American Transit required to provide, pay, honor or reimburse any claims set forth herein in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the subject claim, as Rodriguez is not an eligible injured person entitled to no-fault benefits under American Transit policy BTC B404287, Claim No. 657848-05 and/or New York State Regulation 68; (4) a declaratory judgment that American Transit is not required to provide, pay, or honor any current or future claim for no-fault benefits under the Mandatory Personal Injury Protection endorsement under American Transit insurance policy BTC B404287, Claim No. 657848-05, nor is American Transit required to provide, pay, honor or reimburse any claims set forth herein in any current or future proceeding, including without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the subject claim, as Rodriguez is not an eligible injured person as defined by American Transit policy BTC B404287, Claim No. 657848-05 and/or New York State Regulation 68; and (5) for such other and further relief as this Court deems just and proper. After a review of the relevant case law and statutes, plaintiff's motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

The captioned action arises from an alleged automobile accident that occurred on October 6, 2014, in which defendant Rodriguez, while riding bicycle, allegedly sustained personal injuries when struck by a vehicle owned by American Transit's insured, THE DAY 4 CORPORATION, insured under policy No. BTC B404287. American Transit notes that the insurance policy contained

the mandatory no-fault endorsement prescribed by the New York State Department of Financial Services, which states, in part:

MANDATORY PERSONAL INJURY PROTECTION

The Company will pay first party benefits to reimburse for basic economic loss sustained by an eligible injured person on account of personal injuries caused by an accident arising out of the use or operation of a motor vehicle or a motorcycle during the policy and within the United States...

Defendant Rodriguez alleged that he received medical treatment from the defendant medical providers, and assigned the rights to collect No-Fault benefits to the medical provider defendants, under assigned Claim No. 657848-05 to the above set forth policy relating to the October 6, 2014 motor vehicle accident. Additionally, Rodriguez has sought to collect no-fault benefits in his own right. American Transit received defendant Rodriguez's claims for no-fault benefits on an NF-2 form dated October 17, 2014, and a letter of representation from his attorney, Schwartzapfel Lawyers P.C., on October 17, 2014 (Annexed as Exhibit B). Additionally, American Transit notes that all medical providers have either commenced, or have the right to commence, actions or arbitrations against it in accordance with Article 51 of the Insurance Law for purported overdue no-fault benefits.

American Transit sought to verify that claimant was actually injured and received the medical treatment for which claims were submitted, and duly requested an Independent Medical Exam ("IME") from claimant. Plaintiff, American Transit, notes that such IMEs are specifically allowed pursuant to New York Codes of Rules and Regulations 65-1.2, which provides, in pertinent part:

CONDITIONS

Action Against Company. 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.

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

- (a) Execute a written proof of oath;
- (b) As may reasonable be required to submit to examinations under oath by any person maned by the Company and subscribe the same.
- (c) Provide authorization that will enable the Company to obtain Medical records; and
- (d) Provide any other pertinent information that may assist the Company in determining the amount due and payable.

Additionally, the policy and New York State Insurance Regulation 68 further provide that:

The eligible injured person shall submit to an Independent Medical Examination by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require.

Pursuant to the regulations and the subject insurance policy, plaintiff requested that Rodriguez appear for an IME. (Copies of the various notices are annexed as Exhibit C). Rodriguez failed to attend both the first IME which plaintiff scheduled for November 26, 2014, at 2:30 at 159-16 Union Turnpike, Ste. 303, Flushing, New York with Dr. Michael Russ and on the subsequently scheduled date of December 17, 2014. Plaintiff submits affidavits (from Luis Campbell, Thomas J. Kelly and Dr. Michael Russ, annexed to Exhibit A) attesting to the mailing procedures and with personal knowledge of defendant Rodriguez's failure to attend the IMEs. American Transit's subsequent "Denial of Claims Form" (NF-10), denying benefits to Rodriguez for failure to cooperate and appear for the scheduled medical exams, is annexed as Exhibit D.

American Transit commenced the captioned action by filing a summons and verified complaint on or about June 25, 2015. (See Ex. E). American Transit avers, through its attorney, Justin Rothman that, to date, none of the defendants has joined issue or appeared, pleaded or asked for an extension in this action and that the time to do so has expired.

POSITION OF THE PLAINTIFF:

American Transit moves for a determination that Rodriguez, by failing to appear for a properly requested and scheduled IME, breached a condition precedent to coverage of the subject policy, as such, he is not an eligible injured person entitled to no-fault benefits under the policy. Additionally, it seeks a declaration that, because Rodriguez breached a condition precedent to coverage under the policy, the policy was thereby rendered *void ab initio*. Therefore, since Rodriguez's assignees, the medical providers, acquire no greater rights than their assignor, American Transit, is entitled to deny the medical providers payment for any and all claims arising out of the motor vehicle accident of October 6, 2014 as set forth in the underlying Verified Complaint and under American Transit policy BTC B404287, Claim No. 657848-05.

Further, American Transit urges that it is entitled to a default judgment against all of the defendants insofar as they were all properly served with the underlying papers and have failed to appear in this action. It maintains that it properly served defendant Rodriguez with copies of the summons and complaint pursuant to CPLR Article three on August 6, 2015 and filed the affidavit of service with the Clerk of the Court on September 11, 2015. (A copy of the affidavit of service of Qazi Haider, sworn to on August 7, 2015, is annexed as part of Exhibit F.) Defendant Burt M. Greenberg, MD, PC, was served with copies of the summons and complaint pursuant to CPLR

Article three on August 12 , 2015. A copy of the affidavit of service of David Kleinberg, sworn to on August 13, 2015, is annexed as part of Exhibit F. The affidavit was filed with the Clerk of the Court on September 11, 2015. The remaining medical providers, all domestic corporations, were served with copies of the summons and complaint pursuant to CPLR Article three on September 4, 2015 and that the affidavits of service were duly filed with the Clerk of the Court on September 23, 2015. See annexed affidavits of service by Kyle Warner, sworn to on September 8, 2015, as part of Exhibit F. Additionally, all defendants were served with an additional copy of the summons, pursuant to CPLR 3215, on April 8, 2016. (See affidavit of Colwyn Edwards, Exhibit H). American Transit, through its attorney, avers that the providers have failed to appear, plead or proceed in this action and the time set forth by law for these defendants to answer or appear has expired and has not been extended by the Court. Therefore, American Transit argues it is entitled to a default judgment against all of the defaulting defendants pursuant to CPLR 3215.

LEGAL CONCLUSIONS:

American Transit's application for a default judgment against defendants is granted. CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial. . . , the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." See *Atlantic Cas. Ins. Co. v RJJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Here, American Transit has submitted proof that it properly served the defendants with copies of the summons and complaint pursuant to CPLR

Article three on April 6, 2015 and that the affidavits of service were duly filed with the Clerk of the Court. Additionally, all defendants were served with an additional copy of the summons pursuant to CPLR 3215. Defendants have failed to answer or otherwise appear as required within 20 days (*see* CPLR 320[a]) and their time to answer has not been extended by this Court. American Transit filed the instant motion for default on May 10, 2016 and defendants have failed to respond to the same.

“New York courts “rarely, if ever” grant declaratory judgments on default “with no inquiry by the court as to the merits.” *Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 (1st Dept 1978). Default declaratory judgment actions ““will not be granted on the default and pleadings alone”” but require that the ““plaintiff establish a right to a declaration against . . . a defendant.”” *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 (3d Dept 1986), quoting *National Sur. Corp. v Peccichio*, 48 Misc2d 77, 78 (Sup Ct Albany County 1965).” *de Beeck v Costa*, 39 Misc3d 347 (Sup Ct New York County 2013). However, here American Transit has demonstrated that it has a prima facie cause of action. *See Gagen v Kipany Prods. Ltd.*, 289 AD2d 844 (3d Dept 2001). Additionally, defendants’ default in answering the complaint constitutes an admission of the factual allegations therein and any reasonable inferences which may be made from the same. *See Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 778 (1984).

“The No-Fault Regulations provide 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.” *Hertz Vehicles, LLC v Delta Diagnostic Radiology, P.C.*, 2015 WL 708610, 2015 NY Slip Op 30242(U), *3 (Sup Ct, NY County, Feb. 18, 2015, No. 158504/12) (Rakower, J.). In particular, 11 NYCRR 65-1.1 states: “No action shall lie against [a No-Fault insurer] unless, as a condition precedent

thereto, there shall have been full compliance with the terms of this coverage.” The Regulation at 11 NYCRR 65-1.1 also mandates that: “Upon request by the Company, the eligible injured person or that person’s assignee or representative shall: . . . submit to an Independent Medical Examination by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require.”

In *Hertz, supra*, this Court further stated, inter alia, that:

The failure to appear for a scheduled [EUO] is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach 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]; *Hertz Corp. v. V.S. Care Acupuncture, P. C.*, 2013 NY Slip Op 30895(U), *3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A), *1 [N.Y. App. Term 2012]. Accordingly, when the claimants or the assignors fail to appear for the requested exams, “the . . . insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the 30 day period . . . Since the contract has been vitiated, [the insurer] may deny all the claims retroactively to the date of loss.” See *LK Health Care Prods. Inc. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1230(A), *5 [N.Y. Civ. Ct. 2013].

Id., *3; see also *Hertz Vehicles, LLC v New Utrecht Servs., Inc.*, 2014 WL 5426997, 2014 NY Slip Op 32767(U), *2-3 (Sup Ct, NY County, Oct. 27, 2014, No. 151559/12).

In regard to proof of timely mailing in compliance with the No-Fault Regulations, this Court stated:

“[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption.” *American Transit Insurance Company v. Lucas*, 111 A.D. 3d 423, 424 [1st Dept 2011]. A presumption of mailing “may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed.” *Residential Holding Corp. v.*

Scottsdale Ins. Co., 286 A.D. 679, 680 [2nd Dept 2001].

Hertz Vehicles, LLC, 2015 WL 708610, *supra* at *4.

Here, American Transit has demonstrated, through proof of timely mailing in compliance with all no-fault requirements, (both for the scheduling of IMEs and its timely filing of its denials of coverage under the policy), proof of Rodriguez's failure to appear on two occasions for duly noticed and scheduled IMEs, and through the filing of its verified amended complaint, that it has met its prima facie entitlement to a judgment declaring that neither Rodriguez nor the provider defendants are entitled to No-Fault coverage for the subject claims due to Rodriguez's having breached a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. Thus, Rodriguez is not an "eligible injured person" entitled to no-fault benefits under the American Transit policy.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff American Transit Insurance Company's motion pursuant to CPLR 3215, granting American Transit a judgment on default against individual defendant, Norin Yair Rodriguez and against co-defendant medical providers: Burt M.Greenberg, M.D., P.C., Concierge Compounding Pharmaceuticals, Inc., North Shore-Long Island Jewish Health System, Inc. d/b/a North Shore LIJ Medical P.C., and North Shore University Hospital, for failure to appear or answer in this action, is granted and it is further,

ORDERED and ADJUDGED that individual defendant Norin Yair Rodriguez is not an “eligible injured person” entitled to no-fault benefits under American Transit policy BTC B404287, Claim No. 657848-05 , and it is further,

ORDERED and ADJUDGED that plaintiff American Transit Insurance Company is not obligated to honor or pay claims for reimbursement for any and all claims of individual defendant Norin Yair Rodriguez and is not obligated to honor or pay claims for reimbursement for any and all claims of co-defendant medical providers: Burt M.Greenberg, M.D., P.C., Concierge Compounding Pharmaceuticals, Inc., North Shore-Long Island Jewish Health System, Inc. d/b/a North Shore LIJ Medical P.C., and North Shore University Hospital, under American Transit policy BTC B404287, Claim No. 657848-05; and it is further,


ORDERED that plaintiff American Transit Insurance Company is to serve a copy of this order with notice of entry upon all parties and the County Clerk’s Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED that the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision, order, and judgment of this Court.

Dated: August 4, 2016

ENTER:



KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT