

American Tr. Ins. Co. v McIntosh

2017 NY Slip Op 30380(U)

January 9, 2017

Supreme Court, Bronx County

Docket Number: 304602/14

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 7**

Index No.304602/14

Motion No. 2

Motion Date: 10/17/16

AMERICAN TRANSIT INSURANCE COMPANY.

Plaintiff(s),

-against-

DECISION/ORDER

Present:

Hon. Wilma Guzman

LAKEISHA MCINTOSH, ARIS DIAGNOSTIC MEDICAL,
PLLC, KINGSBROOK JEWISH MEDICAL CENTER,
MAJESTIC ACUPUNTURE, P.C., MOON LIGHT PT, P.C.,
N.V. MEDICAL SERVICES, P.C. PAIN MEDICAL,
P.L.L.C., PEARL MEDICAL P.C. REHAB MEDICAL &
DIAGNOSTIC P.C., T & S MEDICAL SUPPLY
CORPORATION, THERAPEUTIC CHIROPRACTIC
SERVICES P.C.

Defendant(s),

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion
for an Order granting default judgment against the defendants:

Papers

Numbered

Notice of Motion, Attorney's Affirmation in Support,

and Exhibits Thereto.....

A-H

Upon the foregoing papers, the Decision/Order on this motion is as follows:

Plaintiff American Transit Insurance Company (hereinafter referred to as "ATIC") moves for (1) default judgment pursuant to C.P.L.R. § 3215 granting ATIC a summary judgment against the defendants, LAKEISHA MCINTOSH, ARIS DIAGNOSTIC MEDICAL, PLLC, KINGSBROOK JEWISH MEDICAL CENTER, MAJESTIC ACUPUNTURE, P.C., MOON LIGHT PT, P.C., N.V. MEDICAL SERVICES, P.C. PAIN MEDICAL, P.L.L.C., PEARL MEDICAL P.C. REHAB MEDICAL & DIAGNOSTIC P.C., T & S MEDICAL SUPPLY CORPORATION, THERAPEUTIC CHIROPRACTIC SERVICES P.C., seeking an Order declaring that the defaulting defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on April 17, 2013, due to (1) the failure of defendant, LAKEISHA MCINTOSH, to attend two properly scheduled Independent Medical Examinations; and (2) for an Order granting plaintiff summary judgment pursuant to C.P.L.R. §3215, against LAKEISHA MCINTOSH, ARIS DIAGNOSTIC MEDICAL, PLLC, KINGSBROOK JEWISH MEDICAL CENTER, MAJESTIC ACUPUNTURE, P.C., MOON LIGHT PT, P.C., N.V. MEDICAL SERVICES, P.C. PAIN MEDICAL, P.L.L.C., PEARL MEDICAL P.C. REHAB MEDICAL & DIAGNOSTIC P.C., T & S MEDICAL SUPPLY CORPORATION, THERAPEUTIC CHIROPRACTIC SERVICES P.C., and seeking an order declaring that the defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on April 17, 2013, due to the failure of defendant, LAKEISHA MCINTOSH, to attend the properly scheduled Independent Medical Examinations.

No personal appearance in opposition to the motion having been made by the defendants on the scheduled oral argument date, the motion is granted on default of the defendants, except the motion is withdraw as to defendants, T & S MEDICAL SUPPLY CORPORATION, KINGSBROOK JEWISH MEDICAL CENTER and PAIN MEDICAL, P.L.L.C.

This case arises from an automobile accident on April 17, 2013, wherein defendant, LAKEISHA MCINTOSH, allegedly received personal injuries. ATIC issued an Insurance Policy under New York Policy of insurance numbered CAP 608507 provided to DTG Enterprise, its

insured. The defendant, LAKEISHA MCINTOSH submitted a claim to ATIC, as a purported eligible injured person of the above-referenced insurance policy and claim number 771542-04 was assigned.

Pursuant to the policy, the applicable no-fault statute permits insurers to request Independent Medical Examinations (IME's). Pursuant to the no-fault endorsement, ATIC requested that LAKEISHA MCINTOSH appear for an IME/PMR. Two requests were made and scheduled.

Defendant, LAKEISHA MCINTOSH was requested to appear for the PMR/Acupuncture IME with Dr. Joseph Cole which was scheduled for May 29, 2013 at 11:00 A.M., she failed to appear. The IME was rescheduled to June 12, 2013 and again defendant failed to appear, plaintiff, ATIC, denied the claim based upon the claimant's failure to attend duly scheduled Independent Medical Examinations (IME's). Plaintiff submits the affidavit of Sandra Joseph, claim representative in support of defendant MCINTOSH's failure to appear and the ordinary and customary practice to issue general denials.

In support of the motion, plaintiff submits copies of the pleadings, affidavits of service upon defendants of the summons and complaint and the additional notices as required by C.P.L.R. §3215(g)(4), copies of the notices requesting that MCINTOSH appear for the IME's and copies of the denial form of MCINTOSH's no-fault claim to all defendants.

In further support of the motion, plaintiff submits the affidavit of Luis Campbell, mail room supervisor for "ATIC" who is familiar with the ordinary, customary and routine mailing business practices at ATIC, Mr. Campbell is fully familiar based on personal knowledge of the facts and circumstances as he was responsible to oversee all the mailing at "ATIC", including but not limited to mailing denial claims, explanation of benefits and requests for verification. Ms. Joseph the claim Examiner assigned is responsible for its handling, receiving the bills and to issued payments, or request additional verification, and she handled the claims and denial forms

with regards to the defendant, LAKEISHA MCINTOSH, herein. In addition, she describes the procedure in which denial of claim forms are generated, print all documents in his queue, personally examines the documents, placed the documents into the properly addressed envelope, to be mailed to the claimants, and placed the sealed envelope into the mail bin. All mail bins are collected and he defers the description of mailing procedures to Luis Campbell. Thereafter, all information is electronically stored. The affidavit of Thomas J. Kelly, an employee of Comprehensive Medical Reviews, sworn to June 25th, 2013; states that at the request of ATIC, he was responsible for mailing the IME notice for the IME scheduled with Dr. Joseph Cole, at 11:00 A.M. on May 29, 2013. The IME was cancelled due to LAKEISHA MCINTOSH's non-appearance. A follow up IME was scheduled with Dr. Joseph Cole at 9:15 A. M. on June 12, 2013. Again, LAKEISHA MCINTOSH's failed to appear. The notices provided LAKEISHA MCINTOSH to appear on the aforementioned dates for the scheduled IME's.

The affidavit of Dr. Joseph Cole, sworn to July 6, 2013, states that he is licensed to practice in the state of New York. Dr. Cole further attests that defendant, LAKEISHA MCINTOSH, was scheduled to appear for medical examinations on May 29, 2013. and June 12, 2013, and she failed to comply with the requests and did not appear for the examinations. The affidavit of the Mail Room Supervisor at ATIC, Luis Campbell, sworn to November 23, 2015 further states that prior to April 9, 2012 all notices and other mail are collected and delivered to the USPS Main USPS Office located at the corner of 33rd Street and 8th Avenue, New York, NY at 12:00 P.M. and 4:00 P.M. After April 9, 2012, the processed mail is taken to the Cadman USPS Post Office located at 271 Cadman Plaza East, Suite One, Brooklyn, New York 11201-9997, also delivered at 12:00 P.M. and 4:00 P.M. Mr. Campbell states that it is standard mail room policy and procedure to collect and deliver such mail to the U.S. Post Office each day. Mr. Campbell further states that based upon the aforementioned procedures the correspondence in the instant case were mailed on the dates said forth on the letters.

The appearance at a medical examination is a prerequisite to any claim against an insurer. See 11 NYCRR §65-1.1; see also NYCRR §65-3.5. The failure to appear for such examination

constitutes a breach of a condition precedent and voids the policy ab initio. Unitrin Advantage Ins. Co. V. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559,560, 918 N.Y.S. 2d 473, 474 (1st Dept.), leave denied; 17 N.Y. 3d 705, 952 N.E. 2d 1091, 929 N.Y.S. 2d 96 (2011). Plaintiff may deny all claims retroactively regardless of whether the denials were timely issued Id.

Plaintiff's proof is sufficient to demonstrate a viable cause of action against the defaulting defendant. See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, supra. See also Shore Med. Diagnostic, P.C. v. Praetorian Ins. Co., 34 Misc. 3d 131A (App. Term 1st Dept. 2011); Celtic Med. P.C. v. NY Cent Mut. Fire Ins. Co., 15 Misc. 3d 13 (App. Term 2nd Dept. 2007). The affidavits submitted in support of a motion for default judgment pursuant to CPLR §3215 "need only allege enough facts to enable a court to determine that a viable cause of action exists." Woodson v. Medon Leasing Corp., 100 N.Y.2d 62, 70, 760 N.Y.S.2d 727, 733, 790 N.E.2d 1156,1162 (2003).

The defaulting defendant is "deemed to have admitted all factual allegations contained in the complaint and all reasonable information that flow from them." Id. Therefore, plaintiff's submitted proof is sufficient to demonstrate a viable cause of action against all of the defaulting defendants.

The requested reliefs sought by the plaintiff herein are based upon defendant LAKEISHA MCINTOSH's failure to appear for the four scheduled IME's which voided the insurance policy.

Regardless of when the assignee submits a bill, payment will be rightfully denied based upon the voided policy. As such, plaintiff's motion is granted on default.

Based upon the facts and applicable law herein, this Court grants the petitioner's motions as follows:

Accordingly, it is

ORDERED that plaintiff's motion requesting default judgment against defendants LAKEISHA MCINTOSH, ARIS DIAGNOSTIC MEDICAL, PLLC, MAJESTIC ACUPUNCTURE, P.C., MOON LIGHT PT, P.C., N.V. MEDICAL SERVICES, P.C., PEARL MEDICAL P.C. REHAB MEDICAL & DIAGNOSTIC P.C., THERAPEUTIC CHIROPRACTIC SERVICES P.C., is hereby granted, and it is further

ORDERED that plaintiff's motion for a preliminary injunction pursuant to C.P.L.R. §6311 is granted on default and a preliminary injunction is issued enjoining defendants LAKEISHA MCINTOSH, ARIS DIAGNOSTIC MEDICAL, PLLC, MAJESTIC ACUPUNCTURE, P.C., MOON LIGHT PT, P.C., N.V. MEDICAL SERVICES, P.C., PEARL MEDICAL P.C. REHAB MEDICAL & DIAGNOSTIC P.C., THERAPEUTIC CHIROPRACTIC SERVICES P.C., from commencing, prosecuting, and proceeding on any lawsuits pending in any court of competent jurisdiction. It is further

ORDERED that the portion of plaintiff's motion which seeks, pursuant to C.P.L.R. §602(b) to join this action with all pending and subsequently filed Civil Court and District Court actions involving defendants as Assignee of Defendant LAKEISHA MCINTOSH is hereby granted on default. It is further

ORDERED and ADJUDGED that defendant, LAKEISHA MCINTOSH, is not an eligible person entitled to no-fault benefits under American Transit Insurance Company's Insurance policy number CAP 608507 and bearing claim number 771542-04; and it is further

ORDERED and ADJUDGED that the plaintiff AMERICAN TRANSIT INSURANCE COMPANY is not obligated to honor or pay claims for reimbursements submitted by the defendants LAKEISHA MCINTOSH, ARIS DIAGNOSTIC MEDICAL, PLLC, MAJESTIC ACUPUNCTURE, P.C., MOON LIGHT PT, P.C., N.V. MEDICAL SERVICES, P.C., PEARL

MEDICAL P.C. REHAB MEDICAL & DIAGNOSTIC P.C., THERAPEUTIC CHIROPRACTIC SERVICES P.C., as assignees of LAKEISHA MCINTOSH, under American Transit Insurance Company Insurance Policy number CAP 608507, claim number 771542-04, from the alleged incident on April 17, 2013 involving LAKEISHA MCINTOSH; and it is further

ORDERED and ADJUDGED that the plaintiff AMERICAN TRANSIT INSURANCE COMPANY is not obligated to honor, pay or provide any current or future claims for reimbursements under the no-fault benefits under the Mandatory Personal Injury Protection endorsement insurance policy CAP 608507 from the alleged incident on April 17, 2013 involving LAKEISHA MCINTOSH, submitted by the aforementioned defendants; and it is further

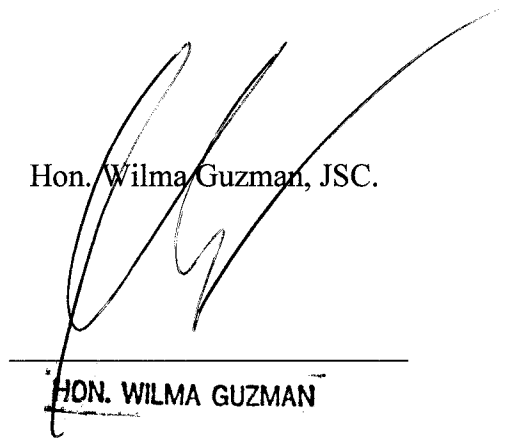
ORDERED that plaintiff serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order and file proof of service with the clerk of the Court.

This constitutes the Decision and Order of this Court.

Date

1/9/17

Hon. Wilma Guzman, JSC.



HON. WILMA GUZMAN