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| <b>American Tr. Ins. Co. v Hernandez</b>                                                                                                                                                                                                                         |
| 2017 NY Slip Op 30444(U)                                                                                                                                                                                                                                         |
| March 3, 2017                                                                                                                                                                                                                                                    |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 651693/15                                                                                                                                                                                                                                         |
| Judge: Kathryn E. Freed                                                                                                                                                                                                                                          |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 2

-----X  
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

DECISION/ORDER

Index No. 651693/15

Mot. Seq. No. 001

JOSHUA HERNANDEZ, APT PHYSICAL  
THERAPY, P.C., ELECTROPHYSIOLOGIC MEDICAL  
DIAGNOSTICS, P.C., GET HEALTHY  
ACUPUNCTURE, P.C., KAZU CHIROPRACTIC, P.C.,  
MIDDLE VILLAGE DIAGNOSTIC IMAGING, P.C.,  
PARKWAY MEDICAL & REHABILITATION, PLLC,  
ROYAL REHAB INC., and YZG MEDICAL, P.C.,

Defendants.

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

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

| PAPERS                                      | NUMBERED        |
|---------------------------------------------|-----------------|
| NOTICE OF MOTION AND AFFIRMATION IN SUPPORT | 1, 2 (Exs. A-H) |

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

In this declaratory judgment action, plaintiff American Transit Insurance Company moves for an order: 1) pursuant to CPLR 3215, granting it a default judgment against individual defendant Joshua Hernandez and co-defendant medical providers APT Physical Therapy, P.C., Electrophysiologic Medical Diagnostics, P.C., Get Healthy Acupuncture, P.C., Middle Village Diagnostic Imaging, P.C., Parkway Medical & Rehabilitation, PLLC, and YZG Medical, P.C. (hereinafter collectively “the defaulting provider defendants”) due to their failure to appear in this action; 2) pursuant to CPLR 3212, granting it summary judgment against defendant medical provider

Royal Rehab Inc. (hereinafter “Royal”)<sup>1</sup>; 3) granting plaintiff a judgment declaring that Hernandez is not an “eligible injured person” entitled to no-fault benefits under insurance policy no. MPHB200605 issued by plaintiff, claim no. 902268-02; 4) granting plaintiff a judgment declaring that it is not obligated to honor or pay claims for reimbursement submitted by the medical provider defendants, as assignees of Hernandez, under insurance policy no. MPHB200605, claim no. 902268-02, nor is plaintiff required to pay, honor or reimburse any claims in any current or future proceeding including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under policy no. MPHB200605, claim no. 902268-02 from Hernandez’s alleged accident occurring on July 14, 2014, since Hernandez is not an “eligible injured person” as defined by the policy and/or New York State Regulation 68; 5) a judgment declaring that plaintiff 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 policy no. MPHB200605, claim no. 902268-02, and that it is not obligated to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitration and/or lawsuits seeking to recover no-fault benefits arising under policy no. MPHB200605, claim no. 902268-02 from the alleged accident of July 14, 2014 involving Hernandez since Hernandez is not an eligible injured person as defined by the policy and/or New York State Regulation 68; and 6) for such other and further relief as this Court deems just and proper. After a review of the motion papers, and after a review of the relevant statutes and case law, the motion, which is unopposed, is **denied with leave to renew upon proper**

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<sup>1</sup>Plaintiff’s claims against Kazu Chiropractic, P.C. were discontinued by stipulation dated October 27, 2015 and filed with this Court on March 29, 2016. Ex. F; NYSCEF Doc. No. 7. The claims against Royal, the sole party to answer the complaint (and which had opposed the instant motion), were discontinued pursuant to stipulation dated September 19, 2016. NYSCEF Doc. No. 24.

papers.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On July 14, 2014, defendant Joshua Hernandez was allegedly injured while riding a bicycle when he was struck by a vehicle owned by nonparty Nightingale Taxi LLC (hereinafter "Nightingale") (Ex. C; Ex. F at pars. 13 and 17) and insured by plaintiff under policy number MPHB200605. Ex. A, Joseph Aff., at par. 12; Ex. E.

The policy and New York Insurance Regulation 68 provide as follows:

**CONDITIONS**

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

The policy and New York Insurance Regulation 68 also provide as follows:

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, [plaintiff], when, and as often as, [plaintiff] may reasonably require.

On or about August 12, 2014, Hernandez completed an application for no-fault benefits (hereinafter "NF-2") which he sent to plaintiff, Nightingale's no-fault insurer. Ex. C. The NF-2, which referenced claim number 902268, was received by plaintiff on August 18, 2014. Ex. A, Joseph Aff., at par. 18; Ex. C.

By correspondence dated October 29, 2014, Independent Physical Exam Referrals, Inc. at the request of plaintiff, wrote to Hernandez demanding that he appear for an independent medical examination (hereinafter "IME") on November 14, 2014. Ex. A; Ex. D. This request was made because Hernandez rescheduled an IME which was to have occurred on October 29, 2014. Ex. D.

On November 17, 2014, Independent Physical Exam Referrals again demanded that Hernandez appear for an IME, this time on December 2, 2014, since he failed to appear for the examination scheduled for November 14, 2014. *Id.*

Hernandez failed to appear for the IME on December 2, 2014. Ex. A, Portnoy Aff. Sandra Joseph, a claims adjuster for plaintiff, then issued a general denial on December 10, 2014 due to Hernandez's failure to appear for an IME. Ex. A, Joseph Aff., at par. 27; Ex. E.

On or about May 15, 2015, plaintiff commenced the captioned no-fault insurance action by filing a summons and complaint with this Court. Ex. F.<sup>2</sup> In its complaint, plaintiff alleged, *inter alia*, that it provided a policy of insurance to Nightingale (policy no. MPHB200605, claim no. 902268-02) (*Id.*, at pars. 13 and 17); defendant Hernandez was injured while riding a bicycle when he was struck by a vehicle owned by Nightingale on July 14, 2014 (*Id.*, at par. 17); that, as a result of the accident, Hernandez received medical treatment and sought no-fault benefits (*Id.*, at pars. 20-21); that Hernandez assigned his no-fault benefits to the defendant medical providers (*Id.*, at par. 21); and that Hernandez breached a condition precedent under the policy by failing to appear for an independent medical examination ("IME") (*Id.*, at pars. 31-33).

Hernandez was properly served pursuant to CPLR 308(2) on August 14, 2015. Ex. G. The defaulting provider defendants were properly served via the Secretary of State on September 3, 2015. An additional mailing of the summons and complaint was made on each defendant pursuant to CPLR 3215 on March 22, 2016. Ex. H. As noted above, the claims against Royal, the only defendant to answer the complaint, and against defendant Kazu Chiropractic, have been discontinued.

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<sup>2</sup>All references are to the exhibits annexed to the affirmation of Justin Rothman, Esq. submitted in support of the motion.

Plaintiff now moves for 1) pursuant to CPLR 3215, granting it a default judgment against Hernandez and the defaulting medical provider defendants; 2) pursuant to CPLR 3212, granting it summary judgment against Royal; 3) granting it a judgment declaring that Hernandez is not an “eligible injured person” entitled to no-fault benefits under insurance policy no. MPHB200605 issued by plaintiff, claim no. 902268-02; 4) granting it a judgment declaring that it is not obligated to honor or pay claims for reimbursement submitted by the medical provider defendants, as assignees of Hernandez, under insurance policy no. MPHB200605, claim no. 902268-02, and that it is not required to pay, honor or reimburse any claims in any current or future proceeding including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under policy no. MPHB200605, claim no. 902268-02 from Hernandez’s alleged accident occurring on July 14, 2014, since Hernandez is not an “eligible injured person” as defined by the policy and/or New York State Regulation 68; 5) a judgment declaring that it 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 policy no. MPHB200605, claim no. 902268-02, and that it is not obligated to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitration and/or lawsuits seeking to recover no-fault benefits arising under policy no. MPHB200605, claim no. 902268-02 from the alleged accident of July 14, 2014 involving Hernandez since Hernandez is not an “eligible injured person” as defined by the policy and/or New York State Regulation 68; and 6) for such other and further relief as this Court deems just and proper.

In support of the motion, plaintiff submits, inter alia, an attorney affirmation establishing, inter alia, that the defaulting defendants failed to appear in this matter; the affidavit of Joseph; the

affidavit of Luis Campbell, plaintiff's mail room supervisor, attesting to the procedures involved in plaintiff's mailing of a denial of benefits under claim no. 902268-02; the affidavit of Lynn Hershman of Independent Physical Exam Referrals, Inc. attesting to the fact that she mailed Hernandez notices directing him to appear for an IME on November 14 and December 2, 2014; the affidavit of Dr. Kevin Portnoy attesting to the fact Hernandez failed to appear at his office for an IME on November 14 and December 2, 2014; a copy of the policy issued by plaintiff to Nightingale; an NF-2 form submitted by Hernandez which was received by plaintiff on August 18, 2014; letters from Independent Physical Exam Referrals, Inc. to Hernandez scheduling physical examinations for November 14 and December 2, 2014; a denial of Hernandez's claim mailed to Nightingale by Joseph on December 10, 2014; the verified complaint; affidavits of service; and proof of an additional mailing on each defendant pursuant to CPLR 3215(g).

**POSITION OF THE PLAINTIFF:**

Plaintiff argues that it is entitled to a default judgment against Hernandez and the defaulting medical provider defendants. Additionally, plaintiff asserts that, upon such default, it is entitled to a declaration that it is not required to provide Hernandez coverage under its policy since he failed to comply with a condition precedent to coverage by appearing for an IME and that, since Hernandez assigned his rights under the policy to the defaulting medical provider defendants, those parties, too, are not entitled to coverage under the policy.

**LEGAL CONCLUSIONS:**

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 [it].” 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.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be provided by plaintiff’s affidavit or a verified complaint. See CPLR 3215(f).

Here, the moving papers establish that plaintiff properly served Hernandez with the summons and complaint pursuant to CPLR 308(2) on August 14, 2015; that it properly served defaulting medical providers APT Physical Therapy, P.C., Electrophysiologic Medical Diagnostics, P.C., Get Healthy Acupuncture, P.C., Middle Village Diagnostic Imaging, P.C., and YZG Medical, P.C. pursuant to Business Corporation Law 306 on September 3, 2015; and that it served defaulting medical provider Parkway Medical & Rehabilitation, PLLC pursuant to Limited Liability Corporation Law 303 on September 3, 2015. Ex. G. Each defendant was then subsequently served with another copy of the summons and complaint pursuant to CPLR 3215(g) on March 22, 2016. Ex. H. However, none of the foregoing defendants answered the complaint or otherwise appeared. Rothman Aff., at pars. 32-33. Additionally, the verified complaint (Ex. F) sets forth the facts constituting plaintiff’s claim. See CPLR 3215(f). Thus, this Court finds that defendants Hernandez, APT Physical Therapy, P.C., Electrophysiologic Medical Diagnostics, P.C., Get Healthy Acupuncture, P.C., Middle Village Diagnostic Imaging, P.C., YZG Medical, P.C., and Parkway Medical & Rehabilitation, PLLC are in default.

This Court further determines, however, that plaintiff is not entitled to the declaratory relief it demands.

New York's no-fault system is designed "to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists." *Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 317 (2007) (quoting *Matter of Medical Society of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]). As part of this system, regulations have been enacted which prescribe specific time frames for requesting and scheduling IMEs. Specifically, 11 NYCRR 65-3.5(a) provides that "within 10 business days after receipt" of an NF-2 form, an insurer shall forward, to the parties required to complete them, the verification forms it will require prior to payment of the initial claim. Under 11 NYCRR 65-3.5(b), "[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms" and under 11 NYCRR 65-3.5(d), "[i]f the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms."

An insurer must affirmatively establish its compliance with these claim procedures in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for a medical examination. *American Transit Ins. Co. v Vance*, 131 AD3d 849 (1<sup>st</sup> Dept 2015); *American Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1<sup>st</sup> Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1<sup>st</sup> Dept 2015).

*American Transit Ins. Co. v Tavaréz*, 2016 NY Slip Op 31601(U) (Sup Ct New York County 2016).

The moving papers in this action show that plaintiff received Hernandez's NF-2 form on August 18, 2014. Ex. A, Joseph Aff., at par. 18; Ex. C. Additionally, the papers reflect that, on October 29, 2014, Independent Physical Exam Referrals, at the request of plaintiff, wrote to Hernandez demanding that he appear for an IME on November 14, 2014. Ex. D. This request was made because Hernandez rescheduled an IME which was to have occurred on October 29, 2014. *Id.*

On November 17, 2014, Independent Physical Exam Referrals again demanded that Hernandez appear for an IME, this time on December 2, 2014, since he failed to appear for the examination scheduled for November 14, 2014. Id. However, the denial of claim form (form NF-10) is silent as to any date on which final verification was requested, if ever. Ex. E. Additionally, plaintiff's motion papers are silent with respect to whether it complied with the time periods set forth in 11 NYCRR 65-3.5 in seeking Hernandez's IME.

Plaintiff also represents that it received claims from the defaulting medical provider defendants related to Hernandez's claim, but the moving papers do not contain copies thereof or proof as to when they were received. Thus, plaintiff has not established that its initial request that plaintiff appear for an IME was timely scheduled in accordance with 11 NYCRR 65-3.5.

Further, although plaintiff purports to submit a copy of the policy issued to Nightingale, the policy annexed to the motion contains neither a policy number nor any indication that it was issued to Nightingale. Ex. B. Further, in her affidavit in support of the motion (Ex. A), Joseph does not state that the policy annexed to the motion is a true and accurate copy of the policy issued to Hernandez.

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

ORDERED that the branch of the motion by plaintiff American Transit Insurance Company seeking summary judgment against defendant Royal Rehab Inc. is denied as moot; and it is further,

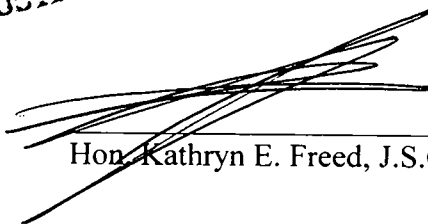
ORDERED that plaintiff American Transit Insurance Company's motion is otherwise denied with leave to renew within 30 days from the date of entry of this decision and order upon proof of proper service thereof, failing which this action shall be dismissed in its entirety; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: March 3, 2017

ENTER:

HON. KATHRYN E. FREED  
JUSTICE OF SUP.

  
Hon. Kathryn E. Freed, J.S.C.