

American Tr. Ins. Co. v Durowaa

2017 NY Slip Op 31510(U)

July 17, 2017

Supreme Court, New York County

Docket Number: 157278/2016

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
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

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AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

INDEX NO. 157278/2016

MOTION DATE 4/18/2017

MOTION SEQ. NO. 002

- v -

FELICIA DUROWAA, A&E ANESTHESIA ASSOCIATES LLC,
AGYAL PHYSICAL THERAPY, PLLC, LENEX SERVICES, INC.,
MANALAPAN SURGERY CENTER, INC, PROFESSIONAL
CHIROPRACTIC CARE PC, THIRD AVE CHIROPRACTIC
CARE, P.C., WESTCHESTER RADIOLOGY & IMAGING, P.C.,
YIN YANG NY ACUPUNCTURE, P.C.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this application to/for Declaratory Judgment

Upon the foregoing documents, it is
ordered that the motion is granted without opposition.

In this declaratory judgment action, plaintiff American Transit Insurance Company (“ATIC”) moves for an order: 1) pursuant to CPLR 3215, granting it a default judgment against individual defendant Felicia Durowaa, and co-defendants Anesthesia Associates LLC., AGYAL Physical Therapy, PLLC., Lenex Services, Inc., Manalapan Surgery Center, Inc., Professional Chiropractic Care, PC., Third Avenue Chiropractic Care, P.C., Westchester Radiology & Imaging, P.C., Yin Yang NY Acupuncture, P.C. (hereinafter collectively “the defaulting medical provider

defendants”) due to their failure to appear in this action; 2) granting ATIC a declaratory judgment that Durowaa is not an “eligible injured person” entitled to no-fault benefits under ATIC insurance policy number CAP 614268, issued by plaintiff, claim number 783530-03; 3) granting ATIC a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by the defaulting medical provider defendants, as assignees of Durowaa under ATIC insurance policy number CAP 614268 and claim number 783530-03, nor is ATIC required to 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 policy number CAP 614268, claim number 783530-03 from an alleged accident on July 27, 2015 involving Durowaa, since Durowaa is not an “eligible injured person” as defined by the ATIC policy and/or New York State Regulation 68; 4) a declaratory judgment that ATIC 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 number CAP 614268, claim number 783530-03, 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 number CAP 614268, claim number 783530-03 in connection with the alleged accident of July 27, 2015 since Durowaa is not an “eligible injured person” as defined by the policy 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 motion papers, and after a review of the relevant statutes and case law, the motion, which is unopposed, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On July 27, 2015, defendant Durowaa was allegedly injured while riding as a passenger in an ATIC insured vehicle owned by non-party Recco Holding, LLC ("Recco") and insured by ATIC under policy number CAP 614268. See Ex. B for the insurance policy and see Complt., at pars. 12, 13 14 and 17. The ATIC 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 18, 2015, Durowaa completed an application for no-fault benefits ("NF-2") which she sent to ATIC, Recco's no-fault insurer. Ex. C. The NF-2 was received by ATIC the same day, along with a letter of representation from Durowaa's attorney, Golden & Rivin, P.C. Rothman Aff., at par. 10

By correspondence dated September 15, 2015, ATIC wrote to Durowaa and her attorneys to request that she appear for an independent medical examination ("IME") by Daniel Sposta, M.D., on, September 28, 2015. Ex. D. When Durowaa failed to appear for the IME on September 28, 2015, ATIC again wrote to plaintiff and her counsels, on September 29, 2015 requesting that she appear for an IME by Dr. Sposta on October 12, 2015. Ex. D. Durowaa again failed to appear

for the IME. Ex. A, Sposta Aff. Based on Durowaa's failure to appear for the scheduled IMEs, Iris Hernandez, on behalf of ATIC, issued her a denial of no-fault benefits on October 23, 2015. See Affidavit as part of Ex. A and NF-10 in Ex. E.

On August 10, 2016, ATIC commenced the captioned declaratory judgment action against Durowaa, Anesthesia Associates LLC., AGYAL Physical Therapy, PLLC., Lenex Services, Inc., Manalapan Surgery Center, Inc., Professional Chiropractic Care, PC., Third Avenue Chiropractic Care, P.C., Westchester Radiology & Imaging, P.C., and Yin Yang NY Acupuncture, P.C. See Ex. F for a copy of the summons and complaint.

Plaintiff thereafter served the summons and complaint on all defendants. See Ex.G An additional mailing of the summons and complaint was made on the foregoing entities on April 3, 2017. Ex. H.

On April 17, 2017, ATIC filed the instant motion for a default against defendants Durowaa, Anesthesia Associates LLC., AGYAL Physical Therapy, PLLC., Lenex Services, Inc., Manalapan Surgery Center, Inc., Professional Chiropractic Care, PC., Third Avenue Chiropractic Care, P.C., Westchester Radiology & Imaging, P.C., and Yin Yang NY Acupuncture, P.C. The motion is unopposed. On February, 6, 2017, plaintiff filed a stipulation of discontinuance and release as to Professional Chiropractic Care, P.C. only.

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 defendants Durowaa, Anesthesia Associates LLC., AGYAL Physical Therapy, PLLC., Lenex Services, Inc., Manalapan Surgery Center, Inc., Third Avenue Chiropractic Care, P.C., Westchester Radiology & Imaging, P.C., and Yin Yang NY Acupuncture, P.C. and that those defendants have failed to appear. Rothman Aff., at pars. 35-36.

Defaults in 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). Here, ATIC, through the submission of affidavits by individuals with personal knowledge, has demonstrated the facts constituting its claim. *See Gagen v Kipany Prods. Ltd.*, 289 AD2d 844 (3d Dept 2001). Defendants’ defaults in answering the complaint constitute admissions 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: “[u]pon request by the Company, the eligible injured person or that person’s assignee or representative shall: . . . submit to an [IME] by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require.”

Given Durowaa’s failure to appear for an IME, and thus to satisfy this condition precedent to coverage, ATIC had the right to deny all claims by him and the defaulting medical providers retroactively to the date of loss. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560-561 (1st Dept 2011).

ATIC has demonstrated, through proof of timely mailing in compliance with the no-fault regulations (both for the scheduling of IMEs and its issuance of its denial of coverage under the policy), proof of Durowaa’s failure to appear on two occasions for a duly noticed and scheduled IME and, through the filing of its verified complaint, that it has met its prima facie entitlement to

a judgment declaring that the defaulting medical providers are not entitled to no-fault coverage for the subject claims due to 's breach of a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. Thus, Durowaa is not an "eligible injured person" entitled to no-fault benefits under American Transit policy number CAP 614268, claim number 783530-03.

In light of the foregoing, it is hereby:

ORDERED that plaintiff American Transit Insurance Company's motion, pursuant to CPLR 3215, granting it a judgment on default against individual defendant Felicia Durowaa and co-defendant medical providers Anesthesia Associates LLC., AGYAL Physical Therapy, PLLC., Lenex Services, Inc., Manalapan Surgery Center, Inc., Third Avenue Chiropractic Care, P.C., Westchester Radiology & Imaging, P.C., and Yin Yang NY Acupuncture, P.C. s granted; and it is further,

ORDERED and ADJUDGED that individual defendant, Felicia Durowaa is not an "eligible injured person" entitled to no-fault benefits under American Transit policy number CAP 614268, claim number 783530-03, 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 by defendant medical providers: Anesthesia Associates LLC., AGYAL Physical Therapy, PLLC., Lenex Services, Inc., Manalapan Surgery Center, Inc., Professional Chiropractic Care, PC., Third Avenue Chiropractic


Care, P.C., Westchester Radiology & Imaging, P.C., and Yin Yang NY Acupuncture, P.C. 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 Clerk is directed to enter judgment accordingly; and it is further,

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

HON. KATHRYN FREED
JUSTICE OF THE SUPREME COURT


HON. KATHRYN E. FREED, J.S.C.

7/17/2017
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION: _____

CHECK IF APPROPRIATE: _____