

American Tr. Ins. Co. v Brune
2017 NY Slip Op 31738(U)
August 17, 2017
Supreme Court, New York County
Docket Number: 153193/2016
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

AMERICAN TRANSIT INSURANCE COMPANY,

INDEX NO. 153193/2016

- v -

MOT. DATE

MOT. SEQ. NO. 001

LUCAS BRUNE, et al.

The following papers, numbered 1 to 1 were read on this motion to/for default judgment and declaratory judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits No(s). 1
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

In a declaratory judgment action, Plaintiff American Transit Insurance Company ("ATIC") moves for 1) a default judgment against individual defendant Lucas Brune (Brune) and co-defendants Gaia Chiropractic, P.C, New Millennium Medical Imaging, P.C, SH Medical PC, Vivid Acupuncture ("Providers") for failure to appear or answer in this action; granting plaintiff a declaratory judgment that Brune is not an "eligible injured person" entitled to no-fault benefits under ATIC insurance policy CAP 613858, claim no. 783626-02; 2) a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by providers named herein, as assignees of Brune, pursuant to the aforementioned policy and claim nor is ATIC 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 ATIC insurance policy and claim number referenced above from the alleged accident of July 18, 2015, involving Brune as Brune is not an eligible injured person as defined by the policy and/or NYS Regulation 68; 3) a declaratory judgement 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 ATIC insurance policy 613858 and claim number 783626-02 nor is ATIC 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 arising from the alleged accident of July 18, 2015, as Brune is not an "eligible injured person" as defined by the ATIC policy referred to above and/or New York State Regulation 68; and (5) for such other and further relief as this Court deems just and proper.

Dated: 8/17/17

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

The motion is unopposed. For the reasons that follow, plaintiff's motion is granted.

The action arises from an alleged automobile accident on July 18, 2015, in which defendant Brune was allegedly injured while a passenger in a vehicle owned by Sensational Service, Inc., ("Sensational") and insured by ATIC under policy CAP 613858. Following the accident, Brune made a claim for no-fault benefits to ATIC as a purported eligible injured person pursuant to claim number 783626-02. Brune completed an application for no-fault benefits and listed his address as 2479 Bedford Avenue, apt 5a, Brooklyn, NY. Plaintiff received a letter of representation from Brune's attorney dated August 19, 2015.

The insurance policy issued 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...

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.

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.

Brune alleged that he received medical treatment from the Providers, and assigned the rights to collect no-fault benefits to the medical provider defendants under claim number 783626-02 under the policy relating to the July 18, 2015 motor vehicle accident. Brune also has sought to collect no-fault benefits in his own right. ATIC received Brune's claims for no-fault benefits on an NF-2 form dated August 19, 2015, and a letter of representation from his attorney on August 19, 2015.

By letters dated August 28, 2015 and September 23, 2015, ATIC wrote to Brune's attorneys requesting that Brune appear for IMEs by Drs. Michael Russ and Corey Stein on September 22, 2015 and October 6, 2015.

ATIC submits affidavits from Sandra Joseph and Luis Campbell attesting to its mailing procedures and with personal knowledge of Brune's failure to appear for IMEs. In addition, ATIC submits the affidavits of Dr. Russ and Dr. Stein, at whose offices Brune failed to appear for his IMEs. Lynn Hershman, an employee of Independent Physical Exam Referrals, Inc., also submits an affidavit attesting to the fact that she mailed notices to Brune and that she received notification that he failed to appear. ATIC's "Denial of Claims Form" (NF-10), signed and dated October 23, 2015, denied benefits to Brune based on his failure to appear for scheduled IMEs.

ATIC commenced the captioned action by filing a summons and verified complaint April 14, 2016.

Plaintiff alleges its served all corporate defendants pursuant to CPLR Article 3 by serving the New York Secretary of State on July 21, 2016 and affidavits of service were filed with the clerk of the court on August 12, 2016.

ATIC alleges that Brune was personally served with the summons and complaint at his home on July 20, 2016. Plaintiff also submits proof that all defendants were served with an additional copy of the summons and verified complaint by mail March 16, 2017. Furthermore, ATIC asserts that the defendants served with summons and complaint have failed to appear, plead or proceed in this action and that the time set forth by law for the defendants to answer or appear has expired and has not been extended by the Court. Therefore, ATIC argues that it is entitled to a default judgment against Brune and the defaulting medical Providers pursuant to CPLR 3215.

CPLR 3215 provides that 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 R/J/N Servs. Inc.*, 89 AD3d 649, 651, 932 N.Y.S.2d 109 (2d Dept 2011). Here, ATIC has submitted proof that it properly served the defendants with copies of the summons and complaint pursuant to CPLR Article 3 on July 20, 2016 and July 21, 2016, respectively 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 and complaint as per CPLR 3215. Defendants have failed to answer or otherwise appear as required within 20 days and their time to answer has not been extended by this Court. Accordingly, defendants Brune and Providers have defaulted in this action.

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, 508 N.Y.S.2d 660 (3d Dept 1986), quoting *National Sur. Corp. v Peccichio*, 48 Misc2d 77, 78, 264 N.Y.S.2d 177 (Sup Ct Albany County 1965)." *de Beeck v Costa*, 39 Misc3d 347, 959 N.Y.S.2d 628 (Sup Ct New York County 2013).

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a prima facie cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]). ATIC has demonstrated that it has a prima case as set forth herein.

Here, ATIC has shown, through proof of timely mailing in compliance with all no-fault requirements, the scheduling of IMEs and its timely filing of its denials of coverage under the policy, proof of Brune'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 defendant Brune and the Provider Defendants are not entitled to no-fault coverage for the subject claims due to Brune's having breached a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. Base on the foregoing, Brune is not an "eligible injured person" entitled to no-fault benefits under the American Transit policy.

Conclusion

In accordance herewith, 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 Lucas Brune and against co-defendant medical providers: Gaia Chiropractic, PC, New Millennium Medical Imaging PC, SH Medical PC, Vivid Acupuncture for failure to appear or answer in this action, is granted and it is further

ORDERED and **ADJUDGED** that individual defendant Lucas Brune is not an "eligible injured person" entitled to no-fault benefits under American Transit policy CAP 613858 Claim No. 783626-02, 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 Lucas Brune and is not obligated to honor or pay claims for reimbursement for any and all claims of Co-Defendant medical providers: Gaia Chiropractic, PC, New Millennium Medical Imaging PC, SH Medical PC, Vivid Acupuncture under American Transit policy CAP 613858 Claim No. 783626-02; 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 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

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the Court.

Dated:

8/17/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.