

American Tr. Ins. Co. v Phillip
2017 NY Slip Op 32428(U)
November 13, 2017
Supreme Court, New York County
Docket Number: 158153/2016
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

AMERICAN TRANSIT INSURANCE COMPANY,

INDEX NO. 158153/2016

Plaintiff,

MOTION DATE 10/5/17

MOTION SEQ. NO. 001

- v -

**CALVIN A. PHILLIP, 21ST CENTURY PHARMACY INC.,
FARMACIA CENTRAL, INC., FLATLANDS
CHIROPRACTIC WELLNESS, P.C., JEFF HARMONIZE
ACUPUNCTURE, P.C., MDAX INC., METRO PAIN
SPECIALISTS PROFESSIONAL CORPORATION, NEW
MILLENNIUM MEDICAL IMAGING, P.C., STARRETT
CITY MEDICAL, P.C.,**

Defendants.

The following papers, numbered 6-19, were read on this motion for entry of a default judgment.

Notice of Motion – Affidavit of Service – Affirmation in Support – Exhibits A- H – Affidavit of Service – RJ1 – Affidavit as to Military Service (Phillip) | Nos. 6-19

Motion by Plaintiff American Transit Insurance Company pursuant to CPLR 3215 for entry of a default judgment against individual defendant Calvin A. Phillip (“Phillip”) and medical provider co-defendants 21st Century Pharmacy Inc., Farmacia Central, Inc., Flatlands Chiropractic Wellness, P.C., Mdax Inc., Metro Pain Specialists Professional Corporation, New Millennium Medical Imaging, P.C., and Starrett City Medical, P.C. (“Provider-Defendants”) is granted, there being no opposition submitted.

BACKGROUND

I. Plaintiff’s Allegations

In the instant case, Plaintiff alleges that Phillip did not appear for his scheduled independent medical examinations (“IMEs”) relating to a motor vehicle accident on February 11, 2016 (the “Accident”). In the Accident, a vehicle owned

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

by Kewal Prechmand (“Prechmand”), Plaintiff’s insured, allegedly struck Phillip, a pedestrian. Plaintiff further alleges that Phillip is not an eligible injured person entitled to no-fault benefits under Prechmand’s policy due to Phillip’s failure to appear for his IMEs. As such, Plaintiff now moves for a judgment on default declaring (1) that Phillip is ineligible for no-fault benefits relating to the Accident, (2) that Provider-Defendants, as Phillip’s assignees, also are ineligible for no-fault benefits relating to the Accident, and (3) that Plaintiff is not required to honor any current or future claims submitted to Plaintiff by any of the defendants relating to the Accident.

II. The No-Fault Claims

Phillip submitted to Plaintiff an application for motor vehicle no-fault benefits (“NF-2”) dated March 2, 2016 (Reinus affirmation, exhibit B). Plaintiff allegedly received Phillip’s NF-2 on March 8, 2016 (affirmation of Reinus ¶ 10; Reinus affirmation, exhibit B). The NF-2 states that Phillip “was a pedestrian when the accident happened” at 2:55 a.m. who suffered “[m]ultiple injuries” (Reinus affirmation, exhibit B, at 1). The NF-2 lists the treating provider as “Starrett City Medical P.C. - 10510 Flatlands Ave., Brooklyn, NY 11236” and the treating hospital as “Jamaica Hospital Medical Center - 8900 Van Wyck Expressway, Jamaica, NY 11418” (*ibid.*). The amounts of both the health bills to date and any other expenses were marked “to be provided.”

The NF-2 lists Phillip’s address as “937 E 56th St, apt 3A, Brooklyn, NY 11234” (“Phillip’s NF-2 Address”) and the address of Phillip’s attorney, Joshua Brian Irwin, P.C. (“Irwin”), as “2171 86th Street, Suite 2, Brooklyn, New York 11214” (the “Suite 2 Address”) (*ibid.*). A letter accompanying the NF-2, dated March 2, 2016, lists Irwin’s address as “2171 86th Street, Suite 1, Brooklyn, New York 11214” (“Irwin’s Suite 1 Address”) (*id.* at 3 [emphasis added]).

The papers indicate that the Provider-Defendants, as assignees of Phillip, submitted claims to Plaintiff relating to the Accident (affirmation of Reinus ¶ 13).

III. The IME Requests

On March 17, 2016, Plaintiff, through its agent, Signet Medical Services, P.C. (“Signet”), allegedly mailed Phillip a request for an IME at Phillip’s NF-2 address (affirmation of Reinus ¶ 16; Reinus affirmation, exhibit C, at 1). Signet also allegedly mailed a copy of the March 17, 2016 letter to Irwin’s Suite 1

Address (*ibid.*). The March 17, 2016 letter requested the IME take place on April 5, 2016, at 11:00 a.m. (*ibid.*).

Irwin then allegedly requested that the April 5, 2016 IME be rescheduled (affirmation of Reinus ¶ 17; Reinus affirmation, exhibit C, at 2, 3). On April 4, 2016, Signet mailed a letter to Phillip's NF-2 Address and Irwin's Suite 1 Address confirming that Irwin rescheduled the April 5, 2016 IME and that the new IME would take place on April 18, 2016, at 1:15 p.m. (Reinus affirmation, exhibit C, at 2; aff of Campenelli ¶ 3). Phillip allegedly failed to attend this IME (affirmation of Reinus ¶ 19; Reinus affirmation, exhibit C, at 3; Reinus affirmation, exhibit D, at 1; affirmation of Polavarapu ¶ 4).

On April 19, 2016, Signet mailed a letter to Phillip's NF-2 Address and to Irwin's Suite 1 Address confirming that, as Irwin had rescheduled Phillip's first IME appointment and Phillip had missed his second IME appointment, Plaintiff was rescheduling the IME for May 3, 2016, at 3:45 p.m. (Reinus affirmation, exhibit C, at 3; aff of Campenelli ¶ 4). Phillip allegedly failed to attend this IME (affirmation of Reinus ¶ 21; Reinus affirmation, exhibit D, at 1; affirmation of Polavarapu ¶ 4).

On May 11, 2016, Plaintiff allegedly mailed to Phillip's NF-2 Address and to Irwin's Suite 1 Address copies of a form NF-10 denying all claims made by Phillip and Provider-Defendants relating to the Accident due to Phillip's failure to appear for his IME (affirmation of Reinus ¶ 22, Reinus affirmation, exhibit D; aff of Glaze ¶¶ 2-13; aff of Campbell ¶ 11).

IV. Service of Process and the Defendants' Failure to Appear

Plaintiff commenced this action on September 28, 2016 by e-filing the summons and verified complaint (Reinus affirmation, exhibit E). On November 16, 2016, a certified process server allegedly served process upon Phillip pursuant to CPLR 308 (2) by: (1) at 9:23 a.m., leaving a copy of the summons and verified complaint with a person of suitable age and discretion at Phillip's NF-2 Address, described as his "place of [a]bode"; and (2) mailing a copy of the same to Phillip's NF-2 Address (Reinus affirmation, exhibit F, at 1). A different process server allegedly served process upon Provider-Defendants pursuant to Business Corporation Law § 306 (b) (1) (*id.* at 2-9). On September 11, 2017, copies of the notice pursuant to CPLR 3215 (g) were allegedly mailed to the defendants (Reinus

affirmation, exhibit G). On September 20, 2017, copies of the instant motion were allegedly mailed to the defendants (aff of McPherson).

As the defendants have not appeared in this action, Plaintiff now moves for entry of a default judgment.

DISCUSSION

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.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing (*see* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015]).

Here, Plaintiff established presumptively valid proof of service of process on the defendants. Plaintiff has also established that the defendants have defaulted in answering and that it complied with the CPLR 3215 (g) notice requirements. As such, Plaintiff is entitled to the relief it seeks, provided it submits sufficient proof of the facts constituting its claim.

“The failure to appear for IMEs requested by the insurer “when, and as often as, [it] may reasonably require” (Insurance Department Regulations [11 NYCRR] § 65-1.1) is a breach of a condition precedent to coverage under the [n]o-[f]ault policy (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). “A denial premised on breach of a condition precedent to coverage voids the policy ab initio” (*ibid.*).

To meet its prima facie burden, Plaintiff must establish not only a failure to appear, but also that it requested the IME in accordance with the procedures and time frames set forth in the no-fault implementing regulations (*see Am. Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015]; *see also*

Interboro Ins. Co. v Perez, 112 AD3d 483 [1st Dept 2013]; *Unitrin*). With respect to an insurer's verification needs and requests, 11 NYCRR § 65-3.5 (b) states that:

“[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. Any requests by an insurer for additional verification need not be made on any prescribed or particular form. If a claim is received by an insurer at an address other than the proper claims processing office, the 15[-]business day period for requesting additional verification shall commence on the date the claim is received at the proper claims processing office. In such event, the date deemed to constitute receipt of claim at the proper claim processing office shall not exceed 10 business days after receipt at the incorrect office.”

11 NYCRR § 65-3.5 (c) states that “[t]he insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested.”

11 NYCRR § 65-3.6 (b) states:

“Verification requests. At a minimum, if any requested verifications has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested.”

In the instant motion, Plaintiff has shown prima facie that Phillip failed to appear for his scheduled IME and that it complied with the timeliness requirements of 11 NYCRR §§ 65-3.5 (b) and 65-3.6 (b) and the requirement of 11 NYCRR § 65-3.5 (c) that the insurer request the in-person verification directly from the claimant. As such, Plaintiff has submitted sufficient proof of the facts constituting its claim.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff American Transit Insurance Company's motion for entry of a default judgment pursuant to CPLR 3215 against Calvin A. Phillip and Provider-Defendants is granted without opposition submitted; and it is further

ORDERED that Phillip is ineligible for no-fault benefits relating to the accident of February 11, 2016; and it is further

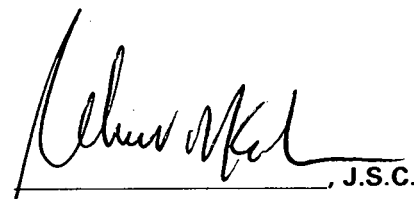
ORDERED that Provider-Defendants are ineligible for no-fault benefits relating to the accident of February 11, 2016; and it is further

ORDERED that Plaintiff is not required to honor any current or future claims submitted to it by any of the defendants relating to the accident of February 11, 2016; and it is further

ORDERED that Plaintiff serve a copy of this decision and order with notice of entry upon the Clerk of the Court and upon the defendants within 20 days of the issuance of this decision and order.

The foregoing constitutes the decision and order of the Court.

Dated: November 13, 2017
New York, New York



J.S.C.

HON. ROBERT D. KALISH

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE