

American Tr. Ins. Co. v Charles
2018 NY Slip Op 31277(U)
June 20, 2018
Supreme Court, New York County
Docket Number: 151895/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 151895/2017

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ADDRIANNA CHARLES, ARTHUR AVENUE MEDICAL SERVICES, P.C., AXIAL CHIROPRACTIC P.C., BRONX CHIROPRACTIC REHABILITATION P.C., DAMADIAN MRI IN CANARSIE, P.C., DIRECT RX PHARMACY INC., ELEGANCE REHAB PT P.C., GARA MEDICAL CARE, P.C., HAMZA PHYSICAL THERAPY PLLC, HANK ROSS MEDICAL P.C., JOSEPH BATER DC, LONGEVITY MEDICAL SUPPLY, INC, MASTER CHENG ACUPUNCTURE P.C., PDCN EMERGENCY AMBULANCE, RALPH INNOVATIVE MEDICAL P.C., STATE CHIROPRACTIC, P.C.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DEFAULT JUDGMENT/SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this declaratory judgment action, plaintiff American Transit Insurance Company (“ATIC”) moves: 1) pursuant to CPLR 3215, for a default judgment against defendants Arthur Avenue Medical Services, P.C., Axial Chiropractic P.C., Bronx Chiropractic Rehabilitation, P.C., Damadian MRI in Canarsie, P.C., Elegance Rehab PT P.C., Gara Medical Care, P.C., Hamza Physical Therapy PLLC, Hank Ross Medical P.C., Joseph Bater DC, Master Cheng Acupuncture P.C., PDCN Emergency Ambulance, Ralph Innovative Medical P.C., and State Chiropractic, P.C. (hereinafter “the defaulting medical providers”); 2) pursuant to CPLR 3212, granting ATIC summary judgment against defendants Direct Rx Pharmacy Inc. (hereinafter “the answering

medical provider”);¹ 3) granting ATIC a declaratory judgment that defendant Addrieanna Charles (hereinafter “Charles”) is not an eligible injured person entitled to no-fault benefits under an insurance policy issued by ATIC under policy number BYC B504894, claim number 664652-03; 4) granting ATIC a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by the medical providers named herein, as assignees of Charles, under ATIC policy number BYC B504894, claim number 664652-03, nor is it obligated to provide, 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 ATIC policy number BYC B504894, claim number 664652-03, relating to an alleged accident on January 13, 2016 involving Charles, since Charles is not an eligible injured person as defined by the policy and/or New York State Regulation 68; 5) 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 ATIC policy number BYC B504894, claim number 664652-03, nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under ATIC policy number BYC B504894, claim number 664652-03 arising from the alleged accident of January 13, 2016 involving Charles, since Charles 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.

¹ The defaulting medical providers and the answering medical provider are referred to collectively as “the medical providers.”

FACTUAL AND PROCEDURAL BACKGROUND:

On January 13, 2016, Charles was allegedly injured in a motor vehicle accident. At the time of the accident, Charles was a passenger in a vehicle insured by ATIC under policy number BYC B504894 (“the policy”), which was issued to Francklin Metayer. Charles was treated by the medical providers and submitted a claim for no-fault benefits to ATIC under policy number 664652-03.

ATIC received NF-2 claim forms from Charles on February 2 and February 17, 2016. Charles assigned his right to collect no-fault benefits to the medical providers which, in turn, sought reimbursement from ATIC for treatment rendered which, they claim, is compensable under the terms of the policy.

Luis Campbell, mailroom supervisor for ATIC, states in an affidavit in support of the motion that a letter directing that Charles appear for an examination under oath (“EUO”) was mailed to Charles on May 9, 2016. The letter, which is annexed to the motion, directed that Charles appear for the EUO on June 1, 2016. When Charles failed to appear for the EUO, a second letter was mailed to her on June 3, 2016, directing her to appear for an EUO on July 6, 2016. The second letter is also annexed to the motion. Charles failed to appear on the second scheduled date as well.

Plaintiff commenced this declaratory judgment action against Charles and the medical providers by filing a summons and verified complaint on February 27, 2017. The defendants were thereafter served with process and received supplemental mailings of the summons and complaint pursuant to CPLR 3215(g). Only the responding medical provider answered the complaint. ATIC discontinued its claims against Charles and defendant Longevity Medical Supply, Inc. in June and July of 2017, respectively.

On February 8, 2018, ATIC filed the instant motion seeking the relief set forth above.

LEGAL CONCLUSIONS:

ATIC's Motion For A Default Judgment

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, ATIC has shown that it properly served the defendants with process and provided them with an additional copy of the summons and verified complaint. The affirmation of ATIC’s attorney in support of the motion establishes that the defaulting providers failed to answer or otherwise appear in this matter. However, since ATIC has failed to establish the facts constituting the claim, its motion for a default judgment is denied.

Despite the submission of affidavits of its employees, ATIC failed to demonstrate that it timely scheduled Charles’ initial EUO within 15 days after it received the NF-2s. *See* 11 NYCRR § 65-3.5(b); *Hertz Vehs. LLC v Significant Care, PT. P.C.*, 157 AD3d 600 (1st Dept 2018); *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 A.D.3d 841, 842 (1st Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015). As noted above, ATIC admits that it received notice of the claim on February 2 and February 17, 2016. However, it also admits that it did not mail Charles the initial notice of EUO until May 9, 2016, approximately three months later.

Although ATIC relies on the case of *American States Ins. Co. v Huff*, 119 AD3d 478 (1st Dept 2014) in support of its argument that Charles' failure to appear for an EUO was a breach of a condition precedent to coverage which precluded Charles or her assignees from recovery under the policy, that case is inapposite herein since it is silent regarding whether the demand for the IME (not EUO) involved in that matter was timely.

ATIC's Motion for Summary Judgment Against Direct Rx Pharmacy Inc.

ATIC moves, pursuant to CPLR 3212, for summary judgment against Direct Rx Pharmacy Inc., the answering medical provider. A moving party is entitled to summary judgment where there is no genuine issue of material fact and it has established its prima facie showing of entitlement to a judgment as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). It is the movant's burden to tender sufficient evidence to demonstrate the absence of any material issue of fact. *See Ayotte v Gervasio*, 81 NY2d 1062 (1993). Here, since ATIC failed to show that it noticed Charles' initial EUO in a timely fashion, it has failed to establish its entitlement to summary judgment against the answering medical provider, which is Charles' assignee. *See Bath Ortho Supply, Inc. v New York Cent. Mut. Fire Ins. Co.*, 34 Misc3d 150(A) (App Term 1st Dept 2011).

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

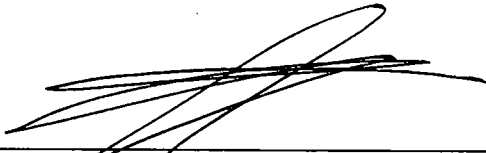
ORDERED that the motion by plaintiff American Transit Insurance Company is denied in all respects; and it is further

ORDERED that American Transit Insurance Company is to serve a copy of this order, with notice of entry, on all parties within 20 days hereof; and it is further

ORDERED that the parties appearing in this action are to appear for a preliminary conference at 80 Centre Street, Room 280, on October 30, 2018 at 2:30 p.m.; and it is further

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

6/20/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE