American Tr. Ins. Co. v Almenas
2018 NY Slip Op 31360(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 158149/2016
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** **2**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

SHANAV ALMENAS, DANIEL W. WILEN, ORTHOPAEDIC SURGERY M.D., P.C., DRS. ABRAMS, PIAZZA & JULEWICZ DC, PLLC, and RICHMOND UNIVERSITY MEDICAL CENTER,

Defendants.

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INDEX NO. 158149/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for JUDGMENT - DECLARATORY.

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

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 SHANAV ALMENAS ("Almenas"), and co-defendants DANIEL W. WILEN, ORTHOPAEDIC SURGERY M.D., P.C., DRS. ABRAMS, PIAZZA & JULEWICZ DC, PLLC, and RICHMOND UNIVERSITY MEDICAL CENTER (hereinafter collectively "the defaulting medical provider defendants") due to their failure to appear in this action; 2) granting ATIC a declaratory judgment that Almenas is not an "eligible injured person" entitled to no-fault benefits under ATIC insurance policy number CAP 612541,

issued by plaintiff, claim number 784178-04; 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 Almenas under ATIC insurance policy number CAP 612541 and claim number 784178-04, 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 612541, claim number 784178-04 from an alleged accident on September 7, 2015 involving Almenas, since Almenas 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 612541, claim number 784178-04, 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 612541, claim number 784178-04 in connection with the alleged accident of September 7, 2015 since Almenas 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 September 7, 2015, defendant Shanav Almenas was allegedly injured while riding as a passenger in an ATIC insured vehicle owned by non-party Lunika Cars LLC ("Lunika") and insured by ATIC under policy number CAP 612541. Doc. 1, at par. 12.[1] The ATIC policy (Doc. 9) 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 September 16, 2015, Almenas completed an application for no-fault benefits ("NF-2") which she sent to ATIC, Lunika's no-fault insurer. Doc. 10.

[1] All references are to the documents filed with NYSCEF in this matter.

The NF-2 was received by ATIC the same day, along with a letter of representation from Almenas' attorneys. Doc. 10. Almenas assigned her rights to collect no fault benefits to the medical provider defendants. Doc. 1, at par. 16.

On October 8, 2015, Comprehensive Medical Reviews ("CMR"), a company hired by ATIC, wrote to Almenas to request that she appear for an independent medical examination ("IME") by a chiropractor on October 28, 2015. Doc. 11. On October 28, 2015, CMR wrote to Almenas again, asking that she appear for an IME on November 11, 2015 since her attorneys requested that the previous IME be rescheduled. Id. When Almenas failed to appear for the IME on November 11, 2015, CMR wrote her again on November 12, 2015, this time asking that she appear for an IME on December 9, 2015. Id. Almenas' attorneys were copied on all of the foregoing IME request letters. Id. Despite these requests, Almenas never appeared for an IME in accordance with ATIC's requests.

On December 17, 2015, ATIC denied Almenas' claim based on her failure to appear for the scheduled IMEs. Doc. 12.

On or about September 28, 2016, ATIC commenced the captioned declaratory judgment action against Almenas and the medical provider defendants. Doc. 1. ATIC thereafter served the summons and complaint on all defendants. Doc. 14. On July 25, 2017, an additional mailing of the summons and complaint was made on the foregoing entities. Doc. 15.

ATIC now moves for a default judgment against Almenas and the medical provider defendants. The motion is unopposed.

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 served Almenas and the medical provider defendants with process (Docs. 14-15) and that they have failed to appear. Rothman Aff., at par. 32.

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 Almenas' repeated failure to appear for an IME, and thus to satisfy this condition precedent to coverage, ATIC had the right to deny all claims by her and

by the defaulting medical providers, to whom Almenas' claims were assigned, 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, by means of its verified complaint as well as the documents and affidavits submitted in support of the motion, proof of timely mailing in compliance with the no-fault regulations (both for the scheduling of IMEs and the issuance of its denial of coverage under the policy) and proof of Almenas' failure to appear on three occasions for a duly noticed and scheduled IMEs. Thus, ATIC is entitled to a judgment that Almenas is not an "eligible injured person" entitled to no-fault benefits under ATIC policy number CAP 612541, claim number 784178-04, as well as a judgment declaring that neither Almenas nor the defaulting medical providers are entitled to no-fault coverage for the subject claims due to Almenas' breach of a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1.

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 SHANAV ALMENAS and co-defendant medical providers DANIEL W.

WILEN, ORTHOPAEDIC SURGERY M.D., P.C., DRS. ABRAMS, PIAZZA & JULEWICZ DC, PLLC, and RICHMOND UNIVERSITY MEDICAL CENTER is granted; and it is further,

ORDERED and ADJUDGED that individual defendant, SHANAV ALMENAS, is not an "eligible injured person" entitled to no-fault benefits under American Transit policy number CAP 612541, claim number 784178-04, and it is further,

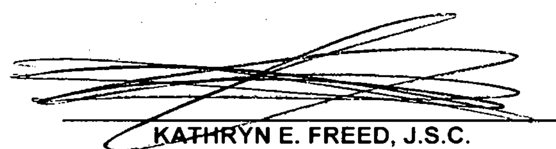
ORDERED and ADJUDGED that plaintiff American Transit Insurance Company is not obligated to honor or pay claims for reimbursement for any and all claims by defendant medical providers DANIEL W. WILEN, ORTHOPAEDIC SURGERY M.D., P.C., DRS. ABRAMS, PIAZZA & JULEWICZ DC, PLLC, and RICHMOND UNIVERSITY MEDICAL CENTER, under American Transit policy number CAP 612541, claim number 784178-04 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.

1/12/2018
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE