

American Tr. Ins. Co. v Cervantes

2018 NY Slip Op 32316(U)

September 17, 2018

Supreme Court, New York County

Docket Number: 160876/2016

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 PART IAS MOTION 2

Justice

-----X INDEX NO. 160876/2016

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

INES CERVANTES, MAIN STREET RADIOLOGY AT BAYSIDE,
LLC, MOUNT SINAI HOSPITAL QUEENS, NY MED,
ORTHOTECH EXPRESS CORP., and UNIVERSITY
ORTHOPEDECS OF NEW YORK, PLLC,

DECISION AND ORDER

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22

were read on this motion to/for DECLARATORY 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 and defendants Main Street Radiology at Bayside, LLC, Mount Sinai Hospital Queens, and University Orthopedics of New York, PLLC (“the medical provider defendants”) and defendant Ines Cervantes (“Cervantes”) (hereinafter collectively “defendants”; 2) granting ATIC a declaratory judgment that Cervantes is not an eligible injured person entitled to no-fault benefits under an insurance policy issued by ATIC under policy number BNT B508560, claim number 663480-02; 3) granting ATIC a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by the medical provider defendants named herein, as assignees of Cervantes, under ATIC policy number BNT B508560, claim number 663480-02, 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 BNT B508560, claim number 663480-02, relating to an alleged accident on November 9, 2015 involving Cervantes, since Cervantes is not an “eligible injured person” as defined by the 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 ATIC policy number BNT B508560, claim number 663480-02, 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 BNT B508560, claim number 663480-02 arising from the alleged accident of November 9, 2015 involving Cervantes, since Cervantes 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 ATIC’s papers, as well as the relevant statutes and case law, the motion, which is unopposed, is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

On November 9, 2015, Cervantes was allegedly injured in a motor vehicle collision while driving a car insured by an ATIC policy issued to her under policy number BNT B508560 (“the policy”). Docs. 1, 8, 10.¹ Cervantes was treated by the medical provider defendants for the injuries she allegedly sustained in the collision and submitted a claim for no-fault benefits to ATIC under claim number 663480-02. Docs. 1, 8, 11. Cervantes then assigned her right to collect no-fault

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

benefits to the medical provider defendants which, in turn, sought reimbursement from ATIC for treatment rendered which, they claim, is compensable under the terms of the policy. Doc. 1.

Cheryl Glaze, a No-Fault Claims Supervisor for ATIC, states in an affidavit in support of the motion that ATIC received an NF-2 claim form from Cervantes on November 30, 2015. Doc. 9. She asserts that Cervantes “failed to appear for a properly requested and scheduled medical examination” on April 6 and 20, 2016. Doc. 9. In an affidavit in support of the motion, Lynn Hershman, an employee of Independent Physical Exam Referrals, Inc., acting on behalf of ATIC, states that she sent Cervantes notices to appear for the April 6 and 20 examinations on March 16 and April 7, 2016, respectively. Doc. 9. However, plaintiff failed to appear for an examination on either day. Doc. 9.

Plaintiff commenced this declaratory judgment action against Cervantes and the medical provider defendants by filing a summons and verified complaint on December 27, 2016. Doc. 1.² Although defendants were served with process and received supplemental mailings of the summons and complaint pursuant to CPLR 3215(g) (Docs. 8, 15, 16), ATIC’s attorney represents that none of the defendants have answered or appeared in this action. Doc. 8, at pars. 30-31.³

On February 13, 2018, ATIC filed the instant motion seeking the relief set forth above. In its motion, ATIC argues that it is entitled to a default judgment against the defendants because Cervantes violated a condition precedent to coverage under the policy by failing to appear for a physical examination. ATIC further asserts that, since Cervantes is not entitled to coverage under the policy, the medical provider defendants are not entitled to coverage by means of her assignment to them of her rights pursuant to the policy. No opposition has been submitted to the motion.

² Although ATIC also sued NY Med and Orthotech Express Corp., it has discontinued its claims against those defendants. Doc. 3.

³ After ATIC’s motion was filed, Cervantes’ attorney filed a notice of appearance. Doc. 20. However, none of the defendants has answered.

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, 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 medical provider defendants failed to answer or appear in this matter and that, as of the time the motion was filed, Cervantes had not answered or appeared. However, since ATIC has failed to establish the facts constituting the claim, its motion for a default judgment must be denied.

Despite the submission of the affidavits in support of the motion, ATIC failed to demonstrate that it timely scheduled Cervantes’ initial medical examination within 15 days after it received the NF-2. *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, Glaze admits that ATIC received notice of the claim on November 30, 2015. However, Hershman also admits that it did not mail Cervantes the initial notice seeking her physical examination until March 16, 2016, approximately 3 ½ months later.

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

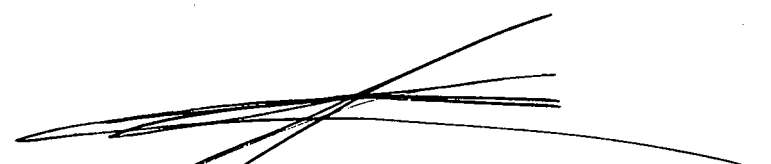
ORDERED that the motion by plaintiff American Transit Insurance Company is denied; and it is further

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

ORDERED that defendant Ines Cervantes may move, within 20 days after service of this order with notice of entry, to extend her time to serve an answer, should she be so advised; and it is further

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

9/17/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: