

<b>American Tr. Ins. Co. v Hernandez-Guzman</b>
2018 NY Slip Op 32835(U)
November 2, 2018
Supreme Court, New York County
Docket Number: 161501/2017
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: **HON. W. FRANC PERRY, J.S.C.**

PART 23

AMERICAN TRANSIT INSURANCE COMPANY

Plaintiff,

-vs-

MARTIN HERNANDEZ-GUZMAN, JEFFREY COHEN,  
M.D. & MARK KRAMER, M.D., P.C., COMPLEX  
CHIROPRACTIC, P.C., LLC, JOURNAL SQUARE  
SURGICAL CENTER, RIVER PARK ACUPUNCTURE  
P.C., LLC SURGICORE OF JERSEY CITY LLC, TRINITY  
PAIN MANAGEMENT OF STATEN ISLAND PLLC,  
WESTCHESTER RADIOLOGY & IMAGING, P.C.,  
Y.A. MEDICAL CARE, PLLC

Defendant Respondent.

INDEX NO. 161501/2017

MOT. DATE

MOT. SEQ. NO. 001

**ORDER AND JUDGMENT**

The following papers were read on this motion to/for  
Notice of Motion – ~~Petition~~ – OTSC – Affidavits – Exhibits ..... No(s) 6-18  
~~Notice of Cross-Motion~~ – Answering Affidavits – Exhibits ..... No(s).  
Replying Affidavits – Exhibits ..... No(s).

Plaintiff, AMERICAN TRANSIT INSURANCE COMPANY (“Plaintiff”) moves for an order (1) pursuant to CPLR 3215 granting default judgment against the Defendant, MARTIN HERNANDEZ-GUZMAN (“Defendant”), and Co-Defendants, JEFFREY COHEN, M.D. & MARK KRAMER, M.D., P.C., COMPLEX CHIROPRACTIC, P.C., JOURNAL SQUARE SURGICAL CENTER, RIVER PARK ACUPUNCTURE P.C., SURGICORE OF JERSEY CITY LLC, TRINITY PAIN MANAGEMENT OF STATEN ISLAND PLLC, WESTCHESTER RADIOLOGY & IMAGING, P.C., Y.A. MEDICAL CARE PLLC (“Co-defendants”) for failure to answer or appear in this action, (2) granting Plaintiff a declaratory judgment that Defendant is not an eligible injured person entitled to no-fault benefits under Plaintiff’s insurance policy CS B407753, Claim No.: 676502-02, (3) granting Plaintiff a declaratory judgment that Plaintiff is not obligated to honor or pay claims for reimbursement submitted by the Co-defendants named

herein, (4) a declaratory judgment that Plaintiff 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 Plaintiff's insurance policy.

This action arises out of an alleged accident which occurred on February 21, 2017. According to the Plaintiff, Plaintiff issued a policy of insurance to its insured OLIVIO FERNANDEZ, F., under a New York policy of insurance numbered CS B407753. The policy of insurance that Plaintiff issued to OLIVIO FERNANDEZ, F. included a no-fault endorsement which provided coverage to an insured or an eligible injured person in the amount of \$50,000 for all necessary expenses resulting from a motor vehicle accident, and was in effect on FEBRUARY 21, 2017. The policy of insurance contained the mandatory no-fault endorsement prescribed by the New York State Department of Financial Services. The applicable no-fault statute permits insurers to request an independent medical examination.

On February 21, 2017, a vehicle owned by the insured OLIVIO FERNANDEZ, F. was involved in a motor vehicle accident. The Defendant was allegedly a bicyclist struck by the insured vehicle and made a claim to the Plaintiff, AMERICAN TRANSIT, as a purported eligible injured person of the above-referenced insurance policy, to the plaintiff under claim # 676502-02. According to Plaintiff, Plaintiff received a New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle No-Fault Benefits (NF-2) on March 20, 2017 from and on behalf of individual Defendant MARTIN HERNANDEZ-GUZMAN, claiming benefits under the Policy. Defendant assigned his rights to collect no-fault benefits to various health care providers including the Co-defendants. The Co-defendants have submitted claims to the Plaintiff with an assignment of benefits from Defendant and alleging they had rendered services that are compensable under the terms of the policy.

Pursuant to the no-fault endorsement, Plaintiff requested that Defendant appear for an Independent Medical Examination. Despite due demand by Plaintiff, Defendant failed to appear for a properly requested and scheduled independent medical examinations resulting in Defendant's breach of a condition precedent to coverage. As assignees of the Defendant, the Co-defendants acquired no greater right to receive payment for first party benefits reimbursement than the assignor, Defendant. Under New York law, the Co-defendants, as assignees, "stand in the shoes" of the assignor and thus, acquire no greater rights than the assignor (*see Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 [1st Dept 2011]; *Long Island Radiology v Allstate Ins. Co.*, 36 A.D.3d 763 [2d Dept 2007]; *East Acupuncture P.C. v Allstate Ins. Co.*, 61 A.D.3d 202 [2d Dept 2009]).

Consequently, Plaintiff's assert that Defendant's breach of a condition precedent to coverage under the Policy voided the contract ab initio and entitles Plaintiff to deny payment to both Defendant and his assignees (*Unitrin Advantage Ins. Co.*, 82 AD3d at 559).

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant's default in answering or appearing (*SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016]). "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists" (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, New York County 2016], quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70-71 [2003]).

In support of Plaintiff's motion, Plaintiff provides proof that Defendant was personally served on April 3, 2018. Plaintiff submits further proof that Co-defendant, WESTCHESTER RADIOLOGY & IMAGING, P.C., was served on April 12, 2018, that Co-defendant COMPLEX CHIROPRACTIC, P.C. was served on April 13, 2018, that Co-defendant JEFFREY COHEN, M.D. & MARK KRAMER, M.D., P.C. was served on April 13, 2018, that Co-defendant RIVER PARK ACUPUNCTURE P.C. was served on April 13, 2018, that Co-defendant TRINITY PAIN MANAGEMENT OF STATEN ISLAND PLLC was served on April 13, 2018, that Co-defendant Y.A. MEDICAL CARE PLLC was served on April 5, 2018, and that JOURNAL SQUARE SURGICAL CENTER was served on April 5, 2018. The Defendant and aforementioned Co-defendants defaulted in appearing and answering the summons and complaint and are currently in default.

NOW, on reading and filing of the following papers submitted to the Court: the summons and complaint and proof of service thereof, the notice required by CPLR 3215(g)(3) and proof of mailing thereof, the Notice of Motion for Default Judgment, dated August 31, 2018, the Affidavit of Cheryl Glaze, sworn to on August 29, 2018, and upon all pleadings and proceedings heretofore had herein, it is hereby

ORDERED that Plaintiff's motion for default judgment against Defendant, MARTIN HERNANDEZ-GUZMAN and Co-Defendants, JEFFREY COHEN, M.D. & MARK KRAMER, M.D., P.C., COMPLEX CHIROPRACTIC, P.C., JOURNAL SQUARE SURGICAL CENTER, RIVER PARK ACUPUNCTURE P.C., SURGICORE OF JERSEY CITY LLC, TRINITY PAIN MANAGEMENT OF STATEN ISLAND PLLC, WESTCHESTER RADIOLOGY & IMAGING, P.C., Y.A. MEDICAL CARE PLLC is granted; and it is further

ORDERED that Plaintiff's motion for declaratory judgment is granted; and it is further

ORDERED and ADJUDGED that Defendant is not an eligible injured person entitled to no-fault benefits under Plaintiff's insurance policy CS B407753, Claim No.: 676502-02; and it is further

ORDERED and ADJUDGED that Plaintiff is not obligated to honor or pay claims for reimbursement submitted by the Co-defendants named herein, as assignees of Defendant, under Plaintiff's insurance policy CS B407753, Claim No.: 676502-02, nor is Plaintiff 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 Plaintiff's insurance policy CS B407753, Claim No.: 676502-02 from the alleged accident of February 21, 2017 involving Defendant as Defendant is not an eligible injured person as defined by the Policy and/or New York State Regulation 68, and it is further,

ORDERED and ADJUDGED that Plaintiff 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 Plaintiff's insurance policy CS B407753, Claim No.: 676502-02, nor is Plaintiff 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 Plaintiff's insurance policy CS B407753, Claim No.: 676502-02 from the alleged accident of February 21, 2017 involving Defendant as Defendant is not an eligible injured person as defined by the Policy and/or New York State Regulation 68; and it is further

ORDERED that the clerk shall enter judgment accordingly.

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

Dated: November 2, 2018  
New York, New York

  
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HON. W. FRANC PERRY, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE