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| American Tr. Ins. Co. v Gomez |
| 2018 NY Slip Op 32907(U) |
| November 13, 2018 |
| Supreme Court, New York County |
| Docket Number: 158693/2017 |
| Judge: Joel M. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45
Justice
INDEX NO. 158693/2017
MOTION DATE 10/30/2018
MOTION SEQ. NO. 001

AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

- v -

ELENA GOMEZ, ACA PT & REHAB, P.C., ALEXANDER
GRIGORIAN D.O., CITIMEDICAL I, PLLC, COMPLETE SPINAL
PHYSICAL THERAPY AND CHIROPRACTIC PLLC, EXCEL
SURGERY CENTER, L.L.C., FJ ORTHOPAEDICS AND PAIN
MANAGEMENT PLLC, HEALTHY LIVING MEDICAL AND
SURGICAL PRODUCTS, INC., HEEL TO TOE FOOT CENTER
LLC, JOSEPH BATER DC, LEXINGTON MEDICAL DIAGNOSTIC
SERVICES P.C., METROPOLITAN SURGICAL SERVICES
LLC, MIISUPPLY LLC, MORRIS PARK CHIROPRACTIC
PLLC, MSJR OF QUEENS PC, OPTIMUM HEALTH
ACUPUNCTURE, P.C., SINHA ORTHOPEDICS P.C., TOMLINSON
AVE. PHYSICAL THERAPY AND CHIROPRACTIC PLLC

Defendant.

DECISION AND ORDER

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, 24

were read on this motion to/for

JUDGMENT - DECLARATORY

Upon the foregoing documents:

Plaintiff American Transit Insurance Company seeks a default judgment and a
declaratory judgment against Defendant Elena Gomez, Defendants ACA PT & Rehab P.C.,
Alexander Grigorian D.O., Complete Spinal Physical Therapy and Chiropractic PLLC, Excel
Surgery Center, L.L.C., FJ Orthopaedics and Pain Management PLLC, Healthy Living Medical
and Surgical Products, Inc., Heel to Toe Foot Center LLC, MIISupply LLC, Morris Park
Chiropractic PLLC, MSJR of Queens PC, Sinha Orthopedics P.C., Tomlinson Ave. Physical
Therapy and Chiropractic LLC ("Additional Defendants"), and Defendants Citimedical I, PLLC,
Metropolitan Surgical Services LLC, Optimum Health Acupuncture, P.C., Joseph Bater DC, and
Lexington Medical Diagnostic Services P.C. ("Answering Defendants").

Defendant Gomez and Additional Defendants have failed to appear, answer or otherwise move in this action. Nor did they submit opposition to the instant motion for a default judgment.

Plaintiff has submitted unrebutted evidence demonstrating compliance with the requirements of CPLR § 3215. Plaintiff is entitled to a default judgment and the declaratory relief sought in the Complaint against Defendant Gomez and Additional Defendants. *See Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 A.D.3d 617 (1st Dep't 2018) (properly awarding declaratory judgment by default upon Plaintiff's showing proof of facts constituting the claims and Defendant's failure to appear in action or oppose motion).

Answering Defendants Citimedical I, PLLC, and Optimum Health Acupuncture, P.C., filed an untimely Answer to the Complaint approximately eight months after they were served with the Complaint. (NYSCEF 2, 5). That same day, Plaintiff filed the instant default motion. (NYSCEF 8). CPLR § 2101(f) provides that a "party on whom a paper is served shall be deemed to have waived any objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections." Plaintiff's default motion filed within fifteen days after the Answer serves as a rejection of the Defendants' untimely Answer. *American Transit Ins. Co. v. Baucage*, 146 A.D.3d 413, 413-14 (1st Dep't 2017) (finding that, in a factually similar matter, Plaintiff's motion for default judgment filed within fifteen days of an untimely response was sufficient to reject Defendant's untimely Answer). Defendants also give no "reasonable excuse" for the delay in answering the complaint. *Id.* Accordingly, Plaintiff's motion for default judgment is granted as to Citimedical I, PLLC, and Optimum Health Acupuncture, P.C.

Defendants Citimedical I, PLLC, Metropolitan Surgical Services LLC, Joseph Bater, DC, and Lexington Medical Diagnostic Services, P.C, filed untimely Answers to the Complaint more

than nine months after the Answering Defendants were served with the Complaint, and approximately one month after they were served with notice of the instant default motion. (NYSCEF 2, 25, 27). The Defendants have given no reasonable excuse as to why they failed to timely answer the complaint. In addition, any contention that Plaintiff accepted the untimely Answer by failing to reject it fails, as Defendants' answer was served after the motion for default judgment was made. *Estrella v. Herrera*, 12 A.D.3d 320, 321 (1st Dep't 2005). Accordingly, Plaintiff's motion for default judgment is granted as to the Answering Defendants.

The Defendants may seek a vacatur of the instant default judgment if they can satisfy the requirements of CPLR §5015 or CPLR §317, or any other applicable law.

Therefore it is:

ORDERED Plaintiff's Motion for a Default Judgment against all Defendants is Granted; it is further;

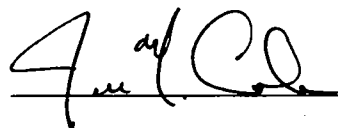
ORDERED that, consistent with the foregoing, it is adjudged and declared that Defendant Elena Gomez has breached a policy condition of the American Transit policy and therefore, Defendants ACA PT & Rehab P.C., Alexander Grigorian D.O., Complete Spinal Physical Therapy and Chiropractic PLLC, Excel Surgery Center, L.L.C., FJ Orthopaedics and Pain Management PLLC, Healthy Living Medical and Surgical Products, Inc., Heel to Toe Foot Center LLC, MIISupply LLC, Morris Park Chiropractic PLLC, MSJR of Queens PC, Sinha Orthopedics P.C., Tomlinson Ave. Physical Therapy and Chiropractic LLC, Citimedical I, PLLC, Metropolitan Surgical Services LLC, Optimum Health Acupuncture, P.C., Joseph Bater DC, and Lexington Medical Diagnostic Services P.C., are not entitled to no-fault coverage or first party coverage, as a result of a motor vehicle accident that occurred on April 13, 2016, and

that none of the defendants are entitled to first party no-fault benefits, together with costs and disbursements in this action; and it is further

ORDERED that upon presentation of a copy of this Decision and Order with notice of entry, accompanied by a proper form of judgement, the Clerk is hereby directed to permit entry of judgment in favor of Plaintiff American Transit Insurance Company and against Defendants Elena Gomez, ACA PT & Rehab P.C., Alexander Grigorian D.O., Complete Spinal Physical Therapy and Chiropractic PLLC, Excel Surgery Center, L.L.C., FJ Orthopaedics and Pain Management PLLC, Healthy Living Medical and Surgical Products, Inc., Heel to Toe Foot Center LLC, MIISupply LLC, Morris Park Chiropractic PLLC, MSJR of Queens PC, Sinha Orthopedics P.C., Tomlinson Ave. Physical Therapy and Chiropractic LLC, Citimedical I, PLLC, Metropolitan Surgical Services LLC, Optimum Health Acupuncture, P.C., Joseph Bater DC, and Lexington Medical Diagnostic Services P.C.

This constitutes the Decision and Order of the Court.

11/13/2018
DATE



CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: