

American Tr. Ins. Co. v Derosé
2019 NY Slip Op 31283(U)
May 7, 2019
Supreme Court, New York County
Docket Number: 158163/2018
Judge: Francis A. Kahn, III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14

Acting Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

ROBERTA DEROSE, AMC PSYCHOLOGY, P.C.,
ASSEM PHYSICAL THERAPY, P.C.,
BROOK CHIROPRACTIC OF NY P.C.,
ENGLEWOOD ORTHOPEDICS GROUP, PC,
MANLI LI, MEDIGNA INC., NEW YORK WELLNESS PT, P.C.,
NOEL RUPIDO SIAPNO, NRS PT, PC, NY CHIROPRACTIC
REHABILITATION P.C., PREFERRED MEDICAL, P.C., SANFORD
CHIROPRACTIC, PC, SYNERGY HEALTH CHIROPRACTIC, PC,
TRINITY MEDICINE P.C., WELLNESS DIAGNOSTIC IMAGING
P.C.

Defendants.

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INDEX NO. 158163/2018
MOTION DATE 04/26/2019
MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 8- 20, 23
were read on this motion to/for SUMMARY/DEFAULT/DECLARATORY JUDGMENT .

Plaintiff moves for: [1] a default judgment pursuant to CPLR §3215 against Defendants Roberta Derosé, AMC Psychology, P.C., Assem Physical Therapy, P.C., Brook Chiropractic of NY P.C., Englewood Orthopedics Group, P.C., Manli Li, Medigna Inc., New York Wellness Pt, P.C., Noel Rupido Siapno, NY Chiropractic Rehabilitation P.C., Preferred Medical, P.C., Sanford Chiropractic, P.C., Trinity Medicine P.C., Wellness Diagnostic Imaging P.C., for their failure to answer or appear in this action; [2] summary judgment pursuant to CPLR 3212 against Defendant NRS PT, P.C.; [3] a judgment declaring pursuant to CPLR §3001 that Defendant Roberta Derosé is not an eligible injured person entitled to no-fault benefits under Plaintiff's insurance policy CAP 612891, Claim No.: 1002728-07; [4] a judgment declaring pursuant to CPLR §3001 that Plaintiff is not obligated to honor or pay claims for reimbursement submitted by Defendants, as assignees of Derosé, under Plaintiff's insurance policy CAP 612891, Claim No.: 1002728-07, nor is Plaintiff required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including arbitrations and/or lawsuits seeking to recover no-fault benefits arising under Plaintiff's insurance policy CAP 612891, Claim No.: 1002728-07 from the alleged accident of July 14, 2017 involving Derosé as Derosé is not an eligible injured person as defined by the Policy and/or New York State Regulation 68; and [5] a judgment declaring that Plaintiff is not required to provide, pay or honor any current or future claim for no-fault benefits under the Mandatory Personal Injury Protections endorsement under Plaintiff's insurance policy CAP 612891, Claim No.: 1002728-07, 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 CAP 612891, Claim No.: 1002728-07 from the alleged

accident of July 14, 2017 involving Derosé as Derosé is not an eligible injured person as defined by the policy and/or New York State Regulation 68.

On July 14, 2017, Defendant Derosé was allegedly injured while riding as a passenger in a motor vehicle insured by Plaintiff under insurance policy CAP 612891. By that policy, Plaintiff agreed to provide \$50,000 in no-fault coverage to an insured or eligible injured person. Under Claim No.: 1002728-07 to Plaintiff's subject insurance policy, Derosé sought no-fault benefits as eligible injured person.

In order to receive said benefits, pursuant to a condition precedent prescribed by the insurance policy and by statute, Plaintiff required that Derosé submit to an examination under oath ("EUO") (*see* Exhibit B, Insurance Policy's New York Mandatory Personal Injury Protection Endorsement, Section I, Proof of Claim, section [b], page 16¹; 11 NYCRR §65-1.1, Proof of Claim, section [d]; New York Insurance Regulation 68). In order to take any action against Plaintiff, there must be full compliance with the terms of the insurance coverage² (*see* Exhibit B, Section I, Conditions, Action Against Company, page 15).

On or about July 21, 2017, Derosé completed an application for no-fault benefits ("NF-2") which she sent to Plaintiff (*see* Exhibit C). The NF-2 was received by Plaintiff on August 11, 2017 (*see* Plaintiff's attorney's affirmation [NYSCEF Document #10], at paragraph 14).

By correspondence dated September 28, 2017, Plaintiff wrote to Derosé to request that she appear for an EUO on November 28, 2017 (*see* Exhibit D). When Derosé failed to appear for the EUO on November 28, 2017, Plaintiff again wrote to Derosé on November 29, 2017 requesting that she appear for an EUO on January 29, 2018 (*see* Exhibit D). After Derosé again failed to appear for the EUO, Plaintiff issued a denial of no-fault benefits on February 1, 2018 (*see* Exhibit E). This denial of no-fault benefits was sent to Derosé and her health care providers (*see* Exhibit E).

On September 1, 2018, Plaintiff commenced the instant matter (*see* NYSCEF Document #1; *see also* Exhibit F). Plaintiff thereafter served the summons and complaint on all Defendants (*see* Exhibit G). An additional mailing of the summons and complaint was made on the foregoing entities on January 31, 2019 (*see* Exhibit H).

On February 11, 2019, Defendant Synergy Health Chiropractic, P.C. filed its answer (*see* NYSCEF Document #5; *see also* Exhibit F). On February 28, 2019, Defendant NRS PT, P.C. filed its answer (*see* NYSCEF Document #7; *see also* Exhibit F).

On February 15, 2019, Plaintiff filed a stipulation of discontinuance and release as to Synergy Health Chiropractic, P.C. (*see* NYSCEF Document #6; *see also* Exhibit F).

¹ Parrotting the statutory language, the policy requires that "[u]pon request by the Company, the eligible injured person or that person's assignee or representative shall as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same."

² The policy states, "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage."

On April 5, 2019, Plaintiff filed the instant motion. On May 1, 2019, Defendant NRS PT, P.C., filed a cross-motion in opposition to Plaintiff's motion and for summary judgment on its outstanding bill of \$395.82 for services rendered August 3, 2017 (*see* NYSCEF Document #23). The cross-motion motion is unopposed.

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” (*see Widman v Turner*, 55 Misc3d 131[A] [App Term 2d Dept 2017] *quoting Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 [2d Dept 2011]; *see also American Transit Insurance Company v Durowaa*, __ Misc3d __, 2017 NY Slip Op 31510 [Sup Ct, New York County, 2017]). Proof of the facts constituting the claim may be provided by plaintiff's affidavit or a verified complaint (*see* CPLR §3215[f]).

The moving papers establish that Plaintiff properly served Defendants Roberta Derosé, AMC Psychology, P.C., Assem Physical Therapy, P.C., Brook Chiropractic of NY P.C., Englewood Orthopedics Group, P.C., Manli Li, Medigna Inc., New York Wellness PT, P.C., Noel Rupido Siapno, NY Chiropractic Rehabilitation P.C., Preferred Medical, P.C., Sanford Chiropractic, P.C., Trinity Medicine P.C. and Wellness Diagnostic Imaging P.C. and that those Defendants have failed to appear, warranting that a default judgment be granted.

As for the answering Defendant, NRS PT, P.C., Plaintiff failed to meet its *prima facie* burden for summary judgment. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). CPLR 3212(b) requires the court to determine if the movant's papers justify holding, as a matter of law, “that the cause of action or defense has no merit” (*id.*). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]).

Similarly, “[d]eclaratory relief should not issue merely on the basis of a default by one side to the controversy. The Plaintiff bears the burden of affirmatively proving its right to the declaratory relief it seeks” (*Mount Vernon Fire Ins Co. v NIBA Constr. Inc.*, 195 AD2d 425, 427 [concurring opinion, Sullivan, J.][1st Dept 1993] *citing Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 [3d Dept 1986]).

The Insurance Law and regulations promulgated thereunder provide that “[w]ithin 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part” (11 NYCRR 65.15[g][3]; *see* Insurance Law § 5106[a]). This 30-day period may be extended by, *inter alia*, a timely demand by the insurance company for further verification of a claim (*see* 11 NYCRR 65.15[d][1], [e]; *see New York Hosp. Medical Center of Queens v Country-*

Wide Ins. Co., 295 AD2d 583 [2d Dept 2002]). While Plaintiff did request verification of the claim by demanding an EUO, this request for verification of the claim was untimely given that the EUO was not scheduled within 30 calendar days of Plaintiff's receipt of the NF-2 form (11 NYCRR 65.15; All-Boro Medical Supplies, Inc. v Progressive Northeastern Ins Co, 17 Misc3d 950 [Civil Ct, Kings County, 2007]). No-fault law is in derogation of the common law which is to be strictly construed (see Maxwell v State Farm Mut. Auto. Ins. Co., 92 AD2d 1049, 1050 [3rd Dept 1983]).

Here, Plaintiff's failure to schedule the EUO until September 28, 2017, more than 30-days after receipt of Derose's NF-2 form was clearly in violation of 11 NYCRR 65.15. This reduced to zero the 30-day period that it had to accept or deny Derose's application for benefits (11 NYCRR 65.15[f][10]; see, Keith v Liberty Mut. Fire Ins. Co., 118 AD2d 151, 154 [2d Dept 1986]). Accordingly, Plaintiff's February 1, 2018 denial of Derose's claim was untimely and the failure to issue a denial of claim within the 30-day time limit prescribed by 11 NYCRR 65.15(g)(3) and Insurance Law § 5106(a) precludes an insurer from interposing a statutory exclusion defense (see New York Hosp. Medical Center of Queens, v Country-Wide Ins Co., supra).

Defendant NRS PT, P.C.'s, cross-motion is denied as untimely. Plaintiff's motion was returnable in Room 130 on April 26, 2019 and marked fully submitted without opposition on that date. Defendant NRS PT, P.C.'s notice of cross-motion had the same return date but was dated and filed on May 1, 2019.

In light of the foregoing, it is hereby:

ORDERED that the branch of Plaintiff American Transit Insurance Company's motion pursuant to CPLR §3215, for a default judgment against Defendants a default judgment against Defendants Roberta Derose, AMC Psychology, P.C., Assem Physical Therapy, P.C., Brook Chiropractic of NY P.C., Englewood Orthopedics Group, P.C., Manli Li, Medigna Inc., New York Wellness Pt, P.C., Noel Rupido Siapno, NY Chiropractic Rehabilitation P.C., Preferred Medical, P.C., Sanford Chiropractic, P.C., Trinity Medicine P.C., Wellness Diagnostic Imaging P.C., is granted based upon their failure to answer or appear in this action; and it is further,

ORDERED that the branch of Plaintiff's motion for summary judgment pursuant to CPLR §3212 is denied; 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.

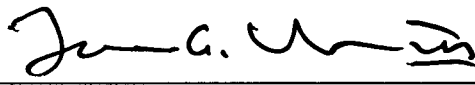
5/7/2019
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


 FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.