

**American Tr. Ins. Co. v Hall**

2019 NY Slip Op 32307(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 159043/2018

Judge: Melissa A. Crane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No.: 159043/2018

-against-

Mot. Seq. No. 001

ONEIL O. HALL, 550 REMSEN PHYSICAL THERAPY, P.C.,  
ADVANCED SPINAL CARE REHABILITATION PA,  
BREFNI CHIROPRACTIC DIAGNOSTICS, P.C.,  
BURKE PHYSICAL THERAPY, P.C.,  
CHUNG CHIROPRACTIC, P.C, CITIMED SERVICES, PA,  
COLUMBUS IMAGING CENTER, DYNAMIC SURGERY CENTER, LLC,  
HEALTHPLUS SURGERY CENTER, LLC, JOHN A. NASRINPAY,  
JULY PT, P.C., METROPOLITAN INTERVENTIONAL MEDICAL SERVICES, P.C.,  
OPTIMUS PLUS PRODUCTS CORP, PCG ACUPUNCTURE PC,  
PRINCIPLE LABS LLC, TRAPEZIUS DIAGNOSTIC CHIROPRACTIC P.C.,

Defendants.

-----X

**MELISSA A. CRANE, J.S.C.:**

This case arises from an automobile accident that occurred on December 19, 2017, that allegedly involved individual defendant Oneil O. Hall (“Hall”), a passenger in the insured’s vehicle. Andrew then assigned the rights to collect no-fault benefits to co-defendants under insurance policy B717086, Claim No. 1014475-03. Hall allegedly sustained serious bodily injuries because of the collision. On September 29, 2018, plaintiff commenced an action seeking a declaratory judgment against the assignor and numerous medical provider co-defendants.

First, plaintiff withdrew its motion as to Burke Physical Therapy, P.C., Columbus Imaging Center, John A. Nasrinpay, Trapezus Diagnostic Chiropractic P.C., and Brefni Chiropractic Diagnostics, P.C., and subsequently discontinued this action as to Burke Physical Therapy, P.C., Columbus Imaging Center, John A. Nasrinpay, Trapezus Diagnostic Chiropractic P.C., and Brefni Chiropractic Diagnostics, P.C. (NYSCEF doc nos 24 and 27). Second, plaintiff

does not seek relief against defendant John A. Nasrinpay (“Nasrinpay”), due to its inability to serve Nasrinpay (Pablan Aff, p. 2, fn 3).

Plaintiff now moves for default judgment pursuant to CPLR 3215 against defendants Oneil O. Hall and PCG Acupuncture PC (the “non-answering defendants”) for their failure to answer the summons and complaint. Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of defendants’ failure to answer or appear in this action (*see* CPLR 3215[f]). The non-answering defendants have not opposed plaintiff’s default motion and did not appear for oral argument on July 3, 2019. Therefore, the court grants plaintiff’s default motion as to those defendants.

Plaintiff also moves for summary judgment against defendants 550 Remsen Physical Therapy, P.C., Advanced Spinal Care Rehabilitation PA, Chung Chiropractic, P.C., CitiMed Services, PA, Dynamic Surgery Center, LLC, Healthplus Surgery Center, LLC., July PT, P.C., Metropolitan Interventional Medical Services, P.C., Optimus Plus Products Corp, and Principle Labs LLC, based on the defendant Oneil O. Hall’s failure to appear for Independent Medical Examinations (“IMEs”) with Dr. Michael Russ and Dr. Brian Wolin on April 10, 2018, and with Dr. Eric Roth and Dr. Brian Wolin on May 10, 2018. Plaintiff also moves for summary judgment based on Hall’s failure to appear for Examinations Under Oath (“EUOs”) on April 12, 2018 and May 10, 2018.

Defendants CitiMed Services, PA, Dynamic Surgery Center, LLC, and Healthplus Surgery Center, LLC filed their answer on March 4, 2019 (Exh F, NYSCEF Doc No 16) and opposed plaintiff’s summary judgment motion.

Plaintiff submits: the attorney affirmation of Ariana Pabalan; an affidavit from American Transit claim examiner Iris Hernandez, who generated the denials and verification requests in

this case, and who details the procedure for generating these documents; an affidavit of mail room supervisor of American Transit Insurance Company, Luis Campbell, who attests to the mailing of denial of claim forms and verification requests; Cheryl Glaze, who handled the no-fault claims and supervised the EUO scheduling coordinators and the generation of EUO scheduling letters in this case; a transcript from Michael Fritz, Esq, who attests that he waited for Hall to appear for his EUO on April 12, 2018, and that Hall never appeared; American Transit SIU Investigator Lasil Williams, who attests to the nonappearance of Hall for his EUO scheduled on May 10, 2018; an affidavit of Comprehensive Medical Reviews, LLC employee, Walter Distler, attesting to the scheduling of the IMEs and the mailing of the scheduling letters; an affidavit from Dr. Brian Wolin, Dr. Michael Russ, and Dr. Eric Roth, the doctors assigned to conduct the assignor's IMEs.

A summary judgment movant carries the initial burden of tendering sufficient, admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once a movant meets its initial burden, the burden then shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The failure to appear for a scheduled examination under oath / a scheduled independent medical examination is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). The court's holding in *Unitrin* applies to EUOs in addition to IMEs (*see, Seacoast Med., PC v. Praetorian Ins. Co.*, 38 Misc3d 127 [App. Term, 1st Dept 2012]). “The failure to comply with the provision of an insurance policy requiring the insured to submit to an examination under oath

... is a material breach of the policy, precluding recovery of the policy proceeds” (*see Argento v. Aetna Casualty & Surety Co.*, 184 AD2d 487, 487–488 [2nd Dept 1992]).

Plaintiff has demonstrated *prima facie* entitlement to summary judgment against defendants 550 Remsen Physical Therapy, P.C., Advanced Spinal Care Rehabilitation PA, Chung Chiropractic, P.C., CitiMed Services, PA, Dynamic Surgery Center, LLC, Healthplus Surgery Center, LLC., July PT, P.C., Metropolitan Interventional Medical Services, P.C., Optimus Plus Products Corp, and Principle Labs LLC,

Cheryl Glaze and Luis Campbell’s affidavits establish the timely and properly mailing of the EUO notices. The EUO transcripts from Michael Fritz, Esq. and the affidavit of Lasil Williams establish that defendant Hall failed to appear for his EUO on April 12, 2018 and May 10, 2018 (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2nd Dept 2006]). Walter Distler’s affidavit establishes the timely and proper mailing of IME notices. Affidavits from Dr. Wolin, Dr. Russ, and Dr. Roth establish that Hall failed to appear for IMEs on April 10, 2018 and May 10, 2018.

Accordingly, it is,

**ORDERED** that the court grants plaintiff’s default motion for default judgment, without opposition, against defendants Oneil O. Hall and PCG Acupuncture PC; and it is further

**ORDERED** that the court grants plaintiff’s motion for summary judgment, against defendant 550 Remsen Physical Therapy, P.C., Advanced Spinal Care Rehabilitation PA, Chung Chiropractic, P.C., CitiMed Services, PA, Dynamic Surgery Center, LLC, Healthplus Surgery Center, LLC., July PT, P.C., Metropolitan Interventional Medical Services, P.C., Optimus Plus Products Corp, and Principle Labs LLC, and it is further

**ADJUDGED AND DECLARED** that defendants Oneil O. Hall, PCG Acupuncture PC, 550 Remsen Physical Therapy, P.C., Advanced Spinal Care Rehabilitation PA, Chung Chiropractic, P.C., CitiMed Services, PA, Dynamic Surgery Center, LLC, Healthplus Surgery Center, LLC., July PT, P.C., Metropolitan Interventional Medical Services, P.C., Optimus Plus Products Corp, and Principle Labs LLC, are not entitled to no-fault coverage for the motor vehicle accident that occurred on September 29, 2018, involving individual defendant Oneil O. Hall, for claims submitted under insurance policy under insurance policy B717086, Claim No. 1014475-03, as referenced in the complaint, and plaintiff American Transit Insurance Company is under no obligation to pay the no-fault claims filed by Oneil O. Hall and the above defendants, in connection with the December 19, 2017 accident at issue.

DATED: 7-31, 2019  
New York, New York

ENTER:

  
MELISSA A. CRANE, J.S.C

**HON. MELISSA A. CRANE**