

American Tr. Ins. Co. v Gillard
2019 NY Slip Op 33141(U)
October 18, 2019
Supreme Court, New York County
Docket Number: 160061/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON

PART

IAS MOTION 37EFM

Justice

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INDEX NO. 160061/2018

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 08/23/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

VALINDA GILLARD, ALMATCARE MEDICAL SUPPLY INC., BARNERT SURGICAL CENTER, LLC, BARRY HUGHES, PA, BLUE BELL ACUPUNCTURE, P.C., CITIMEDICAL I, PLLC, CVS RX INC, DAVID FLEISS, EPIC PAIN MANAGEMENT & ANESTHESIA CONSULTANTS LLC, HARLEM MEDICAL ASSOCIATES P.C., CTO MANAGEMENT, LLC, NJMHC, JOHN PALEMIRE, DC, LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C., LIDA'S MEDICAL SUPPLY INC., MALAGA MEDICAL P.C., MANDIT PHYSICAL THERAPY, P.C., MORRIS BELLIFEMINE, NORTHEAST ANESTHESIA AND PAIN MANAGEMENT, NY ORTHOPEDICS, PC, PARK WEST SURGICAL GROUP, LLC, SPINE CARE OF NJ, PC, SPINE CONSULT NJ PC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion for

JUDGMENT - DECLARATORY

Upon the foregoing documents, plaintiff's motion for a declaratory judgment on default is granted as to Valinda Gillard, Almatcare Medical Supply Inc., Barnert Surgical Center, LLC, Barry Hughes, PA, Blue Bell Acupuncture, P.C., Citimedical I, PLLC, CVS Rx Inc. d/b/a Express Pharmacy, David Fleiss, MD, Epic Pain Management & Anesthesia Consultants LLC, Harlem Medical Associates P.C., CTO Management LLC d/b/a Health East Ambulatory Surgical Center, John Palemire, DC, Lenox Hill Radiology and Medical Imaging Associates, P.C., Lida's Medical Supply Inc., Malaga Medical P.C., Mandit Physical Therapy, P.C., Morris Bellifemine, MD, Northeast Anesthesia and Pain Management, Park West Surgical Group, LLC d/b/a Park West Surgical Group, LLC d/b/a Park West Medical Group, and Spine Care of NJ, PC only.

In September 2018, plaintiff, American Transit Insurance Company, commenced this action against defendants Valinda Gillard ("claimant-defendant"), Almatcare Medical Supply Inc., Barnert Surgical Center, LLC, Barry Hughes, PA, Blue Bell Acupuncture, P.C., Citimedical I, PLLC, CVS Rx Inc. d/b/a Express Pharmacy, David Fleiss, MD, Epic Pain Management & Anesthesia Consultants LLC, Harlem Medical Associates P.C., CTO Management LLC d/b/a Health East Ambulatory Surgical Center, NJMHC d/b/a Hudson Regional Hospital, John

Palemire, DC, Lenox Hill Radiology and Medical Imaging Associates, P.C., Lida's Medical Supply Inc., Malaga Medical P.C., Mandit Physical Therapy, P.C., Morris Bellifemine, MD, Northeast Anesthesia and Pain Management, NY Orthopedics, PC d/b/a/ Spine Care NYC, Park West Surgical Group, LLC d/b/a Park West Surgical Group, LLC d/b/a Park West Medical Group, Spine Care of NJ, PC, Spine Consult NJ PC (all, except Gillard, the "medical provider defendants").

On June 6, 2017, the claimant-defendant, a member GROUP KB786 Inc., suffered a motor vehicle accident. Claimant-defendant's insurance policy was active on June 6, 2017. This insurance policy included a no-fault endorsement, covering expenses arising from injuries allegedly sustained from the motor vehicle accident.

The claimant-defendant notified plaintiff of the motor vehicle accident under claim #1000093-05 and sought no-fault benefits from the medical provider defendants. The claimant-defendant, who possesses an independent right to collect no-fault benefits, "assigned her rights to collect no-fault benefits to various health care providers" including the medical provider defendants. The medical provider defendants submitted claims to plaintiff for services provided to the claimant-defendant that are allegedly compensable under the insurance policy. Pursuant to Article 51 of the Insurance Law, the medical provider defendants "have commenced or have the right to commence actions or arbitration against the Plaintiff" for allegedly overdue no-fault benefits.

On August 11, 2017, plaintiff mailed a request to the claimant-defendant and the claimant-defendant's attorney for the claimant-defendant to attend an Independent Medical Examination ("IME") on September 5, 2017 with Dr. Eric Roth at a New York, New York address. The appointment was rescheduled. On September 14, 2017, plaintiff mailed another request to the claimant-defendant and the claimant-defendant's attorney for the claimant-defendant to attend an IME on October 3, 2017 with Dr. Eric Roth at a New York, New York address. On October 3, 2017, the claimant-defendant "refused to appear" at the IME scheduled with Dr. Eric Roth. The claimant-defendant has failed to provide an IME "selected by or acceptable to" plaintiff. The claimant-defendant has allegedly failed to comply with plaintiff's policy and Regulations 11 NYCRR 65-1.1, which require an IME to "recover under the mandatory personal protection coverage." Pursuant to a 2003 opinion of the Insurance Department of the State of New York that stated, "any pending claim submitted for services rendered may be denied by the insurer due to the policy breach and resulting lack of coverage," plaintiff denied all coverage. Plaintiff notified defendants that plaintiff was denying coverage, by mailing NF-10 forms indicating that the claimant-defendant failed to comply with the policy by failing to submit an IME.

In early January 2019, defendants were served with the Summons and Verified Complaint.

On January 9, 2019, the medical provider defendants NJMHMC d/b/a/ Hudson Regional Hospital, NY Orthopedics, PC d/b/a Spine Care NYC, and Spine Consult NJ PC answered plaintiff's Complaint, "denying having knowledge or information sufficient to form a belief as to the allegation(s)" in the following paragraphs of plaintiff's Complaint: 1-25, 27, 29-30, 39-58. The answering medical provider defendants admitted the information in the following paragraphs of plaintiff's Complaint: 26, 28, 31 (to the extent that the claimant-defendant filed a claim for injuries), 32, 33 (to the extent that the claimant-defendant completed an application of

benefits form), 34, 35 (to the extent that the claimant-defendant assigned rights to collect no-fault benefits to the answering medical provider defendants), 36, 37 (to the extent that the answering medical provider defendants submitted claims to the plaintiff with an assignment of benefits from the claimant-defendant and alleging they rendered services compensable under plaintiff's insurance policy), and 38. The answering medical provider defendants put forth nineteen affirmative defenses.

In March 2019, pursuant to CPLR 3215(g), the claimant-defendant and the medical provider defendants were served with an additional copy of the Summons and Complaint via first class mail in an envelope labeled "Personal and Confidential."

On June 4, 2019, plaintiff and the medical provider defendants NJMHC d/b/a/ Hudson Regional Hospital, NY Orthopedics, PC d/b/a Spine Care NYC, and Spine Consult NJ PC executed a Stipulation of Discontinuance and Release.

On August 23, 2019, plaintiff moved for a default judgment declaring that claimant-defendant is not an eligible injured person entitled to no-fault benefits, that plaintiff is not obligated to pay the subject claims, and that plaintiff is not obligated to pay future claims for claimant-defendant.

Pursuant to CPLR 3215(f), plaintiff has established that plaintiff is entitled to a default judgment by submitting the following: the November 15, 2017 Affidavit of Ronni McLaughlin, an employee in the office of National Claim Evaluation who served claimant-defendant with notices for IME with Dr. Eric Roth via mail on August 11, 2017 and on October 3, 2017; the August 15, 2018 Affidavit of Dr. Eric Roth, who was scheduled to conduct the IME of claimant-defendant; the July 18, 2019 Affidavit of Merit by Cheryl Glaze, who is employed as a No-Fault Claims Supervisor for plaintiff since 1990; the Affidavit of Luis Campbell, the plaintiff's Mail Room Supervisor in Brooklyn who oversees the mailing of Denial of Claim Forms, Explanation of Benefits, and requests for Additional Service; a copy of plaintiff's insurance policy; a police accident report, dated June 6, 2017; three letters scheduling an IME with Dr. Eric Roth, mailed to claimant-defendant at a New York, New York address; plaintiff's denial of claim form; the affidavits of service upon claimant-defendant and medical provider defendants, dated on or about January 2019; the affidavit of additional service, dated March 4, 2019; the Request for Judicial Intervention, dated July 19, 2019; the Affidavit of Service of the Notice of Motion and Affirmation in Support, dated July 23, 2019.

To date, the claimant-defendant and all medical provider defendants except for NJMHC d/b/a Hudson Regional Hospital, NY Orthopedics, PC d/b/a Spine Care NYC, and Spine Consult NJ PC, have failed to appear in this action, answer or otherwise move against the complaint, and their time to do so has expired. Consequently, pursuant to CPLR 3215(a), plaintiff is entitled to a default judgment against the claimant-defendant and all medical provider defendants except for NJMHC d/b/a Hudson Regional Hospital, NY Orthopedics, PC d/b/a Spine Care NYC, and Spine Consult NJ PC. Additionally, pursuant to CPLR 3001, plaintiff is entitled to a declaratory judgment that the claimant-defendant "breached a policy condition" by not providing an IME. Consequently, the claimant-defendant and all medical provider defendants except for NJMHC d/b/a Hudson Regional Hospital, NY Orthopedics, PC d/b/a Spine Care NYC, and Spine Consult

NJ PC "are not entitled to no-fault coverage or first-party coverage" for injuries allegedly sustained during the motor vehicle accident on June 6, 2017.

Conclusion

Motion granted in part. The Clerk is hereby directed to enter a declaratory judgment on default in favor of plaintiff, American Transit Insurance Co., and against the claimant-defendant, Valinda Gillard, and the following medical provider defendants: Almatcare Medical Supply Inc., Barnert Surgical Center, LLC, Barry Hughes, PA, Blue Bell Acupuncture, P.C., Citimedical I, PLLC, CVS Rx Inc. d/b/a Express Pharmacy, David Fleiss, MD, Epic Pain Management & Anesthesia Consultants LLC, Harlem Medical Associates P.C., CTO Management LLC d/b/a Health East Ambulatory Surgical Center, John Palemire, DC, Lenox Hill Radiology and Medical Imaging Associates, P.C., Lida's Medical Supply Inc., Malaga Medical P.C., Mandit Physical Therapy, P.C., Morris Bellifemine, MD, Northeast Anesthesia and Pain Management, Park West Surgical Group, LLC d/b/a Park West Surgical Group, LLC d/b/a Park West Medical Group, and Spine Care of NJ, PC only. The remaining defendants are not entitled to no-fault benefits from plaintiff arising out of the subject accident.

10/18/2019
DATE

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CASE DISPOSED

GRANTED

☐

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN



ARTHUR F. ENGORON, J.S.C.

HON. ARTHUR F. ENGORON

NON FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

REFERENCE