

American Tr. Ins. Co. v Brookdale Hosp. Med. Ctr.

2019 NY Slip Op 33491(U)

November 27, 2019

Supreme Court, New York County

Docket Number: 162089/2018

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

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. 162089/2018

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 10/21/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE BROOKDALE HOSPITAL MEDICAL CENTER,
CLASSIC MEDICAL DIAGNOSTIC REHAB P.C., DIRECT
PT CARE P.C., GORDON C. DAVIS, MEDICAL, P.C., KZ
PHARMACY INC, LONGEVITY MEDICAL SUPPLY, INC.,
NEW MILLENNIUM MEDICAL IMAGING, P.C., SEN LONG
ACUPUNCTURE CARE P.C., ST. MARY FAMILY
PHYSICAL THERAPY, P.C., YAN Z CHIROPRACTIC P.C.,

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, 18, 19, 20, 29, 30

were read on this motion for JUDGMENT - DECLARATORY

Upon the foregoing documents, it is hereby ordered that plaintiff's request for a declaratory
judgment on default is granted in part and denied in part, and plaintiff's request for summary
judgment is denied without prejudice.

On November 28, 2018, plaintiff, American Transit Insurance Company, commenced this action
against The Brookdale Hospital Medical Center; Classic Medical Diagnostic Rehab P.C.; Direct
PT Care P.C.; Gordon C. Davis, Medical, P.C.; KZ Pharmacy Inc.; Longevity Medical Supply,
Inc.; New Millennium Medical Imaging, P.C.; Sen Long Acupuncture Care P.C.; St. Mary
Family Physical Therapy, P.C.; and Yan Z Chiropractic P.C. for a judgment, declaring that
defendants have no right under the no-fault regulations and that plaintiff owes no duty to
defendants to pay no-fault claims arising out of a March 29, 2018 accident, because [1] non-
party claimant's alleged injuries did not arise out of the subject accident, [2] non-party claimant
violated the no-fault regulations by misrepresenting the facts and circumstances of the subject
accident, and [3] the insurance policy does not cover the subject accident, "as it was the result of
deliberate, staged, and intentional acts committed by" Michael Wright, a non-party claimant
("non-party claimant").

Background

On March 29, 2018, "the insured" Teresa Limo was allegedly injured in a motor vehicle
accident. Non-party claimant, a cyclist at the time of the subject motor vehicle accident, made a
claim to plaintiff as an eligible injured person. Non-party claimant sought no-fault services and

provisions from defendants for injuries allegedly arising out of the subject accident, and he assigned his rights to collect no-fault benefits to defendants, among other health care providers; non-party claimant also had an independent right to collect no-fault benefits. Non-party claimant also received medical treatment for injuries that did not arise out of the subject accident. Defendants submitted claims to plaintiff for medical services allegedly provided to non-party claimant under the insurance policy. Also, defendants have (or have the right to have) commenced actions or arbitrations against plaintiff.

Plaintiff denies that this accident constitutes a covered incident because (1) plaintiff determined that non-party claimant's injuries were not causally related to the alleged incident, which plaintiff believes was a staged event, (2) the insured vehicle was parked outside one of the passenger's residence at the time cited in the driver's sworn statement, (3) the driver stated that there was no impact and there were no visible injuries to non-party claimant or the car; the driver reported the incident as fraud to the police following the accident, (4) the time and location (at night, in winter) of the subject accident would decrease the number of potential witnesses, (5) in the vast majority of staged accidents, the impact occurs at either the pick-up or drop-off location; likewise, the subject accident allegedly occurred while the cab was picking up passengers, (6) the vague testimonies of Dominique Washington and non-party claimant intimate that the accident was staged, (7) non-party claimant testified that the subject accident did not cause bleeding, bruising cuts or lacerations; he was released two to three hours after being admitted to the hospital, and (8) an Insurance Services Office ClaimSearch ("ISO ClaimSearch") revealed that passenger Jacquan Casseus has a history of motor vehicle accidents; in one such incident, the National Insurance Crime Bureau issued a ForeWARN notice and in another incident, he was a witness to an accident with a ForeWARN notice. Plaintiff "maintains a founded belief that non-party claimant's alleged injuries and subsequent treatment were not related to the underlying accident, and that none of the medical treatment submitted by the medical provider defendants was medically necessary."

On May 24, 2019, defendant KZ Pharmacy, Inc. ("KZ Pharmacy") answered with various denials, fifteen Affirmative Defenses, and a demand that the Court dismiss the Complaint.

On July 2, 2019, defendant Longevity Medical Supply, Inc. ("Longevity") answered with various denials, admissions, and forty Affirmative Defenses.

Between March 8 and July 27, 2019, pursuant to BCL 306, plaintiff served defendants with the Summons and Complaint.

On September 17, 2019, plaintiff moved [1] pursuant to CPLR 3215(a), for a default judgment as against the non-answering defendants only; [2] pursuant to CPLR 3212, for summary judgment against answering defendants KZ Pharmacy, Inc. and Longevity Supply, Inc.; [3] for a declaratory judgment that non-party claimant is not entitled to no-fault benefits under the subject insurance policy; [4] for a declaratory judgment that plaintiff is not obligated to pay claims from defendants as non-party claimant's assignees; [5] for a declaratory judgment that plaintiff is not required to honor future claims arising out of the subject incident. On September 23, 2019, plaintiff served defendants with the Notice of Motion and Affirmation in Support via first class mail.

On October 17, 2019, Oleg Rybak, Esq. opposed plaintiff's CPLR 3212 motion for summary judgment as against Longevity and asked that this Court deny the instant motion in its entirety. This Affirmation in Opposition argues that plaintiff allegedly failed to establish *prima facie* entitlement to summary judgment. Rybak also argues that in his September 17, 2019 Affidavit, Timothy F. McNellis, a Special Investigations Unit (SIU) investigator with plaintiff, "seems to base his opinion based on second-hand records and general knowledge, none of which establishes that this accident was anything other than a garden variety collision." The Affirmation also claims that, pursuant to CPLR 3101(a), plaintiff's motion for summary judgment is premature, as it failed to provide Longevity with adequate opportunity for discovery.

In an October 21, 2019 Stipulation of Discontinuance and Release, plaintiff and defendant KZ Pharmacy Inc. (the "releasing defendant") agreed, simply put, that [1] releasing defendant would discontinue claims against plaintiff for medical services allegedly provided to non-party claimant for injuries arising out of the subject motor vehicle accident and [2] the action would be discontinued as against releasing defendant only.

In a November 20, 2019 Stipulation, plaintiff and defendant Longevity Medical Supply, Inc. agreed, simply put, that [1] plaintiff would withdraw the instant motion against said defendant and [2] defendant would withdraw its affirmation in opposition.

Discussion

Pursuant to CPLR 3001, 3212, and 3215(f), plaintiff has established that it is entitled to a declaratory judgment on default by submitting the following: the denial of claim form; the July 17, 2018 Examination Under Oath transcript of Dominique Washington; the July 17, 2018 Examination Under Oath transcript of non-party claimant; the ISO ClaimSearch; the September 17, 2019 Affidavit in Support of Megan Harris, Esq.; the September 17, 2019 Affidavit of Merit of Cheryl Glaze, a No-Fault Claims Supervisor for plaintiff; the September 17, 2019 Affidavit of Timothy F. McNellis ("Mr. McNellis"), a Special Investigations Unit (SIU) investigator with plaintiff.

To date, The Brookdale Hospital Medical Center; Classic Medical Diagnostic Rehab P.C.; Direct PT Care P.C.; Gordon C. Davis, Medical, P.C.; New Millennium Medical Imaging, P.C.; Sen Long Acupuncture Care P.C.; St. Mary Family Physical Therapy, P.C.; and Yan Z Chiropractic P.C. 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 declaratory judgment on default as against said defendants.

CPLR 3212 requires that an Affidavit in Support of a motion for summary judgment be offered by "a person knowledgeable of the facts." The Affirmation in Opposition alleges that "Mr. McNellis seems to base his opinion based on second-hand records and general knowledge, none of which establishes that this accident was anything other than a garden variety collision." In the subject Affidavit, however, McNellis did specify both (1) "I have personal knowledge of the facts and circumstances involving this matter" and (2) "I have personal knowledge of claimant's Examination Under Oath ("EUO") because I was the one who conducted the examination." This Court holds that these statements qualify Mr. McNellis as "a person knowledgeable of the facts,"

in accordance with CPLR 3212. The Affirmation in Opposition, however, pursuant to CPLR 3212 (c) "show[s] facts sufficient to require a trial of any issue of fact." It specifically states, "moreover, the issue of outstanding discovery raises an issue of fact in and of itself requiring the denial of plaintiff's motion." WPP Group USA v. Interpublic Group of Cos., 228 AD2d 296 (1st Dep't, 1996). Consequently, this Court denies plaintiff's motion for summary judgment against Longevity Supply, Inc., as Longevity has demonstrated "facts sufficient to require a trial of any issue of fact."

Conclusion

Thus, pursuant to CPLR 3215(a), plaintiff's request for a declaratory judgment on default is granted as against The Brookdale Hospital Medical Center; Classic Medical Diagnostic Rehab P.C.; Direct PT Care P.C.; Gordon C. Davis, Medical, P.C.; New Millennium Medical Imaging, P.C.; Sen Long Acupuncture Care P.C.; St. Mary Family Physical Therapy, P.C.; and Yan Z Chiropractic P.C. Plaintiff's request for summary judgment is denied without prejudice. The Clerk is hereby directed to enter judgment accordingly.

Plaintiff, American Transit Insurance Company, and answering defendant Longevity Medical Supply, Inc. are hereby directed to appear for a preliminary conference on Tuesday, January 7, 2020 at 10:00 AM, 60 Centre Street, Room 418, New York, NY.

11/27/2019
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER

OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	FIDUCIARY APPOINTMENT
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REFERENCE

CHECK IF APPROPRIATE: