

American Tr. Ins. Co. v Camille
2019 NY Slip Op 33560(U)
December 3, 2019
Supreme Court, New York County
Docket Number: 152879/2018
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

INDEX NO. 152879/2018

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

GAMALIEL CAMILLE, AB MEDICAL SUPPLY INC, ACH CHIROPRACTIC PC, ALEXIOS APAZIDIS, M.D. P.C., ALL CITY FAMILY HEALTHCARE CENTER, INC., ATLAS RADIOLOGY P.C., AVISHAI T. NEUMAN MD, PLLC, THE BROOKDALE HOSPITAL MEDICAL CENTER d/b/a BROOKDALE HOSPITAL, DNA PHARMACY INC., ENERGY CHIROPRACTIC PC, EXCELL CLINICAL LAB INC., FJL MEDICAL SERVICES P.C., HEEL TO TOE FOOT CENTER LLC, IHOME REHAB LLC, IMPULSE IMAGING P.C., JFL MEDICAL CARE PC, JULES FRANCOIS PARI SIEN, KINGS REHAB ACUPUNCTURE PC, MARIA SHIELA MASIGLA PT, PROTECHMED INC., and QUALITY CUSTOM MEDICAL SUPPLY, INC.,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 28

were read on this motion to/for DEFAULT JUDGMENT

Plaintiff American Transit Insurance Company (American Transit) moves for (i) a default judgment against individual defendant Gamaliel Camille (Camille) and provider defendants All City Family Healthcare Center Inc. (All City), Atlas Radiology P.C. (Atlas), Avishai T. Neuman MD, PLLC (Neuman), The Brookdale Hospital Medical Center (Brookdale Hospital), DNA Pharmacy Inc. (DNA), Excell Clinical Lab Inc. (Excell), Heel to Toe Foot Center LLC (Heel to Toe), IHome Rehab LLC (IHome), Impulse Imaging P.C. (Impulse), and Quality Medical Supply, Inc. (Quality)

(collectively, Provider Defendants); (ii) summary judgment, pursuant to CPLR 3212, against defendant Alexios Apazidis, MD, P.C. (Apazidis); and (iii) summary judgment on its declaratory judgment complaint, pursuant to CPLR 3212, declaring that Camille is not an eligible insured person entitled to no-faults benefits under American Transit policy number CAP612453 (the policy), claim number 1004279-03, and that American Transit is not obligated to provide, honor, pay or reimburse any claims submitted by the Provider Defendants, as assignees of Camille, arising from a motor vehicle accident on August 17, 2017, because Camille is not an “eligible injured person” as defined by the policy and the New York State Insurance Regulation 68 (11 NYCRR 65-3.5). There is no opposition to the motion. After a review of the papers presented, as well as the relevant statutes and caselaw, the motion is denied with leave to renew upon proper papers.

FACTUAL AND PROCEDURAL BACKGROUND:

In this action, American Transit seeks a declaration that defendant Camille violated the terms of the policy insuring the vehicle in which he was a passenger by failing to appear for duly scheduled independent medical examinations (IMEs), thereby breaching a condition precedent to coverage. It also seeks a declaration that it properly denied all no-fault coverage due to that violation of the terms and conditions of the Policy, and that there is no coverage for any first party benefits to the Provider Defendants arising out of the August 17, 2017 accident.

This action has been discontinued by stipulation against Provider Defendants All City and Excell (NYSCEF Doc. # 31), and defendant Apazidis (NYSCEF Doc. # 30).

Eight of the Provider Defendants, Atlas, Neuman, Brookdale Hospital, DNA, Heel to Toe, IHome, Impulse, and Quality (Defaulting Provider Defendants) remain in default.

American Transit issued the Policy to its insured non-party Avenue J Express Inc. (NYSCEF Doc. # 13). The Policy contained a no-fault endorsement which provided coverage to an insured or an eligible injured person in the amount of \$50,000 for necessary expenses resulting from a motor vehicle accident, and was in effect on the date of the accident on August 17, 2017 (NYSCEF Doc. # 1, complaint ¶¶ 26-27). Under the applicable no-fault statute, insurers are permitted to request an IME, and compliance therewith is a condition precedent to coverage (11 NYCRR 65-1.1; *see* NYSCEF Doc. # 1, ¶ 28). Under the Policy and under New York Insurance Regulations, an “eligible injured person shall submit to an [IME] by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require” (11 NYCRR 65-1.1).

On August 17, 2017, Camille was a passenger in a vehicle owned by Avenue J Express Inc. which was involved in a motor vehicle accident (NYSCEF Doc. # 1, ¶ 29). Camille was injured and made a claim to American Transit as a purported eligible injured person under the Policy (*id.*). On August 24, 2017, Camille gave notice of the accident to American Transit by sending a letter of representation from his attorney, The Rybak Firm (NYSCEF Doc. # 14). On September 13, 2017, Camille completed an application for benefits (NF-2) claiming benefits under the Policy, and listing his home address as 9717 Farragut Road, Brooklyn, NY 11236 (NYSCEF Doc. # 1, ¶¶ 30-31). Camille assigned his rights to collect no-fault benefits to various health providers, including the Defaulting

Provider Defendants. (*id.*, ¶¶ 33-34). The Defaulting Provider Defendants have submitted claims to American Transit with an assignment of benefits from Camille, claiming they rendered services compensable under the terms of the Policy (*id.*, ¶ 35).

On September 26, 2017, Independent Physical Exam Referrals, Inc. (IPER), on behalf of American Transit, sent to Camille, at his home address of 9717 Farragut Rd, Brooklyn, NY, and to The Rybak Firm, at its business address, a letter notifying Camille of an IME scheduled on November 2, 2017, at 10:15 a.m., with Dr. Francisco H. Santiago, at 3165 Nostrand Avenue, Suite LA, Brooklyn, NY (NYSCEF Doc. # 15). In the letter, IPER referred to the No-Fault Insurance Law as requiring the examination, and indicated that the failure to appear for the examination may result in the denial of benefits.

On November 2, 2017, Camille failed to appear for the IME (NYSCEF Doc. # 1, ¶ 39).

By letter dated November 3, 2017, IPER, on behalf of American Transit, notified Camille that he was scheduled for an IME on December 21, 2017, at 10:15 a.m., with Dr. Francisco H. Santiago, at 3165 Nostrand Avenue, Suite LA, Brooklyn, NY (NYSCEF Doc. # 15). Once again, the letter was mailed to Camille and his attorney (NYSCEF Doc. # 1, ¶ 40).

On December 21, 2017, Camille again failed to appear for an IME (*id.*, ¶ 41).

On February 28, 2018, American Transit issued a denial of claim form (NF-10) to Camille, indicating that the reason for the denial was his failure to appear for the two scheduled IMEs, and based on an examination under oath conducted on February 14,

2018, and on American Transit's investigation, reflecting that Camille's injuries were not causally related to the accident (NYSCEF Doc. # 16).

American Transit moves for a default judgment, pursuant to CPLR 3215, against the Defaulting Provider Defendants and against defendant Camille due to their failure to answer or otherwise appear in this matter. In support of the motion, it submits affidavits of service for each of these Provider Defendants, indicating service of the summons and complaint by service on the New York State Secretary of State, with follow up mailings to the Defaulting Provider Defendants' addresses (NYSCEF Docs. # 18, 19). It also submits an affidavit of personal service upon Camille (NYSCEF Doc. # 5). Further, American Transit submits an affidavit of merit from a claim representative, along with affidavits from Dr. Santiago and Lynn Hershman of IPER (NYSCEF Doc. # 12).

American Transit seeks summary judgment against Camille on its declaratory judgment claims, asserting that it is entitled to such relief because of Camille's failure to appear for the IMEs. It cites to the Policy language and New York Insurance Regulations, which provide that the eligible injured person must submit to IMEs when and as often as the insurer requires, and that this requirement is a condition precedent to coverage under the Policy.

LEGAL CONCLUSIONS:

American Transit's motion for default judgment and for summary judgment is denied with leave to renew upon proper papers.

CPLR 3215(a) provides, in relevant part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” On a default motion, the movant must demonstrate proof of service of the complaint, the defaulting party’s failure to answer or appear, as well as proof of the underlying facts supporting the claim (*see Katz v Blau*, 173 AD3d 987, 988 [2d Dept 2019]).

Here, American Transit has established valid proof of service of the summons and complaint on the Defaulting Provider Defendants and on individual defendant Camille (NYSCEF Doc. #s 18, 19). It submitted affidavits demonstrating that the Defaulting Provider Defendants were served through the Secretary of State as corporations or limited liability companies. It also submitted an affidavit demonstrating that an additional summons and complaint were served by first class mail on those defendants as well as Camille at their last known addresses at least 20 days before seeking this default judgment (*id.*). American Transit, through the affirmation of its attorney, Ariana A. Pabalan, Esq., has established that defendant Camille and the Defaulting Provider Defendants have failed to answer or otherwise respond to the complaint (NYSCEF Doc. # 11, ¶¶ 26, 27, 29-32).

Default judgments are rarely granted on declaratory claims without an inquiry as to the merits (*see Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 [1st Dept 1978]; *K’S Intl. Polybags Mfg. Ltd. v M.T. Packaging Inc.*, 2019 NY Slip Op 30333[U], * 2 [Sup Ct, NY County 2019]). Rather, the plaintiff must establish prima facie entitlement to the declaratory relief (*Mount Vernon Fire Ins. Co. v NIBA Constr.*, 195 AD2d 425, 427 [1st

Dept 1993] [Sullivan J.P., concurring]). Here, American Transit has failed to establish its prima facie entitlement to the declaratory relief sought, and the motion is thus denied with leave to renew upon proper papers.

Under the insurance regulations, IMEs are part of an insurer's entitlement to "additional verification" following its receipt of a provider's statutory claim forms (11 NYCRR 65-3.5[d]). The insurer does not need to pay or deny a claim until the demanded verification is provided (11 NYCRR 65-3.8[a][1], [b][3]; *Montefiore Med. Ctr. v New York Cent. Mut. Fire Ins. Co.*, 9 AD3d 354, 355 [2d Dept 2004]). Once such verification is received, the insurer shall either pay or deny the claim in whole or in part within 30 days of receipt (*Montefiore Med. Ctr. v New York Cent. Mut. Fire Ins. Co.*, 9 AD3d at 355).

In order to make a prima facie showing on summary judgment, an insurer must submit proof of its request for an IME in accordance with the procedures and time frames set forth in the no-fault regulations (11 NYCRR § 65-3.5), and that the defendant assignor, the injured person claiming benefits, did not appear (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 842 [1st Dept 2015]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). Where the insurer requests an IME after receiving a claim, the regulations require that such IME be scheduled within 30 calendar days of receipt of the claim or receipt of the prescribed verification form from the injured person or the service provider (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d at 842). If, however, the IME is demanded pre-claim, that is, prior to the date the injured party received the service at issue, and

prior to the insurer's receipt of a claim for that service, the "verification procedures governing IMEs requested after the receipt of a claim (11 NYCRR 65-3.5, 3.6) do not apply" (*New York Cent. Mut. Fire Ins. Co. v Bronx Chiropractic Servs., P.C.*, 2014 NY Slip Op 33210[U], * 5 [Sup Ct, NY County 2014]; see *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 469 [1st Dept 2016] [insurer may request examination under oath prior to receipt of claim form and the notification requirements for verification requests under 11 NYCRR 65-3.5, 3.6 do not apply]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 7 Misc 3d 18, 20-21 [App Term, 2d Dept 2004], *affd* 35 AD3d 720 [2d Dept 2006]; *Alfa Med. Supplies, Inc. v Praetorian Ins. Co.*, 50 Misc 3d 126[A] [App Term, 1st Dept 2015] [pre-claim IME]).

Here, American Transit fails to submit evidence, in affidavit or any other form, indicating whether the IME was demanded pre-claim or post-claim. In fact, it fails to submit any bills or service claim forms from Camille or any of the Defaulting Provider Defendants (see *Sound Shore Med. Ctr. v New York Cent. Mut. Fire Ins. Co.*, 106 AD3d 157, 165 [2d Dept 2013]). The only form it submits is Camille's NF-2 application for benefits, dated and stamped received by American Transit on September 13, 2017, which indicates that he was injured and was treated as an outpatient at Brookdale Hospital, but which does not have any bills or claims for provider services attached (NYSCEF Doc. # 14). If American Transit was requesting Camille's IME pre-claim then there is no need to consider the time periods set forth in 11 NYCRR 65-3.5(d), and Camille's failure to appear for the IMEs would constitute a breach of a condition precedent vitiating coverage (*Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d at 470). If, however, American Transit

requested the IME after its receipt of any completed verification forms from the Defaulting Provider Defendants, or if Camille's NF-2 was a verification form or claim, then American Transit failed to schedule the first IME within the 30-day calendar requirement in 11 NYCRR § 65-3.5 (d) (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d at 841 [Insurance Department Regulations require a "30-calendar-day time frame for the holding of IMEs"]; *American Tr. Ins. Co. v Vance*, 131 AD3d 849, 850 [1st Dept 2015]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d at 560; *Bronx Acupuncture Therapy, P.C. v Hereford Ins. Co.*, 53 Misc 3d 137 [A], * 1 [App Term, 1st Dept 2016]; *W.H.O. Acupuncture, P.C. v Travelers Home & Mar. Ins. Co.*, 36 Misc 3d 152[A], * 2 [App Term, 2d Dept 2012]).


Camille's first IME was scheduled to be held on November 2, 2017, which is more than 30 calendar days from September 13, 2017 (11 NYCRR § 65-3.5[d]; *see American Tr. Ins. Co. v Clark*, 131 AD3d 840, 840-841 [1st Dept 2015]). Since American Transit submits neither any documentation supporting its argument that it requested the IMEs of Camille within the time frame set forth in 11 NYCRR 65-3.5(d), nor demonstrates that this was a pre-claim IME, it cannot be granted a default judgment or summary judgment against the Defaulting Provider Defendants and Camille on these papers (*see Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 617-618 [1st Dept 2018]; *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff American Transit Insurance Company is denied in all respects, with leave to renew upon proper papers within 30 days after entry of this order, upon penalty of dismissal; and it is further

ORDERED that this constitutes the decision and order of this Court.

12/3/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE