

**American Tr. Ins. Co. v Cespedes**

2019 NY Slip Op 33730(U)

December 24, 2019

Supreme Court, New York County

Docket Number: 161499/2017

Judge: Joel M. Cohen

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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. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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INDEX NO. 161499/2017

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 02/28/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

FERNANDO CESPEDES, COLUMBUS IMAGING CENTER, CONCEPT MEDICAL SUPPLY, INC, DR. IBRAHIM FATIHA, CHIROPRACTIC, P.C., MEDICAL MISSION HEALTH CARE P.C., YY BALANCE ACUPUNCTURE HEALTH CARE P.C.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27

were read on this motion for DECLARATORY JUDGMENT

Upon the foregoing documents

Plaintiff American Transit Insurance Company ("Plaintiff") seeks a default judgment in its declaratory judgment action against Defendant Columbus Imaging Center. Plaintiff also seeks a declaratory judgment against Fernando Cespedes and summary judgment against the remaining defendants, Concept Medical Supply, Inc, Dr. Ibrahim Fatiha, Chiropractic, P.C., Medical Mission Health Care P.C., and YV Balance Acupuncture Health Care P.C. ("Answering Defendants")<sup>1</sup>. The Answering Defendants oppose this motion. For the reasons described below, Plaintiff's motion is granted in part and denied in part.

According to the Complaint, on November 11, 2016, Defendant Fernando Cespedes ("Cespedes") was a passenger in a motor vehicle accident which involved a vehicle owned by non-party American United Transportation and insured by Plaintiff. Defendant Cespedes

<sup>1</sup> Collectively, the Defaulting Defendant and Answering Defendants are referred to as the Providers.

sought to collect No-Fault benefits, as assigned by Plaintiff, from the Providers by way of medical treatment. In exchange for the treatment, Cespedes issued first-party assignments of his No-Fault insurance benefits, as issued by Plaintiff, to the Providers. The Providers have, in turn, submitted claims to Plaintiff alleging they rendered services to Defendant Cespedes compensable under the terms of the policy. (NYSCEF 1).

Plaintiff now seeks a declaration that it is not liable to pay No-Fault benefits to the Defendants due to Cespedes' alleged violations of applicable insurance policy terms. Specifically, Plaintiff complains that Cespedes' failure to attend an Independent Medical Examination (IME) constitutes a breach of the applicable insurance policy issued by Plaintiff. According to the Complaint, Cespedes and his counsel were sent notices requesting appearance at an IME before Dr. Glenn Berman on three occasions, March 8, 2017 (scheduling an examination for March 30, 2017), March 31, 2017 (re-scheduling the examination for April 13, 2017) and on April 14, 2017 (scheduling an examination for April 27, 2017), yet Cespedes failed to appear. Plaintiff contends that because Cespedes is in breach of the insurance agreement, and therefore is ineligible for No-Fault payments, the medical Providers (as assignees) are unable to receive payment under the same policy. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1<sup>st</sup> Dep't 2011).

Before the Court can address Plaintiff's claims, the Court first must ensure it has jurisdiction over all defendants. *Cuccia v H.M. Weiner and Assoc.*, 234 A.D.2d 26, 26 (1st Dep't 1996) (The failure to serve a summons with the complaint in this matter is a jurisdictional defect requiring dismissal of the action); *see also*, CPLR §304. Here, there is no Affidavit of Service on NYSCEF indicating that Defendant Cespedes was served with the Complaint. According to the two affidavits of service that are on NYSCEF, service was attempted on Mr. Cespedes on

two different occasions, but was never effectuated. As such, this Court does not have jurisdiction and this action must be dismissed as against him.

Further, since the relief sought against the Answering Defendants is necessarily predicated on a finding that Mr. Cespedes is not eligible for No Fault benefits and given that Mr. Cespedes has not been served, such relief cannot be provided to Plaintiff. Therefore, the portion of Plaintiff's motion which seeks summary judgment against the Answering Defendants is denied without prejudice.

#### *Default Judgment*

The unopposed portion of Plaintiff's motion which seeks a default judgment as against Defendant Columbus Imaging is Granted. As evidenced by the Affidavits of Service, Plaintiff personally served Columbus Imaging with the Summons and Complaint pursuant to CPLR §311(a). (NYSCEF 5).

Having failed to appear after being duly served, the Defendant Columbus Imaging has defaulted in this action and, under CPLR §3215, Plaintiff is entitled to a default judgment entitling it to the declaratory relief sought in the Complaint. *See Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 A.D.3d 617 (1st Dep't 2018) (properly awarding declaratory judgment by default upon Plaintiff's showing proof of facts constituting the claims and Defendant's failure to appear in action or oppose motion).

Defendant Columbus Imaging may seek a vacatur of the instant default judgment if they can satisfy the requirements of CPLR §5015, CPLR §317 or any other applicable laws.

Therefore, it is:

**ORDERED** Plaintiff's Motion for a Default Judgment against Defendant Columbus

Imaging is Granted; it is further

**ORDERED** that Plaintiff's Motion for a Declaratory Judgment against Defendant

Fernando Cespedes is Denied without prejudice; it is further

**ORDERED** that Plaintiff's Motion for Summary Judgment against Concept Medical

Supply, Inc, Dr. Ibrahim Fatiha, Chiropractic, P.C., Medical Mission Health Care P.C., and YV

Balance Acupuncture Health Care P.C is Denied without prejudice; and it is further

**ORDERED** that all parties who have been served and not defaulted shall appear for a

Preliminary Conference on January 28, 2020 at 11:00 a.m.

This constitutes the Decision and Order of the Court.

12/24/2019

DATE



JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: