

American Tr. Ins. Co. v Ferguson

2020 NY Slip Op 30585(U)

February 25, 2020

Supreme Court, New York County

Docket Number: 160128/2018

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 160128/2018

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 01/29/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

TANNISHA FERGUSON, BRONX CHIROPRACTIC
REHABILITATION P.C., BS KINGS COUNTY MEDICAL
P.C., DAMADIAN MRI IN CANARSIE, P.C., GALMAR
DIAGNOSTIC MEDICAL, P.C., HAMZA PHYSICAL
THERAPY PLLC, HANK ROSS MEDICAL
P.C., INTERVENTIONAL PAIN CONSULTANTS OF NORTH
JERSEY LLC, JULES PARISIEN, JULY PT, P.C., LEOMAX
SUPPLIES INC., LONGEVITY MEDICAL SUPPLY,
INC., MANHATTAN'S HANDS OF HOPE P.T., P.C., MASTER
CHENG ACUPUNCTURE P.C., MMA PHYSICAL THERAPY,
P.C., RALPH INNOVATIVE MEDICAL P.C., RKD RX CORP.,
SHASHEK CHIROPRACTIC P.C., SPINE CARE OF NJ P.C.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30

were read on this motion to/for

JUDGMENT - DECLARATORY

In this action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Tannisha Ferguson (the individual defendant) BS Kings County Medical PC, Galmar Diagnostic Medical PC, Hamza Physical Therapy PLLC, Hank Ross Medical PC, Interventional Pain Consultants of North Jersey LLC, Master Cheng Acupuncture PC, Ralph Innovative Medical PC, RKD Rx Corp., Shashek Chiropractic PC, and Spine Care of NJ PC (the non-answering health-care defendants), declaring that it is not obligated to pay no-fault benefits to the individual defendant or the health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on January 21, 2018 on the grounds that the eligible injured party defendant failed to appear for duly scheduled Examinations Under Oath (EUOs).

The plaintiff also moved for summary judgment seeking the same relief as against answering defendants Bronx Chiropractic Rehabilitation PC, Jules Francois Parisien MD, July PT PC, Longevity Medical Supply, Inc., Manhattan's Hands of Hope PT PC, and MMA Physical Therapy. However, the court notes that by a Stipulation of Discontinuance dated, November 11, 2019, the plaintiff discontinued the action as against defendants July PT PC, Manhattan's Hands of Hope PT PC, and MMA Physical Therapy PC. Furthermore, by a stipulation dated November 20, 2019, the plaintiff withdrew its motion as against defendants Bronx Chiropractic Rehabilitation PC, Francois Parisien MD, and Longevity Medical Supply, Inc. Therefore, the branch of the plaintiff's motion seeking summary judgment against the answering defendants is deemed withdrawn. The remainder of the motion is granted as modified.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, proof of the facts constituting the claim. "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that she was injured in a motor vehicle accident on January 21, 2018, and that she thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment under claim number 1019222-03, as assignees of the individual defendant, for no-fault benefits under insurance policy number

B616685. See Insurance Law 5106(a); 11 NYCRR 65-1.1. In support of its motion, plaintiff submits, *inter alia*, the NF-2 application form for no-fault benefits, marked received on February 21, 2018, and the scheduling letter, proof of mailing, and proof of no-show for three EUOs on March 29, 2018, April 10, 2018, and May 24, 2018 the first of which was mailed on March 5, 2018, and a general denial form dated June 4, 2018. These submissions demonstrate that the initial notice for an examination under oath (EUO) on March 5, 2018 was timely mailed to the individual defendant within 15 business days of its receipt of the NF-2 form, as required by 11 NYCRR 65-3.5(b), and that the individual defendant failed to appear for the duly scheduled EUOs. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1st Dept. 2015). The plaintiff consequently provided *prima facie* evidence that, by failing to appear, the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., *supra*; Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014).

Accordingly, it is,

ORDERED that, upon the parties' Stipulation of Discontinuance dated November 11, 2019, attached, the action is discontinued and the complaint is dismissed, with prejudice and without costs, as to defendants July PT PC, Manhattan's Hands of Hope PT PC, and MMA Physical Therapy PC, and the branch of the plaintiff's instant motion for summary judgment is deemed withdrawn as against them; and it is further,

ORDERED that, upon the parties' stipulation dated November 20, 2019, attached, the plaintiff's instant motion for summary judgment is withdrawn as against Bronx Chiropractic Rehabilitation PC, Francois Parisien MD, and Longevity Medical Supply, Inc.; and it is further,

ORDERED that the branch of the plaintiff's motion for leave to enter a default judgment against the defendants Tannisha Ferguson (the individual defendant) BS Kings County Medical PC, Galmar Diagnostic Medical PC, Hamza Physical Therapy PLLC, Hank Ross Medical PC, Interventional Pain Consultants of North Jersey LLC, Master Cheng Acupuncture PC, Ralph

Innovative Medical PC, RKD Rx Corp., Shashek Chiropractic PC, and Spine Care of NJ PC (the non-answering health-care defendants) is granted; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendant Tannisha Ferguson for injuries that she allegedly sustained in a motor vehicle accident on January 21, 2018, or BS Kings County Medical PC, Galmar Diagnostic Medical PC, Hamza Physical Therapy PLLC, Hank Ross Medical PC, Interventional Pain Consultants of North Jersey LLC, Master Cheng Acupuncture PC, Ralph Innovative Medical PC, RKD Rx Corp., Shashek Chiropractic PC, and Spine Care of NJ PC, to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries that she allegedly sustained in the motor vehicle accident on January 21, 2018; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order.

This constitutes the Decision and Order of the court.

2/25/2020
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

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

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON