

American Tr. Ins. Co. v Suarez
2020 NY Slip Op 31098(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 160805/2018
Judge: Nancy M. Bannon
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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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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

ELIZABETH SUAREZ, EXCELL CLINICAL LAB, INC., KZ PHARMACY INC, LIFE CARE PHYSICAL THERAPY P.C., PARAMOUNT MEDICAL SERVICES, P.C., PARKSIDE CHIROPRACTIC, P.C., PHOENIX MEDICAL SERVICES, P.C., PIERRE THODEN D.C., PREFERRED MEDICAL, P.C., QBS SOLUTIONS INC., RGN GROUP INC., STAND-UP MRI OF THE BRONX, P.C., TREMONT DIAGNOSTIC IMAGING, P.C., WELLNESS PLAZA ACUPUNCTURE P.C., WHIPLASH CHIROPRACTIC, P.C., WISE REHAB P.T. P.C., YBD UNIVERSIAL CORP

Defendant.

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INDEX NO. 160805/2018
MOTION DATE 02/03/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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 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 Elizabeth Suarez (the individual defendant) Excell Clinical Lab Inc., KZ Pharmacy Inc., Phoenix Medical Services PC, Preferred Medical PC, QBS Solutions Inc., RGN Group Inc., Tremont Diagnostic Imaging PC, Wellness Plaza Acupuncture PC, and Wise Rehab PT PC (the non-answering health-care defendants). The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to the individual defendant or the non-answering 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 April 18, 2018, as the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). The plaintiff also moves pursuant to CPLR 3212 for summary judgment against the answering defendants Life Care Physical Therapy PC, Parkside Chiropractic PC, Pierre Thonden DC, and Whiplash Chiropractic PC seeking the same

declaratory relief as against them. No opposition was submitted. The motion for default judgment is denied without prejudice. The motion for summary judgment is denied.

The court notes that the plaintiff discontinued this action as against defendants Life Care Physical Therapy PC, Parkside Chiropractic PC, and Whiplash Chiropractic PC, pursuant to the parties' stipulation filed March 16, 2020, attached. As such, the plaintiff's motion for summary judgment as against those defendants is deemed withdrawn and the plaintiff's motion for summary judgment proceeds only as against defendant Pierre Thonden DC.

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." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987) (internal citations omitted); see also 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).

Here, plaintiff submits, *inter alia*, the individual defendant's completed NF-2 form, dated May 3, 2018, an EUO verification request sent on July 20, 2018 scheduling an EUO on August 7, 2018, a notice rescheduling the EUO to August 28, 2018, verification that the individual defendant failed to appear for both scheduled EUOs, and a general denial form dated September 5, 2018. These submissions fail to establish that the initial notice for the EUO was timely mailed to the individual defendant within 15 business days of its receipt of a relevant claim form, such as the NF-2 or an NF-3, as required by 11 NYCRR 65-3.5(b), as the initial

EUO request was sent over two months after the plaintiff's receipt of the NF-2 form. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017).

Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (see 11 NYCRR 65-1.1; see also 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]), to establish that an EUO was properly noticed, a plaintiff must supply sufficient evidence to determine whether EUO requests served on an individual defendant were subject to the timeliness requirements of 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b) (see Mapfre Ins. Co. of N.Y. v Manoo, 140 AD3d 468 [1st Dept. 2016]) and, if so, whether the requests had been served in conformity with those requirements. See National Liab. & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015). Here, the plaintiff did not provide copies of any completed NF-3 forms that it may have received from any of the health service provider defendants after its receipt of the NF-2 form or any other evidence reflective of the dates on which plaintiff had received any such verification forms. As such, the plaintiff has not met its *prima facie* burden showing that the EUOs were properly noticed within the prescribed timeframe, such that coverage was vitiated by the individual defendant's failure to attend. See Kemper Indep. Ins. Co. v. Adelaida Physical Therapy, P.C., *supra*.

The plaintiff's motion for summary judgment is denied for the same reason. It is well settled that on a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). As the plaintiff fails to meet its burden establishing that the EUOs were properly noticed, the plaintiff cannot establish the absence of any material, triable issues of fact, and the motion must be denied regardless of the sufficiency of the opposing papers. See Alvarez v Prospect Hosp., *supra*.

Accordingly, it is,

ORDERED that, upon the parties' stipulation filed March 16, 2020, attached, the action is discontinued, with prejudice and without costs of fees to any party, as against Life Care Physical Therapy PC, Parkside Chiropractic PC, and Whiplash Chiropractic PC and the plaintiff's instant motion for summary judgment is deemed withdrawn as against those defendants; and it is further,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants Elizabeth Suarez (the individual defendant) Excell Clinical Lab Inc., KZ Pharmacy Inc., Phoenix Medical Services PC, Preferred Medical PC, QBS Solutions Inc., RGN Group Inc., Tremont Diagnostic Imaging PC, Wellness Plaza Acupuncture PC, and Wise Rehab PT PC (the non-answering health-care defendants) is denied without prejudice to renewal upon proper papers; and it is further

ORDERED that the plaintiff's motion for summary judgment as against Pierre Thonden DC, is denied; and it is further,

ORDERED that the parties shall appear for a preliminary conference on August 27, 2020, at 9:30 a.m.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>4/27/2020</u>			
DATE		NANCY M. BANNON, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		