

**American Tr. Ins. Co. v Casseus**

2020 NY Slip Op 31099(U)

April 28, 2020

Supreme Court, New York County

Docket Number: 161036/2018

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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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

JACQUAN CASSEUS, ADA CHIROPRACTIC P.C., BREFNI CHIROPRACTIC DIAGNOSTICS P.C., GOLDEN STAR ACUPUNCTURE P.C., KZ PHARMACY INC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MMA PHYSICAL THERAPY, P.C., MYRTLE AVENUE TRADING LLC, SJR CHIROPRACTIC, P.C., STAND-UP MRI OF QUEENS, P.C., SUMMER PT, P.C.

Defendant.

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INDEX NO. 161036/2018
MOTION DATE 02/28/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

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 Jacquan Casseus (the individual defendant) Brefni Chiropractic Diagnostics PC, Golden Star Acupuncture PC, KZ Pharmacy Inc., Myrtle Avenue Trading LLC, and Stand-Up MRI of Queens 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 March 29, 2018, as the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). No opposition was submitted. By the parties' stipulation dated February 28, 2020, the plaintiff accepted the answer of Brefni Chiropractic Diagnostics PC as timely and withdrew its motion for default judgment as against it. The plaintiff's motion is denied as modified, without prejudice.

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 [1<sup>st</sup> Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1<sup>st</sup> 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 (1<sup>st</sup> Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> 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 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a prima facie case. See id.; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that he was injured in a motor vehicle accident on March 29, 2018, and that he 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 1024168-01, as assignees of the individual defendant, for no-fault benefits under insurance policy number CAP613400. 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 May 4, 2018, and the scheduling letters, proof of mailing, and proof of no-show for three EUOs on June 11, 2018, and July 17, 2018 the first of which was mailed on May 8, 2018, and a general denial form dated July 19, 2018. These submissions demonstrate that the initial notice for an examination under oath (EUO) on May 8, 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 (1<sup>st</sup> Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1<sup>st</sup> Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1<sup>st</sup> Dept. 2014).

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Woodson v Mendon Leasing Corp., 259 AD2d 304 (1<sup>st</sup> Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2<sup>nd</sup> Dept. 2003); Holt v Holt, 262 AD2d 530 (2<sup>nd</sup> Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3<sup>rd</sup> Dept. 1978). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., supra; Frolish v Ryder Truck Rental, supra.

Accordingly, it is,

ORDERED that the plaintiff's motion for leave to enter a default judgment against defendant Brefni Chiropractic Diagnostics PC, is withdrawn pursuant to the parties stipulation dated February 28, 2020, attached, and the defendants motion for default judgment against defendants Jacquan Casseus (the individual defendant) Golden Star Acupuncture PC, KZ Pharmacy Inc., Myrtle Avenue Trading LLC, and Stand-Up MRI of Queens PC (the non-answering health-care defendants) is granted as modified; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendant Jacquan Casseus for injuries that he allegedly sustained in a motor vehicle accident on March 29, 2018, or Golden Star Acupuncture PC, KZ Pharmacy Inc., Myrtle Avenue Trading LLC, and Stand-Up MRI of Queens PC, to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries that he allegedly sustained in the motor vehicle accident on March 29, 2018; and it is further,

ORDERED that the action is severed and continued as against the remaining defendant, Brefni Chiropractic Diagnostics PC; 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; and it is further,

ORDERED that the remaining parties shall appear for a preliminary conference on September 17, 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>4/28/2020</u>				<u>NANCY M. BANNON, J.S.C.</u>	
	DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
				<input type="checkbox"/>	
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