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| American Tr. Ins. Co. v Severino-Javier |
| 2020 NY Slip Op 31721(U) |
| June 1, 2020 |
| Supreme Court, New York County |
| Docket Number: 162041/2018 |
| 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,

INDEX NO. 162041/2018

MOTION DATE 5/29/2020

MOTION SEQ. NO. 001

- v -

TOMAS SEVERINO-JAVIER, ACTIVE MOTION PHYSICAL THERAPY, P.C., CITIMEDICAL I, PLLC, ENDO SURGICAL CENTER OF NORTH JERSEY, HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C., HUDSON TRANSPORTATION, LLC, NEIGHBORHOOD MEDICAL HEALTH CARE P.C., REFILL RX PHARMACY INC, RELIANCE ANESTHESIA SERVICES LLC, RESTORATIVE MASSAGE THERAPY P.C., SAFE ANESTHESIA AND PAIN, LLC, SHAHID MIAN, M.D. P.C., SPECIALTY MEDICAL SERVICES, ST. BARNABAS HOSPITAL, SURGERY CENTER OF ORADELL, THERESA HASTAVA, DC, WELL CARE MEDICAL EQUIPMENT LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for JUDGMENT - DECLARATORY

In this declaratory judgment action brought pursuant to article 51 of the Insurance Law, the plaintiff moves (1) pursuant to CPLR 3215 for leave to enter a default judgment against the defaulting defendants, individual defendant Tomas Severino-Javier and health-care provider defendants Active Motion Physical Therapy, P.C., Citimedical I, PLLC, Endo Surgical Center of North Jersey, Haar Orthopaedics & Sports Medicine, P.C., Hudson Transportation LLC, Neighborhood Medical Healthcare P.C., Reliance Anesthesia Services, LLC, Restorative Massage Therapy, P.C. Safe Anesthesia and Pain LLC, Shahid Mian, M.D., P.C., Specialty Medical Services, Surgery Center of Oradell, and Well Care Medical Equipment, LLC. and (2) pursuant to CPLR 3212 for summary judgment as against the answering defendant, Theresa Hastava, DC.. No opposition is submitted. The motion is granted in its entirety.

In his application for no-fault benefits, the individual defendant alleged, *inter alia*, that he was injured in a motor vehicle accident on October 3, 2015, 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, as assignees of the individual defendant, for no-fault benefits under insurance policy number CAP 612795, claim number 785031-03, to reimburse them for medical supplies and/or treatment rendered to the individual defendant for injuries allegedly sustained in the motor vehicle accident. That branch of the motion seeking relief pursuant to CPLR 3215 is granted inasmuch as the plaintiff has provided proof of service of the summons and complaint upon the defendants, proof of the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]), timely moved for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st Dept 2015]), and satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

As to the facts constituting its claim in this action, the plaintiff submitted proof sufficient to demonstrate that the individual defendant failed to appear for two properly scheduled and noticed independent medical examinations (IMEs), thereby violating a condition precedent to coverage, and creating an absolute coverage defense See Insurance Law 5106(a); 11 NYCRR 65-1.1; Mapfre Ins. Co. of N.Y. v Manoo, 140 AD3d 468, 470 (1st Dept 2016); American Tr. Ins. Co. v Lucas, 111 AD3d 423, 424 (1st Dept 2013); Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co., 35 AD3d 720 (2nd Dept 2006). The plaintiff's proof includes the summons and complaint, the subject policy, an affidavit of David Kosakowski, a claim representative for the plaintiff, an affidavit of Luis Campbell, the plaintiff's mail room supervisor, the denial of claim forms, two IME scheduling letters, proof of mailing of the notices to defendant Severino-Javier and his counsel, and proof of Severino-Javier's failure to appear for the IMEs, along with an affidavit of Dr. Michael Russ, who was to perform the examinations. By this proof, the plaintiff establishes that the defaulting defendants are not entitled to no-fault benefits under article 51 of the Insurance Law, for the purported accident of October 3, 2015. Having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). Therefore, the plaintiff is entitled to a judgment so declaring.

The plaintiff's request for relief under CPLR 3212 is also granted. It is well settled that the proponent of a motion for summary judgment establishes entitlement to that relief by

tendering sufficient evidence to demonstrate the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The plaintiff has met this burden as against the answering defendant, Theresa Hastava, DC , with the proof detailed above.. By failing to oppose the motion, that defendant has failed to raise any triable issue of fact.

The action was previously discontinued as against defendants Refill Rx Pharmacy, Inc. and St. Barnabas Hospital, pursuant to the parties' Stipulations of Discontinuance dated April 26, 2019, and August 24, 2019.

Accordingly, it is

ORDERED that the branch of the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 as against individual defendant Tomas Severino-Javier and health-care provider defendants Active Motion Physical Therapy, P.C., Citimedical I, PLLC, Endo Surgical Center of North Jersey, Haar Orthopaedics & Sports Medicine, P.C., Hudson Transportation LLC, Neighborhood Medical Healthcare P.C. ,Reliance Anesthesia Services, LLC, Restorative Massage Therapy, P.C. Safe Anesthesia and Pain LLC, Shahid Mian, M.D., P.C., Specialty Medical Services, Surgery Center of Oradell, and Well Care Medical Equipment, LLC. pursuant to CPLR 3215 is granted, without opposition; and it is further,

ORDERED that the branch of the plaintiff's motion for summary judgment on the complaint pursuant to CPLR 3212 as against defendant, Theresa Hastava, DC , is granted, without opposition, and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to defendants Tomas Severino-Javier, Active Motion Physical Therapy, P.C., Citimedical I, PLLC, Endo Surgical Center of North Jersey, Haar Orthopaedics & Sports Medicine, P.C., Hudson Transportation LLC, Neighborhood Medical Healthcare P.C. ,Reliance Anesthesia Services, LLC, Restorative Massage Therapy, P.C. Safe Anesthesia and Pain LLC, Shahid Mian, M.D., P.C., Specialty Medical Services, Surgery Center of Oradell, Well Care Medical Equipment, LLC. and Theresa Hastava, DC, for medical supplies and/or treatment rendered to defendant Severino-Javier for injuries allegedly sustained in the October 3, 2015, motor vehicle accident,


claimed under insurance policy number CAP 612795, and claim number 785031-03 and it is further,

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice, as against the remaining defendants, Refill Rx Pharmacy, Inc. and St. Barnabas Hospital, upon the parties' respective Stipulations of Discontinuance, dated April 26, 2019, and August 24, 2019, and it is further,

ORDERED that the Clerk shall enter judgment accordingly

This constitutes the Decision, Order, and Judgment of the court.

6/1/2020
DATE


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

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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | | <input type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | | | OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | | <input type="checkbox"/> | REFERENCE |