

American Tr. Ins. Co. v Borrero
2020 NY Slip Op 32287(U)
July 13, 2020
Supreme Court, New York County
Docket Number: 150683/2019
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 -

VINCENT BORRERO, AHMED MEDICAL CARE, P.C.,AOM
MEDICAL SUPPLY, INC, CLEAR WATER
PSYCHOLOGICAL SERVICES P.C.,DAVIDSON
CHIROPRACTIC P.C.,DIRECT CHIROPRACTIC CARE,
P.C.,F-R MOBILE PHYSICIAN, P.C.,FRIENDLY RX,
INC.,HANDS ON PHYSICAL THERAPY CARE
P.C.,KENSINGTON RADIOLOGY GROUP, P.C.,LENEX
SERVICES, INC.,LESLEY BENDIGO P.T., LIFE CIRCLES
HEALTHCARE MEDICAL, P.C.,MED EQUIPMENTS
SERVICE, INC.,PROFESSIONAL CHIROPRACTIC CARE,
P.C.,QUALITY CUSTOM MEDICAL SUPPLY, INC.,RA
MEDICAL SERVICES P.C.,SIGNIFICANT CARE PT,
P.C.,TOTAL CHIROPRACTIC P.C.,Y.A.M. MEDICAL
SUPPLY, INC.

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, 24, 25

were read on this motion to/for JUDGMENT - DECLARATORY

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, 24, 25

were read on this motion to/for JUDGMENT - DEFAULT

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 VINCENT BORRERO, and health-care defendants CLEAR WATER PSYCHOLOGICAL SERVICES P.C.,DAVIDSON CHIROPRACTIC P.C., FRIENDLY RX, INC., KENSINGTON RADIOLOGY GROUP, P.C., LENEX SERVICES, INC., LIFE CIRCLES HEALTHCARE MEDICAL, P.C., MED EQUIPMENTS SERVICE, INC., PROFESSIONAL CHIROPRACTIC CARE, P.C., QUALITY CUSTOM MEDICAL SUPPLY, INC. and Y.A.M. MEDICAL SUPPLY, INC., and (2) pursuant to CPLR 3212 for summary judgment as against the answering

DECISION + ORDER ON MOTION

defendants AOM MEDICAL SUPPLY, INC, F-R MOBILE PHYSICIAN, P.C . and LESLEY BENDIGO P.T., The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the individual defendant or the health-care defendants to reimburse them for medical supplies and/or treatment rendered to the individual defendant for injuries allegedly sustained in a motor vehicle accident. 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 February 17, 2016, in Brooklyn, N.Y. 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 608757, and assigned claim number 786998-04, 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 Cheryl Glaze, 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 Borrero and his counsel, and proof of Borrero's failure to appear for the IMEs. The plaintiff also submits an affirmation of Dr. Daniel Benson, the physician who was to perform the examinations, and an affidavit of Ronni McLaughlin, of National Claims Evaluations, Inc., who scheduled the IMEs and notified the individual defendant and the attorney identified in his application for benefits.

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 injuries allegedly sustained by defendant Borrero in a motor vehicle accident on February 17, 2016. Having failed to answer, the defaulting 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 defendants with the proof detailed above. By failing to oppose the motion, those defendants failed to raise any triable issue of fact.

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 (1st Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003); Holt v Holt, 262 AD2d 530 (2nd Dept. 1999); Frolish v. Ryder Truck Rental, 63 AD2d 799 (3rd 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 (1) for leave to enter a default judgment pursuant to CPLR 3215 for leave to enter a default judgment against the defaulting defendants, individual defendant VINCENT BORRERO, and health-care defendants CLEAR WATER PSYCHOLOGICAL SERVICES P.C., DAVIDSON CHIROPRACTIC P.C., FRIENDLY RX, INC., KENSINGTON RADIOLOGY GROUP, P.C., LENEX SERVICES, INC., LIFE CIRCLES HEALTHCARE MEDICAL, P.C.,MED

EQUIPMENTS SERVICE, INC., PROFESSIONAL CHIROPRACTIC CARE, P.C., QUALITY CUSTOM MEDICAL SUPPLY, INC. and Y.A.M. MEDICAL SUPPLY, INC. and (2) pursuant to CPLR 3212 for summary judgment as against the answering defendants, AOM MEDICAL SUPPLY, INC, F-R MOBILE PHYSICIAN, P.C . and LESLEY BENDIGO P.T., is granted in its entirety, without opposition; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to individual defendant VINCENT BORRERO, and health-care defendants CLEAR WATER PSYCHOLOGICAL SERVICES P.C., DAVIDSON CHIROPRACTIC P.C., FRIENDLY RX, INC., KENSINGTON RADIOLOGY GROUP, P.C., LENEX SERVICES, INC., LIFE CIRCLES HEALTHCARE MEDICAL, P.C., MED EQUIPMENTS SERVICE, INC., PROFESSIONAL CHIROPRACTIC CARE, P.C., QUALITY CUSTOM MEDICAL SUPPLY, INC. and Y.A.M. MEDICAL SUPPLY, INC., AOM MEDICAL SUPPLY, INC., F-R MOBILE PHYSICIAN, P.C . and LESLEY BENDIGO P.T, for medical supplies and/or treatment rendered to defendant Vincent Borrero for injuries allegedly sustained in the February 17, 2016, motor vehicle accident, claimed under insurance policy number CAP 608757, and assigned claim number 786998-04, and it is further,

ORDERED that the action is severed and shall continue as against the remaining defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly

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


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

7/13/2020
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: