

American Tr. Ins. Co. v Benson
2020 NY Slip Op 32414(U)
July 21, 2020
Supreme Court, New York County
Docket Number: 155415/2019
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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INDEX NO. 155415/2019

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE 07/14/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

EBONY BENSON, BRONX CHIROPRACTIC
REHABILITATION P.C, BURKE PHYSICAL THERAPY,
P.C., CHANNEL MEDICAL, P.C., FIRST HAND PHYSICAL
THERAPY P.C., INTEGRATED CHIROPRACTIC OF NY
P.C., MEDIGNA INC., MEDPLANET, INC, NATURAL
ACUPUNCTURE TOUCH P.C., NOVA MEDICAL
DIAGNOSTIC P.C, and SHERMAN ABRAMS
LABORATORY

**DECISION + ORDER ON
MOTION**

Defendants.

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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 declaratory judgment action brought pursuant to article 51 of the Insurance Law, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defaulting defendants, individual defendant Ebony Benson and healthcare defendants, Channel Medical, P.C., First Hand Physical Therapy, P.C., Medigna Inc., MedPlanet, Inc., Natural Acupuncture Touch, P.C., and Sherman Abrams Laboratory. The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the individual defendant or the healthcare defendants to reimburse them for medical supplies and/or treatment rendered to the individual defendant for injuries allegedly sustained in a motor vehicle accident. Defendants, which the plaintiff does not address. No opposition is submitted. The motion is granted as to all defendants except MedPlanet, Inc. and Sherman Abrams Laboratory, who filed a joint answer, which is not addressed by the plaintiff. By stipulation dated July 17, 2020, the plaintiffs withdrew that portion of their motion which sought summary judgment against defendants Bronx Chiropractic Rehabilitation, P.C., Burke Physical Therapy, P.C., Integrated Chiropractic of NY, P.C., and Nova Diagnostic, P.C.

In her application for no-fault benefits, the individual defendant alleged, *inter alia*, that she was injured in a motor vehicle accident on September 7, 2018, in Brooklyn, N.Y. She 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 CAP613158, and assigned claim number 1039611-02, 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 Benson and her counsel, and proof of Benson's failure to appear for the IMEs. The plaintiff also submits an affirmation of Dr. David Manevitz, 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 Benson at the address she provided in her application for benefits and the attorney identified in her 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 Benson in a motor vehicle accident on September 7, 2018. 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.

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). 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 is granted, without opposition, to the extent it seeks leave to enter a default judgment pursuant to CPLR 3215 for leave to enter a default judgment against individual defendant EBONY BENSON and healthcare defendants, CHANNEL MEDICAL, P.C., FIRST HAND PHYSICAL THERAPY P.C., MEDIGNA INC. and NATURAL ACUPUNCTURE TOUCH P.C. and is otherwise denied, .and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to individual defendant EBONY BENSON and healthcare defendants, CHANNEL MEDICAL, P.C., FIRST HAND PHYSICAL THERAPY P.C., MEDIGNA INC. and NATURAL ACUPUNCTURE TOUCH P.C., for medical supplies and/or treatment rendered to defendant Ebony Benson for injuries allegedly sustained in the February 17, 2016, motor vehicle accident, claimed under insurance policy number CAP613158, and assigned claim number 1039611-02, 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.

7/21/2020

DATE



NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

☐

GRANTED

☐

DENIED

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE