

American Tr. Ins. Co. v Espinal
2020 NY Slip Op 32642(U)
August 14, 2020
Supreme Court, New York County
Docket Number: 156303/2019
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,

INDEX NO. 156303/2019
MOTION DATE 08/04/2020
MOTION SEQ. NO. 001

- v -

SAMUEL ESPINAL, 41 ROAD REHAB ACUPUNCTURE
PLLC, THE BROOKDALE HOSPITAL MEDICAL CENTER,
DYNAMIC MEDICAL IMAGING P.C., FIFTH AVENUE
SURGERY CENTER, IGOR AMIGUD PHYSICIAN
P.C., IHOME REHAB, LLC, KRASNER CHIROPRACTIC,
P.C., MID-ROCKAWAY AVE MEDICAL, P.C., MODERN
SERVICES PAIN MANAGEMENT P.C., NEW AGE
MEDICAL, P.C., RIGHT CHOICE SUPPLY INC,
UNIVERSITY ORTHOPAEDIC ASSOCIATES,
LLC, WARREN STREET ORTHOPEDIC REHABILITATION,
P.C.

DECISION + ORDER ON
MOTION

Defendants.

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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

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
defendants, 41 Road Rehab Acupuncture PLLC, The Brookdale Hospital Medical Center,
Dynamic Medical Imaging P.C., Fifth Avenue Surgery Center, Igor Amigud Physician P.C.,
IHome Rehab, LLC, Krasner Chiropractic, P.C., Mid-Rockaway Ave Medical, P.C., Modern
Services Pain Management P.C., New Age Medical, P.C., and Warren Street Orthopedic
Rehabilitation, P.C and (2) pursuant to CPLR 3212 for summary judgment as against defendant
Samuel Espinal. 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. The action was discontinued as against defendants University
Orthopedic Associates LLC and Right Choice Supply, Inc. No opposition is submitted. The
motion is granted.

In his application for no-fault benefits, the individual defendant alleged, *inter alia*, that he was injured in a motor vehicle accident on September 26, 2018, 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 B509626, and assigned claim number 1040568-01, 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 Espinal and his counsel, and proof of Espinal's failure to appear for the IMEs. The plaintiff also submits an affirmation of Dr. Marc Silverman, the physician who was to perform the examinations, and an affidavit of Lynn Herschmann, of Independent Physical Exam Referrals, Inc., who scheduled the IMEs and notified Espinal, at the address he provided in his application for benefits, 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 Espinal in a motor vehicle accident on September 26, 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.

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 defendant Espinal, who answered the complaint, with the proof detailed above. By failing to oppose the motion, defendant Espinal has failed to raise any triable issue of fact.

Accordingly, it is

ORDERED that the plaintiff’s motion (1) for leave to enter a default judgment pursuant to CPLR 3215 against defendants, 41 Road Rehab Acupuncture PLLC, The Brookdale Hospital Medical Center, Dynamic Medical Imaging P.C., Fifth Avenue Surgery Center, Igor Amigud Physician P.C., IHome Rehab, LLC, Krasner Chiropractic, P.C., Mid-Rockaway Ave Medical, P.C., Modern Services Pain Management P.C., New Age Medical, P.C., and Warren Street Orthopedic Rehabilitation, P.C., and (2) pursuant to CPLR 3212 for summary judgment as against defendant Samuel O. Espinal, 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 Samuel O. Espinal and healthcare defendants 41 Road Rehab Acupuncture PLLC, The Brookdale Hospital Medical Center, Dynamic Medical Imaging P.C., Fifth Avenue Surgery Center, Igor Amigud Physician P.C., IHome Rehab, LLC, Krasner Chiropractic, P.C., Mid-Rockaway Ave Medical, P.C., Modern Services Pain Management P.C., New Age Medical, P.C., and Warren Street Orthopedic Rehabilitation, P.C., for medical supplies and/or treatment rendered to defendant Samuel O. Espinal for injuries allegedly sustained in the September 26, 2018, motor vehicle accident, claimed under insurance policy number B509626, and assigned claim number 1040568-01, 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

8/14/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE