

American Tr. Ins. Co. v Minalla
2020 NY Slip Op 32703(U)
August 19, 2020
Supreme Court, New York County
Docket Number: 150986/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

FRANKLYN MINALLA, ARDEN M. KAISMAN, M.D.,
P.C., CBLPATH, INC., CONTINENTAL MEDICAL,
P.C., DANIEL P. KLEIN, M.D., ENZO CLINICAL LABS,
INC., FDNY EMS, FOREST HILLS MEDICAL
P.C., FRIENDLY RX, INC., GENESIS ORTHO SUPPLY
CORP., HANGER PROSTHETICS & ORTHOTICS EAST,
INC., LENOX HILL MEDICAL ANESTHESIOLOGY,
PLLC, LENOX HILL HOSPITAL, MARK MCMAHON, M.D.,
PRECISION IMAGING OF NEW YORK, P.C., QUEENS
SURGI-CENTER PC, ST. BARNABAS HOSPITAL

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, 27, 29, 30

were read on this motion to/for JUDGMENT - DECLARATORY.

Upon the foregoing documents, it is Upon the foregoing documents, plaintiff's request for a declaratory judgment on default is granted in part; and denied in part, solely as moot; and plaintiff's request for summary judgment is granted, for the reasons stated hereinbelow.

Background

On November 19, 2013, the claimant-defendant, Franklyn D. Minalla, was allegedly injured in a motor vehicle accident. He subsequently sought treatment for injuries allegedly arising out of the subject alleged accident from the medical provider defendants, Arden M. Kaisman, M.D., P.C.; CBLPATH Inc.; Continental Medical P.C.; Daniel P. Klein, M.D.; Enzo Clinical Labs, Inc.; FDNY EMS; Forest Hills Medical P.C.; Friendly RX, Inc.; Genesis Ortho Supply Corp.; Hanger Prosthetics & Orthotics East Inc.; Lenox Hill Medical Anesthesiology, PLLC; Lenox Hill Hospital; Mark McMahan, M.D.; Precision Imaging of New York, P.C.; Queens Surgi-Center PC; and St. Barnabas Hospital.

The claimant-defendant assigned to the medical provider defendants the right to collect no-fault insurance benefits under an insurance policy that plaintiff, American Transit Insurance Company, had issued that covered the vehicle that the claimant-defendant was driving at the time of the subject alleged accident. The medical provider defendants, in their capacities as the

claimant-defendant's assignees under the subject insurance policy, then submitted claims to plaintiff.

On December 21, 2017 and January 18, 2018, the claimant-defendant failed to appear for an Independent Medical Examination ("IME") that plaintiff had scheduled and rescheduled. Consequently, plaintiff disclaimed any obligation to cover any losses and denied all coverage. (NYSCEF Doc. 1).

On November 17 2018, plaintiff commenced the instant action against the claimant-defendant and the medical provider defendants, seeking a judgment declaring that (1) the claimant-defendant breached a condition of plaintiff's insurance policy; and, therefore, (2) the claimant-defendant, and the medical provider defendants, in their capacities as the claimant-defendant's assignees, are not entitled to no-fault coverage, first party coverage, and/or first party no-fault benefits arising out of the subject alleged accident under the subject insurance policy (NYSCEF Doc. 1, at 12-13).

On April 23, 2019, medical provider defendant Precision Imaging of New York P.C. answered the complaint with various admissions, denials, and approximately eleven Affirmative Defenses (NYSCEF Doc. 2).

On May 3, 2019, medical provider defendant St. Barnabas Hospital answered the complaint with various admissions, denials, and seventeen Affirmative Defenses (NYSCEF Doc. 4). Pursuant to a May 5, 2019 stipulation, plaintiff discontinued the instant action as against medical provider defendant Arden M. Kaisman, M.D., P.C., only (NYSCEF Doc. 5). Pursuant to a June 18, 2019 stipulation, plaintiff discontinued the instant action as against medical provider defendant St. Barnabas Hospital, only (NYSCEF Doc. 6).

Pursuant to an August 26, 2019 stipulation, plaintiff discontinued the instant action as against medical provider defendant Continental Medical P.C., only (NYSCEF Doc. 7).

Plaintiff now moves (1) pursuant to CPLR 3215, for a default judgment as against the claimant-defendant, and medical provider defendants CBLPATH Inc.; Daniel P. Klein, M.D.; Enzo Clinical Labs, Inc.; FDNY EMS; Forest Hills Medical P.C.; Genesis Ortho Supply Corp.; Hanger Prosthetics & Orthotics East Inc.; Lenox Hill Medical Anesthesiology, PLLC; Lenox Hill Hospital; Mark McMahon, M.D.; and Queens Surgi-Center PC; (2) pursuant to CPLR 3212, for summary judgment as against medical provider defendant Precision Imaging of New York, P.C. ("Precision"); (3) for a judgment declaring that the claimant-defendant is not an eligible injured person entitled to no-fault benefits under the subject insurance policy; and (4) for a judgment declaring that plaintiff is not obligated to honor or pay current and/or future claims under the subject insurance policy and/or the Mandatory Personal Injury Protection Endorsement for no-fault benefits arising out of the subject alleged accident that the medical provider defendants, in their respective capacities as the claimant-defendant's assignees, submit or will submit (NYSCEF Doc. 20).

In its notice of motion, plaintiff indicates in a footnote that it is not seeking relief as against medical provider defendant Friendly RX, Inc. due to an inability to serve said medical provider

defendant (NYSCEF Doc. 10, at 2). Pursuant to a May 28, 2020 stipulation, plaintiff withdrew the instant motion as against medical provider defendant FDNY EMS, only (NYSCEF Doc. 25). Pursuant to a July 2, 2020 stipulation, plaintiff discontinued the instant action as against that medical provider defendant (NYSCEF Doc. 27).

In opposition, Precision asserts, essentially, that plaintiff has failed to submit “admissible evidence” to this Court to meet plaintiff’s burden to establish that it properly mailed the letters scheduling the claimant-defendant’s IME and that the claimant-defendant failed to appear for said scheduled IMEs (NYSCEF Doc. 29).

Discussion

Late E-Filing Due to COVID-19-Related Court Filing Suspension

This Court accepts plaintiff’s May 20, 2020 notice of motion despite its late filing, which plaintiff addresses in a May 20, 2020 letter to this Court (NYSCEF Doc. 11) due to the COVID-19 -related court filing suspension.

Plaintiff’s Request for a Declaratory Judgment on Default

Plaintiff has established that it is entitled to a declaratory judgment on default as against the claimant-defendant and medical provider defendants CBLPATH Inc.; Daniel P. Klein, M.D.; Enzo Clinical Labs, Inc.; Forest Hills Medical P.C.; Genesis Ortho Supply Corp.; Hanger Prosthetics & Orthotics East Inc.; Lenox Hill Medical Anesthesiology, PLLC; Lenox Hill Hospital; Mark McMahon, M.D.; and Queens Surgi-Center PC, (collectively, the “defaulting defendants”), by complying with CPLR 3215(f) by submitting, inter alia, the following: a copy of the summons and complaint; the subject affidavits of service; the CPLR 3215(g) notice; and the May 20, 2020 affirmation of Jaimie L. Boyd Esq., plaintiff’s attorney. To date, the defaulting defendants have failed to oppose or otherwise respond to the instant complaint and/or motion, and their time to do so has expired. Thus, plaintiff is entitled to a default judgment as against the defaulting defendants.

Plaintiff’s Request for Summary Judgment as against Precision, Only

Precision asserts that the affidavits of Mr. Distler, Mr. Miller, and Mr. Montero (Exhibit A, NYSCEF Doc. 14) are inadmissible, as they fail to include a proper caption (NYSCEF Doc. 29). Precision cites Maximum Physical Therapy, P.C. v Allstate Ins. Co., 8 Misc3d 1021(a) (NYC Civ. Ct. 2005). However, this Court accepts said affidavits, as (1) they are compiled in an e-filing that contains affidavits with the proper caption; (2) they include some of the information that Precision mentions; (3) Precision can discern the information that it needs; and (4) Precision is not claiming, much less suffering, any prejudice. CPLR 2001.

This Court also finds that the subject affidavits sufficiently demonstrate the claimant-defendant’s failure to appear for his scheduled and rescheduled IME. Precision has failed to submit an affidavit from the claimant-defendant, stating that the IME was not scheduled and rescheduled.

Precision also asserts that plaintiff failed to meet its burden to prove that it mailed the subject IME notices to the claimant-defendant and that it did so in a timely manner. However, this Court

finds that the appointment letters that plaintiff e-filed as Exhibit D (NYSCEF Doc. 17) meet this burden.

Thus, this Court finds Precision’s opposition to plaintiff’s request for summary judgment as against Precision, only, to be unavailing.

Conclusion

Thus, for the reasons stated herein, the request of plaintiff, American Transit Insurance Company, for a declaratory judgment on default is hereby granted as against the claimant-defendant, Franklyn Minalla, and medical provider defendants CBLPATH Inc.; Daniel P. Klein, M.D.; Enzo Clinical Labs, Inc.; Forest Hills Medical P.C.; Genesis Ortho Supply Corp.; Hanger Prosthetics & Orthotics East Inc.; Lenox Hill Medical Anesthesiology, PLLC; Lenox Hill Hospital; Mark McMahon, M.D.; and Queens Surgi-Center PC, only.

This Court hereby denies plaintiff’s request for a declaratory judgment on default as against medical provider defendant FDNY EMS, solely as moot, pursuant to the stipulation of discontinuance. Plaintiff discontinued the instant action as against medical provider defendants Arden M. Kaisman, M.D., P.C.; Continental Medical P.C.; and St. Barnabas Hospital. Plaintiff is not seeking relief as against medical provider defendant Friendly RX, Inc. due to inability to serve.

Plaintiff’s request for summary judgment as against medical provider defendant Precision Imaging of New York, P.C., only, is hereby granted.

Accordingly, the Clerk is hereby directed to enter judgment (1) declaring that the claimant-defendant breached a condition of plaintiff’s insurance policy; (2) declaring that the claimant-defendant, and the medical provider defendants, in their capacities as the claimant-defendant’s assignees, are not entitled to no-fault coverage, first party coverage, and/or first party no-fault benefits arising out of the subject alleged accident under the subject insurance policy; (3) declaring that the claimant-defendant is not an eligible injured person entitled to no-fault benefits under the subject insurance policy; (4) declaring that plaintiff is not obligated to honor or pay current and/or future claims under the subject insurance policy and/or the Mandatory Personal Injury Protection Endorsement for no-fault benefits arising out of the subject alleged accident that the medical provider defendants, in their respective capacities as the claimant-defendant’s assignees, submit or will submit; and (5) awarding costs and disbursements to plaintiff.

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8/19/2020

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: