

American Tr. Ins. Co. v Ndiaye
2020 NY Slip Op 32729(U)
August 18, 2020
Supreme Court, New York County
Docket Number: 161187/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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AMERICAN TRANSIT INSURANCE COMPANY,

Index No. 161187/2018

Plaintiff,

Motion Date: 03/30/2020

-against-

Motion Seq. No. 001

MOUSSA NDIAYE, 21 CENTURY CHIROPRACTIC
CARE, ANDREW NICHOLAS DEMAS LAC, ARTHUR
AVENUE MEDICAL OFFICE, P.C., BARRY SLOAN M.D.,
BRIDGES PSYCHOLOGICAL SERVICES P.C.,
ENGLEWOOD ORTHOPEDICS GROUP PC, FUTURE
CHIROPRACTIC CARE, P.C., GALMAR DIAGNOSTIC
MEDICAL, P.C., LIDA'S MEDICAL SUPPLY INC., LITE
CARE REHAB PT P.C, MICHELE GLISPY, MMA
PHYSICAL THERAPY, P.C., RAPID IMAGING CORP.,
REHAB CARE PHYSICAL THERAPY P.C., ROSS ALAN,
INC.

Defendants.

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MELISSA A. CRANE, J.S.C.

This case arises from an automobile accident that occurred on April 10, 2018, involving defendant Moussa Ndiaye ("Ndiaye"). Ndiaye alleges that he sustained bodily injuries as a result of an accident that occurred on April 10, 2018, involving a vehicle owned by the insured, Hurricane Management Corp. ("Hurricane"). Ndiaye submitted claims to plaintiff, American Transit Insurance Company ("American Transit") for no-fault benefits under the insurance policy that plaintiff issued to Hurricane. Ndiaye assigned the rights to collect the no-fault benefits to various medical providers, including Ndiaye's co-defendants. Plaintiff commenced an action on or about November 13, 2018, by a Summons and Complaint, seeking a declaratory judgment against Ndiaye and the medical providers under American Transit insurance policy CAP 616828, Claim No. 1025174-02.

First, plaintiff has discontinued this action against defendants MMA Physical Therapy, P.C., Rapid Imaging Corp., And Ross Alan. Inc. (see NYSCEF Doc No 2 and 3).

Plaintiff now moves for a default judgment pursuant to CPLR 3215 against the non-answering defendants, 21 Century Chiropractic Care, Andrew Nicholas Demas Lac, Arthur Avenue Medical Office, P.C., Barry Sloan M.D., Bridges Psychological Services P.C., Englewood Orthopedics Group P.C., Future Chiropractic Care, P.C., Galmar Diagnostic Medical, P.C., Lida's Medical Supply Inc., Lite Care Rehab PT P.C. And Rehab Care Physical Therapy P.C. Plaintiff is not seeking judgment against defendant Michele Glispy due to an inability to serve her.

Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, proof of defendants' failure to answer or appear, proof of the additional mailings of the summons and complaint, and this motion is brought within one year of the defaults (*see* CPLR 3215; *see also*, *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649 [2nd Dept 2011]). Plaintiff demonstrates prima facie its denial of no-fault claims based on Ndiaye's failure to appear for Independent Medical Examinations ("IMEs") on August 13, 2018 and September 5, 2018. The failure to appear for a scheduled IME is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy *ab initio* (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). Plaintiff submits, *inter alia*: the IME request letters; an affidavit from Cheryl Glaze who has been employed as a No-Fault Claims Supervisor since 1990, and attests to the processing of bills, and issuance of denial of claim forms in this case; an affidavit from Luis Campbell, mailroom supervisor at American Transit; an affidavit from Ronni McLaughlin, who attests that she mailed the IME requests, and an affidavit from Dr. Todd

Aordkian, who attests to Ndiaye's non-appearance at the IMEs. None of the defendants have answered or opposed this motion.

Accordingly, it is

ORDERED that plaintiff American Transit's motion for a default judgment against defendants 21 Century Chiropractic Care, Andrew Nicholas Demas Lac, Arthur Avenue Medical Office, P.C., Barry Sloan M.D., Bridges Psychological Services P.C., Englewood Orthopedics Group P.C., Future Chiropractic Care, P.C., Galmar Diagnostic Medical, P.C., Lida's Medical Supply Inc., Lite Care Rehab PT P.C. and Rehab Care Physical Therapy P.C., is granted without opposition; and it is further

ADJUDGED AND DECLARED that defendant Moussa Ndiaye is not eligible injured persons entitled to no-fault benefits under American Transit insurance policy CAP 616828, Claim No. 1025174-02, as referenced in the complaint; and it is further

ADJUDGED AND DECLARED that defendants 21 Century Chiropractic Care, Andrew Nicholas Demas Lac, Arthur Avenue Medical Office, P.C., Barry Sloan M.D., Bridges Psychological Services P.C., Englewood Orthopedics Group P.C., Future Chiropractic Care, P.C., Galmar Diagnostic Medical, P.C., Lida's Medical Supply Inc., Lite Care Rehab PT P.C. and Rehab Care Physical Therapy P.C. are not entitled to no-fault coverage for the motor vehicle accident that occurred on April 10, 2018, involving individual defendant Ndiaye, for claims submitted under American Transit insurance policy CAP 616828, Claim No. 1025174-02, as referenced in the complaint, and plaintiff American Transit has no duty to provide, pay, honor, or

reimburse any claims in any current or future proceedings, including without limitation arbitrations and/or lawsuits, seeking to recover no-fault benefits arising out of the April 10, 2018 accident.

Dated: 8/18/2020

New York, New York

ENTER:



MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.