

American Tr. Ins. Co. v Surgicore of Jersey City, LLC
2020 NY Slip Op 32950(U)
September 8, 2020
Supreme Court, New York County
Docket Number: 651968/2020
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. 651968/2020

AMERICAN TRANSIT INSURANCE COMPANY

MOTION DATE 08/13/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

SURGICORE OF JERSEY CITY, LLC
a/a/o STEPHANIE WATERS,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13

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

In this action pursuant to Insurance Law § 5106(c) for de novo consideration of a claim for no-fault benefits, the plaintiff insurer moves pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendant Surgicore of Jersey City, LLC a/a/o Stephanie Waters. No opposition is submitted. The motion is denied.

The plaintiff alleges, in a complaint verified by its attorney, that Surgicore provided surgical treatment to Waters for injuries allegedly sustained in a motor-vehicle accident involving a taxi insured by the plaintiff and that Waters assigned Surgicore any right that she may have had to recover no-fault benefits from the plaintiff in connection with the provision of treatment. The plaintiff further alleges that Surgicore submitted a claim in the sum of \$7,142.40 for reimbursement for medical services rendered to Waters, and that plaintiff timely and properly denied that claim on the ground that the services provided were not medically necessary. The complaint further alleges that an arbitrator awarded Surgicore the sum of \$6,389.80. The arbitrator found that by submitting a peer review report of Dr. Raghava Polavarupu, American Transit had effectively rebutted the presumption of medical necessity established by Surgicore. However, Surgicore then submitted a rebuttal peer by Dr. Steven Struhl who performed the

surgery at issue. Dr. Struhl points out that Dr. Polacarapu's conclusion is based solely on a radiological review performed at the behest of American Transit two months after the surgery. Dr. Struhl noted that Waters, 54 years old, was an unrestrained passenger in a taxi which rear-ended the vehicle in front of it and that this type of impact caused Waters to be thrown into the front divider injuring her right shoulder. Dr. Struhl opined that, even if there was some degeneration in the shoulder present prior to the accident, this type of collision would exacerbate or aggravate the pre-existing injury. Dr. Struhl stated that his examination of Waters' right shoulder had revealed tenderness, positive impingement sign and asymmetry. An MRI revealed a labral tear, partial rotator cuff tear involving the supraspinatus and infraspinatus tendons and joint and bursal effusion. Physical therapy was prescribed and administered but was not effective, and Waters remained "highly symptomatic." Arthroscopic surgery was performed on June 11, 2018, and the post-operative diagnosis was anterior labral tear, synovitis and bursitis. Dr. Struhl opined that the surgery was medically necessary and the injury was causally related to the subject motor vehicle accident.

A master arbitrator affirmed the lower arbitrator's award on March 17, 2020. The master arbitrator rejected the plaintiff's contention that the lower arbitrator failed to properly consider the causation issue in her decision, and found that the lower arbitrator carefully considered all the medical evidence and that her award should not be disturbed.

This action ensued.

Insurance Law § 5106(c) provides that:

An award by an arbitrator shall be binding except where vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent. The grounds for vacating or modifying an arbitrator's award by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute a court action to adjudicate the dispute de novo.

Since the award affirmed by the master arbitrator was greater than \$5,000, the plaintiff commenced this action against Surgicore to adjudicate the dispute de novo. Surgicore was served with process but has not answered the complaint or appeared in the action.

CPLR 3215 requires a party moving for leave to enter a default judgment to submit to the court, among other things, “proof of the facts constituting the claim.” While the “quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). In a de novo action to determine the validity of a no-fault disclaimer made on the ground that the services provided by a physician are not medically necessary, a motion for leave to enter a default judgment must be supported by an expert affirmation or affidavit, which may be in the form of a peer review or a review of medical reports. See Global Liberty Ins. Co. v W. Joseph Gorum, M.D., P.C., 143 AD3d 768 (2nd Dept. 2016).

As to proof of the facts constituting its claim, the plaintiff submissions include the summons and complaint, proof of service, the denial of claim forms, an attorney’s affirmation, and the arbitration awards. The plaintiff also submits the sworn Peer Review report dated October 17, 2018, signed by Dr. Raghava Polavarupu, who reviewed Waters’ medical records and concluded the right shoulder surgery performed on June 11, 2018, was not medically necessary. Dr. Polavarupu opined that Waters’ right shoulder injuries were degenerative in nature and there was no evidence of acute traumatic injury arising from the accident. Dr. Polavarupu opined that there was “no causally related medical necessity” for the claims submitted to the plaintiff.

The plaintiff has not met its burden on the motion. Although it submitted the Peer Review of Dr. Polavarupu, neither that report nor any other submission sufficiently addresses the report of Dr. Struhl that was also considered by the arbitrator. The plaintiff also relies upon a complaint verified only by the plaintiff’s attorney and an affirmation by the plaintiff’s attorney. However, a complaint verified by an attorney is insufficient to support entry of judgment pursuant to CPLR 3215. See Feffer v Malpeso, 210 AD2d 60 (1st Dept. 1994). Likewise, an attorney’s affirmation is “utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215.” Beltre v Babu, 32 AD3d 722, 723 (1st Dept. 2006); see

also Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Thus, the plaintiff has failed to submit sufficient proof of the facts constituting the claim. (see CPLR 3215[f]), requiring denial of the motion.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment is denied and the complaint is dismissed, and it is further

ORDERED that the Clerk shall enter judgment accordingly, and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendant within 30 days of the date of this order.

This constitutes the Decision and Order of the court.


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

9/8/2020
DATE

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE