

American Tr. Ins. Co. v Eugene
2020 NY Slip Op 33324(U)
October 8, 2020
Supreme Court, New York County
Docket Number: 161016/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

PIERRE RONALD EUGENE, DOS MANOS
CHIROPRACTIC P.C., ENGLEWOOD
ORTHOPEDICS GROUP P.C., FIVE
BOROUGH SUPPLY INC., FRIENDLY
ACUPUNCTURE P.C., JOEUN,
CHIROPRACTIC P.C., LIFE REHAB PT, P.C.,
MCDONALD AVE CHIROPRACTIC P.C.,
NEW YORK PAIN MANAGEMENT
ASSOCIATES, NEXRAY MEDICA
IMAGING, P.C., NGM ACUPUNCTURE P.C.,
NYC COMMUNITY MEDICAL CARE P.C.
REHAB CARE PHYSICAL THERAPY P.C.,
RF CHIROPRACTIC IMAGING P.C., ROH
PHYSICAL THERAPY P.C., SPINE CARE OF
NJ, VALERIY SABODASH, MD,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, the motion of plaintiff American Transit Insurance Company ("Plaintiff") for entry of a default judgment against defendants Pierre Ronald Eugene, Chiropractic P.C., Friendly Acupuncture P.C., Joeun Chiropractic P.C., Life Rehab Pt, P.C., McDonald Ave Chiropractic P.C., New York Pain Management Associates, Nexray Medical Imaging, P.C., NGM Acupuncture P.C., NYC Community Medical Care P.C., Rehab Care Physical Therapy P.C., RF Chiropractic Imaging P.C., Roh Physical Therapy P.C., Spine Care

Of NJ (all together, “Defendants”) is denied, in accord with the following memorandum decision.¹

Plaintiff is the issuer of an insurance policy issued to defendant Pierre Ronald Eugene (“Eugene”) under Policy No. BC 516730 (the “Policy”), under which he made claims for no-fault benefits in connection with an alleged motor vehicle collision on July 7, 2018 (the “collision”). The remaining defendants are medical providers who have made claims to Plaintiff as assignees of Eugene (the “Medical Provider Defendants”). Plaintiffs commenced this action seeking declaratory and injunctive relief against Defendants on the grounds that Eugene failed to satisfy a condition precedent to coverage by failing to appear for an Examination Under Oath (“EUO”) requested by Plaintiff. Plaintiff now moves for entry of a default judgment against Defendants.

A plaintiff that seeks entry of a default judgment for a defendant’s failure to answer the complaint must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant’s default (CPLR 3215[a], [f]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]). Where an insurer seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an EUO, it must also submit proof establishing that it complied with the timeliness requirements of 11 NYCRR 65–3.5 in order to meet its burden of filing “proof of the facts constituting the claim” for a default judgment (*Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 AD3d 617, 617 [1st Dept 2018]; *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Unitrin Advantage Insurance Company v All of NY, Inc.*, 158 AD3d 449, 449 [1st Dept [2018]]).

¹ Plaintiff’s motion was also made against defendants Englewood Orthopedics Group P.C. and Five Borough Supply Inc.; but was later withdrawn and the action discontinued against those defendants.

The claim procedure set forth in 11 NYCRR 65-3.5 requires, in relevant part, that (1) within ten business days of receipt of an application for no-fault benefits (form NF-2), the insurer shall forward the prescribed verification forms it will require prior to payment of the initial claim to the parties required to complete them, (2) any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms, and (3) if the additional verification required is an EUO, the request for an EUO “must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination” (11 NYCRR 65-3.5 [a-b, e]).

In support of its motion, Plaintiff submits, *inter alia*, the affirmation of its counsel, Ethan A. Rothschild, Esq., and two affidavits of Cheryl Glaze, a No-Fault Claims Supervisor for Plaintiff, and the affidavit of Luis Campbell, the Mail Room Supervisor of Plaintiff. By these submissions, and the exhibits annexed thereto, Plaintiff submits proof that it received an application for no-fault benefits from Eugene, proof that it mailed two letters to Eugene on August 6, 2018 and September 7, 2018 requesting that he appear for an EUO on September 5, 2018 and October 1, 2018, respectively, and that Eugene failed to appear at both EUOs. The Rothschild affirmation also demonstrates that all Defendants were served the summons and complaint and have defaulted by failing to appear in this action. However, Plaintiff’s submissions contain no information regarding the dates on which it received the claims for no-fault benefits, whether and when it forwarded the required verification forms to Defendants, and whether and when it received responses to those verification forms. The Glaze affirmation also does not contain an attestation regarding the date on which Plaintiff received the application for no-fault benefits, although the attached application is dated July 25, 2018 and stamped “received” on July 30, 2018. In the absence of all of this information, the court is unable to

determine whether Plaintiff complied with the timeliness requirements of 11 NYCRR 65-3.5, and Plaintiff has failed to meet its burden of proof on the motion (*see Best Touch*, 162 AD3d at 617). Plaintiff also fails to set forth the “specific objective justification,” or any justification, for requesting the EUO, as required by 11 NYCRR 65-3.5 [e] (*see American Tr. Ins. Co. v. Jaga Med. Servs., P.C.*, 128 AD3d 441, 441 [1st Dept 2015]). As such, the motion is denied.

Accordingly, it is

ORDERED that the motion of plaintiff American Transit Insurance Company for entry of a default judgment is denied; and it is further

ORDERED that a preliminary conference will be held telephonically on November 18, 2020 at 2:30 p.m.



<u>10/8/2020</u>		<u>LOUIS L. NOCK, J.S.C.</u>	
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