

American Tr. Ins. v Romero

2020 NY Slip Op 33478(U)

October 21, 2020

Supreme Court, New York County

Docket Number: 160745/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**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,

Plaintiff,

- v -

KEVIN M. ROMERO, A.O.T. CHIROPRACTIC P.C., BLISS DRUGS INC., CLASSIC MEDICAL DIAGNOSTIC REHAB P.C., COLUMBUS IMAGING CENTER, SUMMONS HIDDEN DRAGON ACUPUNCTURE P.C., METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MYRTLE AVENUE TRADING LLC, PI PHYSICAL THERAPY, P.C., RIGHT AID MEDICAL SUPPLY CORP., VITRUVIAN REHAB, P.T.P.C.,

Defendants.

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INDEX NO. 160745/2018

MOTION DATE 01/06/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

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

Upon the foregoing documents, it is ordered that the motion of plaintiff American Transit Insurance Company (“Plaintiff”) for entry of a default judgment against defendants Kevin M. Romero, A.O.T. Chiropractic P.C., Bliss Drugs, Inc., Classic Medical Diagnostic Rehab P.C., Columbus Imaging Center, Hidden Dragon Acupuncture, P.C., Metro Pain Specialists Professional Corporation, Myrtle Avenue Trading LLC, PI Physical Therapy, P.C., Right Aid Medical Supply Corp., Vitruvian Rehab, P.T.P.C. (together, “Defendants”) is denied, in accord with the following memorandum decision.

Plaintiff is the issuer of an insurance policy issued to non-party Lajara Auto Corp., under which defendant Kevin M. Romero (“Romero”) made claims for no-fault benefits in connection with an alleged motor vehicle collision on December 4, 2017 (the “collision”). The remaining defendants are medical providers who have made claims to Plaintiff as assignees of Romero.

Plaintiff commenced this action seeking declaratory and injunctive relief against Defendants on the grounds that Romero failed to satisfy a condition precedent to coverage by failing to appear for two independent medical examinations (“IME”) on May 15, 2018 and April 10, 2018 that were 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]). Where an insurer seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an IME, 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 (*American Transit Ins. Co. v Vance*, 131 AD3d 849, 850 [1st Dept 2015]; *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841-842 [1st Dept 2015]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]).

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 IME, the insurer shall schedule the IME to be held within 30 calendar days from the date of receipt of the prescribed verification forms (11 NYCRR 65-3.5 [a-b, d]).

In support of its motion, Plaintiff submits, *inter alia*, the affirmation of its counsel, Ariana A. Pabalan, Esq., the affidavit of Cheryl Glaze, a No-Fault Claims Supervisor for Plaintiff, two affidavits of doctors that were scheduled to conduct the IMEs, and affidavits regarding the scheduling of the IMEs and mailing of the IME requests. The Pabalan affirmation, and relevant attachments, demonstrate that all Defendants were served with process and that each has defaulted by failing to appear in the action. However, the Plaintiff has failed to submit proper proof of the facts constituting its claim. At the outset, the Glaze affidavit states that she “reviewed the file for claimant ANDREA COLLINS,” who is not a party to this action, but does not indicate that she reviewed the file for Romero’s claims. Furthermore, although Glaze attests that Plaintiff received the Form NF-2 on January 2, 2018, Plaintiff submits no information regarding when it received claims from the Defendants, whether or when it mailed the prescribed verification forms to the parties required to complete them, and if or when it received responses to those requests for verification. As such, the court cannot determine whether Plaintiff complied with the timeliness requirements of 11 NYCRR 65–3.5 (b), and Plaintiff has failed to meet its burden for entry of 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, 438 [1st Dept 2017]).

Accordingly, it is

ORDERED that Plaintiff’s motion for entry of a default judgment is denied; and it is further

ORDERED that the parties are directed to attend a telephonic conference on November 19, 2020 at 3:00 p.m. Plaintiff is directed to arrange a conference call for the preliminary

conference and circulate the dial-in information to all parties and the court at Ifurdyna@nycourts.gov no later than 48 hours before the start of the conference.

Louis L. Nock

<u>10/21/2020</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE