

American Tr. Ins. Co. v Avelar
2020 NY Slip Op 33622(U)
October 23, 2020
Supreme Court, New York County
Docket Number: 652572/2019
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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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

ROLANDO AVELAR, ACUPUNCTURE WITHOUT BORDERS PC, CHIROPRACTIC ASSOCIATES OF REGO PARK PC, CRYSTAL RAY MEDICAL PC, ELMIRA SAMKOVA MD, HEALTHY RX INC, MEDEA MEDICAL PC, OPTI HEALTH CORP

Defendant.

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INDEX NO. 652572/2019
MOTION DATE 8/25/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

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

In this declaratory judgment action, the plaintiff previously moved for leave to enter a default judgment against the non-answering defendants Rolando Avelar (the individual defendant) and Acupuncture Without Borders PC, Chiropractic Associates of Rego Park PC, Crystal Ray Medical PC, Elmira Samkova MD, Healthy Rx Inc., Medea Medical PC, and Opti Health Corp. (the non-answering health care defendants). The plaintiff sought a declaration that it is not obligated to pay no-fault benefits to the individual defendant or to the non-answering health care defendants to reimburse them for treatment that they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on October 22, 2017 under policy number B702795, claim number 1010953-02 on the grounds that the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). By order dated December 17, 2019, the plaintiff's motion was denied, without prejudice, on the grounds that the plaintiff failed to submit sufficient evidence to demonstrate that the initial EUO request was timely mailed to the individual defendant under 11 NYCRR 65-3.5(b). The plaintiff, having cured the defect, again moves for leave to enter a default judgment against the non-answering defendants. No opposition is submitted. The motion is granted to the extent discussed herein.

To establish entitlement to a default judgment, a plaintiff must submit proof of the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept. 2015]), satisfy the notice requirements for the motion (see CPLR 3215[g]) and timely move for relief (see CPLR 308[2]; 320[a]; 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept. 2015]).

In support of its motion, the plaintiff again submits, *inter alia*, the EUO verification request sent to the individual defendant on December 26, 2017 scheduling an EUO for January 16, 2018, a notice rescheduling the EUO for February 5, 2018, proof of mailing of the requests, and verification of the individual defendant's failure to attend either EUO. The plaintiff also submits the NF-3 forms it received from the health care defendants, showing that the plaintiff received at least 20 claims from December 1, 2017 through February 26, 2018, including at least one received on December 11, 2017. These NF-3 forms demonstrate that the initial EUO request was timely scheduled under 11 NYCRR 65-3.5(b), curing the defect on the prior motion. Thus, the plaintiff has established *prima facie* that the individual defendant failed to appear for a properly noticed EUO breaching a condition precedent to his no-fault insurance benefits, vitiating coverage. See 11 NYCRR 65-1.1; see also Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014).

However, the plaintiff has not demonstrated that it has timely moved for relief against all of the defendants. See CPLR 3215(c). Specifically, the individual defendant was personally served on May 14, 2019, with proof of service being filed the next day, and defendant Elmira Samkova MD was served pursuant to CPLR 308(2) on May 16, 2019 with proof of service being filed the next day. As such, service was complete with respect to Avelar on May 14, 2019 and Samkova on May 26, 2019, and their time to answer expired no later than June 15, 2019. Even accounting for the COVID-19 health crisis and consequent temporary courthouse closure and e-filing limitations from March 22, 2020 (see Administrative Order of the Chief Administrative Judge of the Courts AO/78/20) to May 4, 2020 (see Administrative Order of the Chief Administrative Judge of the Courts AO/87/20), the plaintiff's time to move for a default judgment expired on August 1, 2020 as to those defendants. Thus, the instant motion, filed August 11, 2020 is untimely as against those defendants.

As the remaining defendants were served by service upon the Secretary of State on May 17, 2019 pursuant to Business Corporation Law § 306, with proof of service not being filed until

July 10, 2019, the remaining defendants' time to answer expired on August 9, 2019. Although the plaintiff's one-year deadline to move pursuant to CPLR 3215(c) expired on August 10, 2020, one day prior to the filing of this motion, accounting for the temporary courthouse closure and e-filing limitations, this motion is timely as against them.

An untimely motion for a default judgment must be denied, and the complaint dismissed as abandoned, upon motion or the court's own motion, absent "sufficient cause" shown. See Seide v Calderon, 126 AD3d 417 (1st Dept 2015); Diaz v Perez, 113 AD3d 421 (1st Dept 2014). The plaintiff's contention that the motion is timely as to all of the defendants because it was made within one year of the previous order is wholly without merit. That argument is completely at odds with the plain language of CPLR 3215(c) and there is nothing in the previous order that would suggest that the one-year period was being extended another year or for any amount of time beyond the statutory one-year period from the default. Also without merit is the plaintiff's argument that the motion could not have been made sooner due to the COVID-19 health crisis and consequent temporary courthouse closure and e-filing limitations. As discussed herein, e-filing was limited through May 4, 2020. The plaintiff could have moved for relief sooner and fails to offer any particular reason or explanation for the further delay. As such, upon the court's own motion, the complaint is dismissed as against Rolando Avelar and Elmira Samkova MD.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is granted, without opposition, as against the non-answering defendants except Rolando Avelar and Elmira Samkova MD, and upon the court's own motion, the complaint is dismissed as abandoned as against those defendants pursuant to CPLR 3215(c), and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to Acupuncture Without Borders PC, Chiropractic Associates of Rego Park PC, Crystal Ray Medical PC, Healthy Rx Inc., Medea Medical PC, and Opti Health Corp., for medical supplies and/or treatment rendered to defendant Rolando Avelar for injuries allegedly sustained in the October 22, 2017, motor vehicle accident, claimed under insurance policy number B702795, and assigned claim number 1010953-02, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.



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

10/23/2020
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