

American Tr. Ins. Co. v Pillco
2020 NY Slip Op 33677(U)
October 23, 2020
Supreme Court, New York County
Docket Number: 652601/2019
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 -

ANGEL PILLCO, ADVANCED SPINE SURGERY CENTER,
ADVANT ORTHOCARE INC, ALAN DENNIS BECKLES MD,
AVANGUARD SUPPLY INC, CORONA FAMILY
CHIROPRACTIC CARE PC, DR RANDALL EHRLICH,
ENGLINTON MEDICAL PC, JULY PT PC, NEW YORK
MEDICAL & DIAGNOSTIC CARE PC, OUTPATIENT USA
LLC, PARAMOUNT MEDICAL SERVICES PC, PRECISION
RADIOLOGY BY JACOB LICHY MD PC, RIDGEWOOD
ACUPUNCTURE PC, SANFORD R WERT MD
PC, THOMPSON MEDICAL PC, VALLABH MEDICAL
PC, WELCOME PHYSICAL THERAPY PC

Defendants.

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INDEX NO. 652601/2019
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, 56

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 Angel Pillco (the individual defendant) and Advanced Spine Surgery Center, Advant Orthocare Inc., Alan Dennis Beckles MD, Dr. Randall Ehrlich, Englinton Medical PC, July PT PC, Outpatient USA LLC, Paramount Medical Services PC, Precision Radiology by Jacob Lichy MD PC, Ridgewood Acupuncture PC, Sanford R. Wert MD PC, Thompson Medical PC, Vallabh Medical PC, and Welcome Physical Therapy PC. (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 30, 2017 under policy number B610923, claim number 1010797-01 on the grounds that the individual defendant failed to appear for duly scheduled Examinations Under Oath (EUOs).

By an order dated December 17, 2019, the court denied the plaintiff's first motion, without prejudice, on the grounds that the plaintiff failed to submit sufficient proof of the facts constituting the claim as required by CPLR 3215(f). Specifically, the court found that the plaintiff failed to demonstrate that the initial EUO request was timely mailed to the individual defendant under 11 NYCRR 65-3.5(b). The plaintiff again moves for leave to enter a default judgment against the non-answering defendants. No opposition is submitted. The motion is denied.

The court notes that on August 31, 2020, defendant Avanguard Supply Inc. answered the complaint and the plaintiff accepted the answer and withdrew the instant motion as against that defendant. Previously, by stipulation filed September 10, 2019, the plaintiff discontinued the action as against defendant NY Medical & Diagnostic Care, P.C.

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]).

The plaintiff has failed to cure its defects on the prior motion, and thus fails to submit proof of the facts constituting its claim. A no-fault insurer seeking a declaration of no coverage due to violations of the terms of its policy must demonstrate that it complied with the procedural and timeliness requirements of 11 NYCRR 65-3.5 and 11 NYCRR 65-3.6. See Am. Transit Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1st Dept. 2015). Section 65.3.5(b) provides, in relevant part, that once an insurer receives a verification form for a pending claim, the insurer has 15 days to seek further verification such as an EUO. See Unitrin Advantage Ins. Co. v All of NY, Inc., 158 AD3d 449 (1st Dept. 2018). Section 65-3.5(d) provides that if the verification sought is an EUO, it must be scheduled to be held within 30 calendar days from the date of receipt of the verification forms.

Here, the plaintiff's submissions demonstrate that the initial EUO verification request was sent by regular mail to the individual defendant on February 7, 2018, scheduling an EUO for

February 21, 2018. However, the NF-3 forms submitted by the plaintiff on this motion only show that the plaintiff received claims on November 17, 2017, December 1, 2017, December 17, 2017, and from March 19, 2018 through June 7, 2018. As such, the plaintiff's submissions fail to show that the initial EUO was sent within 15 days of receipt of a claims form or that the initial EUO was scheduled to be held within 30 calendar days of the plaintiff's receipt of a claims form. Thus, the plaintiff again fails to make a *prima facie* showing that the EUOs were properly noticed within the prescribed timeframe. See Kemper Indep. Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); Nat'l Liab. & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015).

Therefore, even assuming that the plaintiff submitted sufficient proof of service of the summons and complaint and proof of the defendants' default, it has again failed to submit sufficient proof of the facts constituting the claim as required for relief under CPLR 3215(f). Since any further default motion would be untimely, the complaint is dismissed as against those defendants. See CPLR 3215[c].

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is denied, and, upon the court's own motion, the complaint is dismissed as against defendants Angel Pillco, Advanced Spine Surgery Center, Advant Orthocare Inc., Alan Dennis Beckles MD, Dr. Randall Ehrlich, Englinton Medical PC, July PT PC, Outpatient USA LLC, Paramount Medical Services PC, Precision Radiology by Jacob Lichy MD PC, Ridgewood Acupuncture PC, Sanford R. Wert MD PC, Thompson Medical PC, Vallabh Medical PC, and Welcome Physical Therapy PC, pursuant to CPLR 3215[c], and it is further,

ORDERED that, the action is discontinued and the complaint is dismissed as against defendant NY Medical & Diagnostic Care, P.C., upon the parties' stipulation filed September 10, 2019, and it is further,

ORDERED that the plaintiff and remaining defendant Avanguard Supply Inc. shall commence discovery and contact the court on or before November 30, 2020, to schedule a preliminary conference, and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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

10/23/2020
 DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE