

American Tr. Ins. v Clarke

2020 NY Slip Op 33735(U)

November 10, 2020

Supreme Court, New York County

Docket Number: 152083/2019

Judge: Melissa A. Crane

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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. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

AMERICAN TRANSIT INSURANCE

Plaintiff,

- v -

CLARKE, MARLON

Defendant.

-----X

INDEX NO. 152083/2019

MOTION DATE 07/20/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

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

Upon the foregoing documents, it is

In this insurance action, plaintiff, American Transit Insurance Company (ATIC), moves for an order: (i) pursuant to CPLR 3215, granting ATIC a default judgment against individual defendant Marlon Clarke (Clarke) and codefendants American Kinetics Lab Inc., Aron Rover MD, PLLC, JLL Chiropractic, P.C., Medaid Radiology, LLC, Merrick Wellness Inc., Metro Pain Specialists P.C., New York Presbyterian Hospital (collectively, the Defaulting Providers) for failure to appear in the action; (ii) pursuant to CPLR 3212, granting ATIC summary judgment against defendant Nu Age Med Solutions Inc. (Nu Age); (iii) granting ATIC a declaratory judgment that Clarke is not an eligible injured person entitled to no-fault benefits under ATIC insurance policy B511504 (the Policy), Claim No.: 1034279-02 (the Claim) from an accident occurring on July 25, 2918 involving Clarke (underlying accident); (iv) granting ATIC a declaratory judgment that ATIC is not obligated to honor or pay claims for reimbursement submitted by the Defaulting Providers and Nu Age named herein, as assignees of Clarke, under the Claim nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein,

in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the Claim from the underlying accident as Clarke is not an eligible injured person as defined by the Policy and/or New York State regulation 68; and (v) granting ATIC a declaratory judgment that ATIC is not required to provide, pay or honor any current or future claim for no-fault benefits under the “Mandatory Personal Injury Protection” endorsement under the Claim, nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the Claim from the underlying accident as Clarke is not an eligible person as defined by the Policy and/or New York State regulation 68.

This case arises from an automobile accident that occurred on July 25, 2018, involving Clarke. Clarke claims that he sustained injuries as a result of the accident. Clarke was allegedly the driver and owner of the insured vehicle and made a claim to ATIC on August 27, 2018, under the Policy for no-fault benefits. On that same day, ATIC received a letter of representation from Clarke’s attorney, Belushin Law Firm (plaintiff exhibit C).

As a result of the accident, Clarke sought treatment from, and assigned his rights to collect no-fault benefits to, various health care providers including codefendants. Defendants submitted claims to plaintiff with an assignment of benefits from Clarke, asserting that they rendered services that are compensable under the terms of the Policy. Pursuant to the no-fault endorsement, ATIC requested that Clarke appear for an independent medical examination (IME) (plaintiff exhibit D). Clarke failed to appear after notice was served on Clarke and his counsel on two separate occasions. As a result of his failure to appear for an IME, ATIC denied Clarke’s claim (plaintiff exhibit E).

Plaintiff commenced an action by filing a summons and complaint on February 27, 2019.

First, plaintiff is not seeking relief against defendant Aron Rovner MD PLLC d/b/a LDRD PC due to an inability to timely serve. As it has been over one year from when the action commenced, the court dismisses the action as against Aron Rovner MD PLLC d/b/a LDRD PC.¹ In addition, plaintiff is not seeking relief against defendants A.C. Medical, P.C., AYM Physical Therapy P.C., Sound Spine Chiropractic, PC and Nu Age Med Solutions Inc. as per stipulations entered into among the parties discontinuing the action as against them. In light of the stipulation with Nu Age, plaintiff's motion seeking summary judgment against it is deemed moot.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the non-answering individual defendant Clarke and codefendants American Kinetics Lab Inc., Aron Rover MD, PLLC, JJJ Chiropractic, P.C., Medaid Radiology, LLC, Merrick Wellness Inc., Metro Pain Specialists P.C., and New York Presbyterian Hospital (Defaulting Providers).

Pursuant to CPLR 3215 (f), “[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of defaulting defendant's failure to answer or appear.” Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the nonanswering Defaulting Providers' failure to appear (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649 [2d Dept 2011]). Plaintiff demonstrates prima facie its denial of no-fault claims based on Clarke's failure to appear for IME's on October 12, 2018 and November 8, 2018. Plaintiff submits, among other things, the IME request letters, affidavits of Cheryl Glaze, a

¹ It appears that plaintiff is sued Aron Rovner MD PLLC and Aron Rovner MD PLLC d/b/a LDRD PC as two separate entities and the action is being dismissed as against Aron Rovner MD PLLC d/b/a LDRD PC only.

no-fault claims supervisor for ATIC, who attests to the processing of claims, requests for additional verification, breach of the Policy, and the issuance of denial of claim forms in this case; Luis Campbell, mail room supervisor at ATIC, who attests to the general mailing procedures and that the general denials for the Claim at issue were mailed on November 21, 2018; Patricia Pontrello, an employee in the office of Independent Physical Exam Referrals, Inc., who attests to mailing the IME scheduling letters; Dr. Michael Russ, who attests to plaintiff's nonappearance at the scheduled IMEs. The court, therefore, grants plaintiff's default motion against the Defaulting Providers.

The court, however, denies plaintiff's motion for default judgment as against Clarke because plaintiff failed to submit an affidavit of nonmilitary service for the individual defaulting defendant, Clarke. In addition to providing proof of service of the summons and complaint and the facts constituting the claim (*see* CPLR 3215 [f]; *Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987]), a plaintiff moving for a default judgment must tender proof of a defendant's nonmilitary status before a judgment may be entered (*see* 50 USC § 3931 [b]; Military Law § 303 [3]; *Unitrin Advantage Ins. Co. v 21st Century Pharm.*, 158 AD3d 450, 450 [1st Dept 2018]). The search must be conducted at the time of the purported default (*American Tr. Ins. Co. v Medina*, 2012 NY Slip Op 033940[U], *4 [Sup Ct, NY County 2012]). Absent from the moving papers, however, is documentary proof that the defendant is not on active military duty. The court, therefore, denies plaintiff's motion for default judgment as against individual defendant Clarke. No basis exists for plaintiff's alternative request for summary judgment because issue has not been joined (*see* CPLR 3212 [a]).

Conclusion

Accordingly, it is

ORDERED that the motion by plaintiff, American Transit Insurance Company (ATIC) for default judgment as against defendants American Kinetics Lab Inc., Aron Rover MD, PLLC, JIL Chiropractic, P.C., Medaid Radiology, LLC, Merrick Wellness Inc., Metro Pain Specialists P.C., New York Presbyterian Hospital is granted, in part, without opposition, and it is further

ORDERED that the motion is denied as to defendant Marlon Clarke; and it is further

ADJUDGED and DECLARED that defendants American Kinetics Lab Inc., Aron Rover MD, PLLC, JIL Chiropractic, P.C., Medaid Radiology, LLC, Merrick Wellness Inc., Metro Pain Specialists P.C., New York Presbyterian Hospital are not entitled to no-fault coverage for the motor vehicle accident that occurred on July 25, 2018, involving individual defendant Marlon Clarke for claims submitted to ATIC insurance policy B511504 (the Policy), Claim No.: 1034279-02 (the Claim) as referenced in the complaint, and plaintiff has no duty to provide pay, honor or reimburse any claims in any current or future proceedings, including without limitation arbitrations and/or lawsuits, seeking to recover no-fault benefits arising out of the July 25, 2018 accident; and it is further

