

**American Tr. Ins. Co. v Sky Limit Physical Therapy,  
P.C.**

2020 NY Slip Op 33970(U)

November 25, 2020

Supreme Court, New York County

Docket Number: 156467/2018

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

SKY LIMIT PHYSICAL THERAPY, P.C., AOT CHIROPRACTIC, P.C., AM PATEL PHYSICAL THERAPY, P.C., PRIORITY CARE REHAB & PT, P.C, HIDDEN DRAGON ACUPUNCTURE, P.C, FRIENDLY ACUPUNCTURE, P.C., TOTAL PSYCHIATRIC MEDICAL SERVICES, PC, MIISUPPLY, LLC., METRO PAIN SPECIALISTS, P.C., HEALTHPLUS SURGERY CENTER, LLC, COMPREHENSIVE MEDICAL ASSIST, P.C, CITIMED SERVICES, P.A., ALL BODY HEALING SUPPLIES, LLC., SHEEPSHEAD BAY MEDICAL SUPPLIES, INC., COLUMBUS IMAGING CENTER, LLC., URBAN MEDICAL, P.C., PI PHYSIAL THERAPY, P.C, RX FOR YOU, CORP., SUTTER PHARMACY, INC., PRO ADJUST CHIROPRACTIC, P.C, BACK TO HEALTH SUPPLIES, INC., ELSA TAVAREZ

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 158, 159, 160, 161, 162, 163, 164, 165

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 166, 167

were read on this motion to/for MODIFY ORDER/JUDGMENT.

Upon the foregoing documents, the motions are decided as follows:

Plaintiff commenced the instant action by filing a summons and complaint on July 12, 2018, seeking a declaratory judgment that it is not obligated to pay no-fault insurance claims arising out of March 24, 2017 accident upon a founded belief that Elsa Tavarez' alleged injuries

did not arise out of the subject accident and that the above treating providers' treatments were not medically necessary.

In an Order entered March 3, 2020, plaintiff was granted a default judgment against all defendants except, Miisupply, LLC, Metro Pain Specialists, PC, Comprehensive Medical Assist, PC, Citimed Services, P.A., Sheepshead Bay Medical Supplies, Inc., and Back to Health Supplies, Inc. This action has been settled and discontinued as against PI Physical Therapy, PC, Sheepshead Bay Medical Supplies, Inc. and Back to Health Supplies, Inc.

Plaintiff now moves for summary judgment with regard to the remaining defendants and Columbus Imaging Center, LLC and Pro Adjust Chiropractic, PC move to vacate their default judgments.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1<sup>st</sup> Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989).

Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Normally, an insurer satisfies its prima facie burden by establishing, through admissible evidence, that it timely pays or denies a provider's bills within 30 days of receipt. 11 N.Y.C.R.R. 65-3.8. See generally *New York & Presbyt. Hosp. v. Allstate Insc. Co.*, 30 A.D.3d 942 (2d Dept 2006); *St. Vincent's Hosp. of Richmond v. Government Employees Insc. Co.*, 50 A.D.3d 1123 (2d Dept 2008). However, several defenses are not precludable if unpreserved in a timely denial. A defense of lack of coverage can be raised at any time. *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195 (1997). This includes fraud such as staged accidents as well. *Fair Price Med. Supp. Corp. v. Travelers Indem. Co.*, 9 Misc.3d 76 (App. Term, 2d Dept, 2nd, 11th and 13th Jud Dists 2015).

Plaintiff's motion for summary judgment cites a litany of caselaw on the subject of non-covered events and staged accidents that are entirely inapposite to the facts of this case. In support of its motion, plaintiff submits a report from biomedical engineering experts, which is not in admissible form, which if admissible would be evidence that Ms. Tavarez' injuries did not arise out of the subject accident. Plaintiff also submits the affirmations of various physicians which raise issues as to the medical necessity of the services that the providers submitted bill for. The Court notes that Ms. Tavarez appeared for an IME as demanded by plaintiff. The sole issues involved appear to be those of causation and medical necessity. As plaintiff has submitted absolutely no evidence of fraud, and has failed to establish that it mailed a timely denial with respect to any of the providers' bills, plaintiff has utterly failed to establish a prima facie entitlement to judgment.

To vacate a judgment, defendant must demonstrate both a reasonable excuse for its default and the existence of a meritorious defense to the action, *Presbyterian Hosp. in City of New York v*

*New York Cent. Mut. Ins. Co.*, 277 AD2d 299 (2d Dept, 2000). The moving defendants previously cross-moved under motion sequence 002 to vacate the default of defendant, Metro Pain Specialists, PC, attaching a proposed answer on behalf of defendants Columbus Imaging Center, LLC and Pro Adjust Chiropractic, PC in addition. As the moving defendant was previously granted a vactur of its default upon the same reasoning, vacatur of the defaults of Columbus Imaging Center, LLC and Pro Adjust Chiropractic, PC is granted.

Plaintiff's motion for summary judgment is DENIED in its entirety.

Moving defendants' motion is GRANTED in its entirety. The default of defendants, Columbus Imaging Center, LLC and Pro Adjust Chiropractic is vacated.

ORDERED that the answer of said defendants is hereby deemed interposed as directed in this Court's prior Order.

11/25/2020  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE