

<b>American Tr. Ins. Co. v Garcia</b>
2020 NY Slip Op 34077(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 160630/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

INDEX NO. 160630/2018
MOTION DATE 03/02/2020
MOTION SEQ. NO. 001

- v -

NOEL GARCIA, CITIMEDICAL I, PLLC, HARLEM MEDICAL ASSOCIATES P.C., JULY PT, P.C., MANHATTAN'S HANDS OF HOPE P.T., P.C. (discontinued), METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MMA PHYSICAL THERAPY, P.C., MYRTLE DME NYC INC (discontinued), PYRAMID CARE PT, P.C., SA QI ACUPUNCTURE P.C., SJ ACUPUNCTURE, P.C. (discontinued), SMART CHOICE MEDICAL P.C., and SOUTHERN BLVD CHIROPRACTIC P.C.,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22

were read on this motion to/for JUDGMENT - DECLARATORY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion by plaintiff American Transit Insurance Company for default judgment against defendants NOEL GARCIA, HARLEM MEDICAL ASSOCIATES, P.C., JULY P.T. P.C., SMART CHOICE MEDICAL, P.C., and SOUTHERN BOULEVARD CHIROPRACTIC P.C. is granted without opposition; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff AMERICAN TRANSIT INSURANCE COMPANY is not obligated to honor or pay claims for reimbursement to HARLEM MEDICAL ASSOCIATES, P.C.,

JULY P.T. P.C., SMART CHOICE MEDICAL, P.C. and SOUTHERN BOULEVARD CHIROPRACTIC P.C., as assignees of NOEL GARCIA, and that such defaulting defendants have no right to litigate or arbitrate for No-Fault benefits with respect to the June 26, 2018 alleged accident; and it is further

ORDERED that the balance of the action is severed and shall continue; and it is further

ORDERED that the motion of plaintiff American Transit Insurance Company for summary judgment against defendants CITIMEDICAL I, PLLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MMA PHYSICAL THERAPY, P.C. and PYRAMID CARE, P.T., PC is denied; and it is further

ORDERED that counsel shall submit to [59nyef@nycourts.gov](mailto:59nyef@nycourts.gov) and NYSCEF a proposed preliminary conference order or proposed competing preliminary conference order on January 15, 2021.

#### DECISION

In motion sequence 001, plaintiff American Transit Insurance Company (ATIC) moves: (1) pursuant to CPLR 3125 for default judgment against defendants Harlem Medical Associates, P.C., July PT, P.C., Myrtle DME NYC Inc., Sa Qi Acupuncture P.C., SJ Acupuncture, P.C., Smart Choice Medical P.C., Southern Blvd Chiropractic P.C. (collectively Defaulting Providers)<sup>1</sup> and

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<sup>1</sup> The action was discontinued by stipulation against defendants Myrtle DME NYC Inc., Sa Qi Acupuncture P.C., SJ

Noel Garcia (Garcia), on the basis that the Defaulting Providers and Garcia have failed to answer or appear in the action; (2) pursuant to CPLR 3212 granting AITC summary judgment against defendants Citimedical I, PLLC, Metro Pain Specialists Professional Corporation, MMA Physical Therapy, P.C, and Pyramid Care PT, P.C. (collectively Answering Providers, together with Defaulting Providers, Providers); (3) for a declaration that Garcia is not entitled to no-fault benefits under ATIC insurance policy SC 501597, claim No.: 1014125-02 (Policy); (4) for a declaration that ATIC is not obligated to honor or pay claims for reimbursement submitted by the Providers named herein, as assignees of Garcia, under the Policy, 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 Policy from the alleged accident of December 8, 2017, involving Garcia on the basis that Garcia is not an eligible injured person as defined by the Policy and/or New York State Regulation 68; and (5) a declaration 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 Policy, nor is ATIC required

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Acupuncture, P.C., and Manhattan's Hands of Hope P.T., P.C. (NYSCEF Doc. Nos. [NYSCEF] 2, 23).

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 Policy from the alleged accident of December 8, 2017, involving Garcia on the basis that Garcia is not an eligible injured person as defined by the Policy and/or New York State Regulation 68.

This action arises out of a claims under the ATIC Policy that Garcia assigned to Provider defendants.

ATIC commenced this action seeking a declaration that it is not obliged to provide coverage and reimbursement for services provided to Garcia. ATIC alleges that Garcia breached a condition precedent to coverage under the Policy by failing to appear for independent medical examinations (IMEs) on March 1, 2018, April 12, 2018, and May 10, 2018 (NYSCEF 1).

Thereafter, on February 3, 2020, ATIC moved for default judgment against Garcia and the Defaulting Providers, and for summary judgment and declaratory judgment against the Answering Providers (NYSCEF 6).

With respect to the motion for default, ATIC has submitted proof of service of the pleadings and the motion on defendant Garcia and the Defaulting Providers, affidavits of merits of employees of plaintiffs with knowledge of the facts, and is

therefore entitled to a judgment of default against such Defaulting Providers in accordance with CPLR § 3215(f).

With respect to the motion of ATIC for a summary declaration against the Answering Providers, a party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [citation omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citation omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.* [citation omitted]).

ATIC must establish that: (1) the IMEs were requested in accordance with the procedures and time frames set forth within 1 NYCRR § 65-3.5 [d] (No-Fault Regulations); and (2) the claimant failed to appear at the schedule IMEs, in order to satisfy ATIC's burden under summary judgment (Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 [1st Dept 2011] [internal citations omitted]).

In opposition, the Answering Providers argue that ATIC fails to conclusively establish that the IMEs were scheduled in compliance with the No-Fault Regulations.

Despite submitting multiple appointment letters (NYSCEF 12), ATIC fails to establish that the IMEs were scheduled pursuant to the No-Fault Regulations, "which prescribes a 30-calendar-day time frame for the holding of IMEs" (American Tr. Ins. Co. v. Vance, 131 AD3d 849, 850 [1st Dept 2015]).

Furthermore, ATIC does not objectively demonstrate that the appointment letters were mailed to Garcia (Interboro Ins. Co. v Perez, 112 AD3d 483, 483 [2013]). Moreover, the affidavits submitted by ATIC employees and medical providers fail to: (1) affirmatively state that the appointment letters were mailed; or (2) conclusively establish that the appointment letters were mailed in compliance with the No-Fault Regulations (NYSCEF 9).

Lastly, although ATIC does not submit a reply, any attempt to cure its deficiency on reply would be improper (American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841, 842 [1st Dept 2015] ["[a]ny belated attempt by plaintiff to cure this deficiency in its prima facie showing by submitting evidence for the first time in reply would have been improper"]).

The Answering Providers have sufficiently raised a triable issue of fact that warrants the denial of summary declaratory relief (Unitrin, 82 AD3d at 560). ATIC's reliance on Unitrin is

misplaced as the instant action is factually distinct because plaintiff in Unitrin conclusively established that its scheduling of the IMEs was in compliance with the No-Fault Regulations (id.).

12/10/2020  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

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