

Ace Am. Ins. Co. v Flowers

2021 NY Slip Op 30039(U)

January 7, 2021

Supreme Court, New York County

Docket Number: 152358/2020

Judge: Lisa S. Headley

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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. LISA S. HEADLEY PART IAS MOTION 22

Justice

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INDEX NO. 152358/2020

ACE AMERICAN INSURANCE COMPANY,
Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

ANTONIO FLOWERS, ALEXIOS APAZIDIS, M.D. P.C., ALL COUNTY, LLC, AMERICAN ACUPUNCTURE P.C., BRONX CHIROPRACTIC HEALTH SERVICES, P.C., ELMWOOD PARK MEDICAL GROUP PC, JAM PHARMACY CORP, JMSK MEDICAL DIAGNOSTICS, P.C., METROPOLITAN MEDICAL & SURGICAL P.C., NEW YORK AMERICAN ACUPUNCTURE P.C., OPEN PHYSICAL THERAPY P.C., PARAMOUNT MEDICAL SERVICE, P.C., PREFERRED MEDICAL, P.C., PSYCHOLOGY AFTER ACCIDENT P.C., QBS SOLUTIONS INC., REHAB CARE PHYSICAL THERAPY P.C., ROSS A. FIALKOV DC, P.C., SAPT PC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for JUDGMENT - DECLARATORY

Upon the foregoing documents, it is hereby ORDERED that the motion by plaintiff, Ace American Insurance Company, for a default judgment pursuant to CPLR §3215, against defaulting defendants, Antonio Flowers, Alexios Apazidis, MD, All County, LLC, American Acupuncture P.C., Bronx Chiropractic Health Services, P.C., Elmwood Park Medical Group PC, JMSK Medical Diagnostics, P.C., Metropolitan Medical & Surgical P.C., New York American Acupuncture P.C., Open Physical Therapy P.C., Paramount Medical Service, P.C., Preferred Medical, P.C., Psychology After Accident P.C., Rehab Care Physical Therapy P.C., Ross A. Fialkov DC, P.C. and SAPT PC, (hereinafter "defaulting defendants") is granted without opposition.

This case arises from an accident that occurred on May 11, 2018, where the claimant/ co-defendant, Antonio Flowers, was involved in a collision with a motor vehicle while riding a bicycle. Defendant Flowers claimed he sustained bodily injuries.

Plaintiff commenced this action on or about March 4, 2020, by the filing of a summons and complaint seeking a declaratory judgment against all defendants in this action due to the alleged violation of co-defendant/claimant Flowers for his failure to appear for scheduled independent medical examinations (IME) on two occasions, which constituted a failure of a condition precedent to receive insurance benefits for the motor vehicle collision under *Insurance Law §5103*. The medical provider defendants submitted over \$43,000.00 in no-fault claims to the plaintiff, as assignees of the claimant/co-defendant Flowers as a result of the accident that occurred on May 11, 2018 and under the policy number, 1M01M010250228.

Plaintiff seeks a declaration that it has no obligation to pay any no-fault benefits to the defendants arising from said accident because defendant Flowers failed to appear for the scheduled IMEs. Plaintiff submits that it duly served the verified complaint upon all the named defendants, and submitted affidavits of service. The defaulting defendants failed to answer, and their time to answer has expired. On July 7, 2020 plaintiff served the defaulting defendants with a Notice of Default pursuant to *CPLR §306 and §3215*.

It should be noted that co-defendants, Jam Pharmacy Corp. and QBS Solutions Inc., are not in default as their attorneys, Gary Tsirelman, PC, submitted an Answer on their behalf.

In support of the instant motion, plaintiff submitted the affidavit of Rosaleen Murphy, a claims adjuster for plaintiff. In her affidavit, Ms. Murphy asserts, *inter alia*, that ACE sought verification of the no-fault claims by requesting IMEs of claimant Flowers scheduled on August

28, 2018 at 2:00pm and September 18, 2018 at 2:30pm, to confirm the legitimacy of the treatment, to which claimant Flowers failed to appear.

CPLR §3215 (a) provides, in part, that “[w]hen a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him.” On a motion for a default judgment under *CPLR §3215* based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. *See, CPLR §3215(f); Matone v Sycamore Realty Corp.*, 50 A.D.3d 978 (2d Dep’t 2008) ; *Allstate Ins. Co. v Austin*, 48 A.D.3d 720 (2d Dep’t 2008); *see also, Liberty County Mut. v Ave. I Med., P.C.*, 129 A.D.3d 783 (2d Dept 2015). Here, the plaintiff established valid proof of service of process on defaulting defendants, and has also established that the defaulting defendants have failed to submit an Answer.

Plaintiff's motion for an order pursuant to *CPLR § 3212* for summary judgment against the answering defendants is granted on the ground that the co-defendant/claimant Flowers failed to attend the scheduled IMEs, which are a condition precedent to coverage. The failure to appear for a duly scheduled IME is a breach of a condition precedent to coverage under the no-fault policy. *See, Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dept 2011). Accordingly, a no-fault insurer makes out its *prima facie* entitlement to summary judgment by “establishing that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that defendants' assignors did not appear.” *Id.* at 560.

In the instant action, plaintiff has made out its *prima facie* case for summary judgment as it has shown that it properly mailed the notices for IMEs to the defendant/claimant Flowers and

that he failed to appear for said IMEs. The defendants have not submitted opposition papers. As such, the plaintiff's motion is granted against the defaulting defendants without opposition.

Accordingly, it is

ORDERED that plaintiff's motion pursuant to CPLR 3215 for default judgment against the defaulting defendants is GRANTED; and it is further

ORDERED that claimant Flowers is not an eligible injured person entitled to no-fault benefits under policy number, 1M01M010250228; and it is further

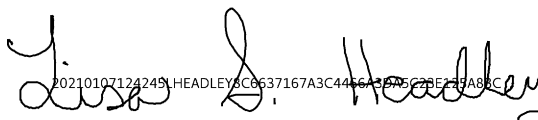
ORDERED that plaintiff is not required to provide, pay, honor, or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitrations or lawsuits seeking to recover no-fault benefits under policy number, 1M01M010250228 to the defaulting defendants; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against the defaulting defendants, with the exception of defendants, Jam Pharmacy Corp. and QBS Solutions Inc., who did file an Answer; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision/Order of the Court.

1/7/2021
DATE


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LISA S. HEADLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

CHECK IF APPROPRIATE: