

American Tr. Ins. Co. v Diaz
2021 NY Slip Op 30568(U)
February 25, 2021
Supreme Court, New York County
Docket Number: 650129/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE
JusticePART 15

AMERICAN TRANSIT INSURANCE COMPANY

- v -

INDEX NO.	650129/2019
MOTION DATE	
MOTION SEQ. NO.	002
MOTION CAL. NO.	

FRANK SUERO DIAZ, ALLCARE MEDICAL SERVICES, P.C., ATLAS PHARMACY, LLC, BROOK CHIROPRACTIC OF NY PC, CHL PHYSICAL THERAPY OF THE BRONX PC, CP ACUPUNCTURE PC, DIGNITY PT PC, EXPERT MEDICAL SUPPLIES, FIRST SPINE CHIROPRACTIC OF NY PC, GEN CEL DIAGNOSTICS, NEW YORK PAIN MANAGEMENT GROUP, SOUND CHIROPRACTIC & PHYSICAL THERAPY, P.C., SPINE CHARE CHIROPRACTIC, P.C., TANDINGAN PT PC and LEVERON, INC d/b/a TITAN PHARMACY

The following papers, numbered _ to _ were read on this motion to/for _____.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	<u>PAPERS NUMBERED</u> _____ _____ _____
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	

CROSS-MOTION: ☐ YES ☐ NO

Upon the foregoing papers, it is ordered that this motion is

This case arises from an automobile accident that occurred on July 6, 2017, involving defendant Frank Suero Diaz (“assignor”). The assignor alleges that he sustained serious bodily injuries as a result of a collision, and submitted claims to plaintiff for no-fault benefits under the insurance policy that plaintiff issued. The assignor assigned the rights to collect no-fault benefits to co-defendants/medical providers. Plaintiff commenced an action on or about January 6, 2019, by a Summons and Complaint, seeking a declaratory judgment against the assignor, in addition to numerous co-defendants/medical providers.

The court has previously granted default judgment, pursuant to CPLR 3215, against the following defendants: Frank Suero Diaz, Allcare Medical Services, P.C., Chl Physical Therapy of the Bronx, PC, CP Acupuncture PC, Dignity PT PC, Gen Cel Diagnostics, New York Pain

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING
REASON(S): _____

Management Group, Sound Chiropractic & Physical Therapy, PC, and Spine Care Chiropractic, P.C. (*see* plaintiff's motion for default judgment, February 4, 2020 Decision and Order granting default judgment attached as Exhibit "B").

Plaintiff now moves for summary judgment against the answering defendants: Atlas Pharmacy, LLC, Expert Medical Supplies, Brooke Chiropractic of NY PC, and First Spine Chiropractic of NY PC ("Remaining Defendants") (*see* edoc 43)

Plaintiff submits an affidavit from Cheryl Glaze, an American Transit claim representative who attests to personal knowledge of Suero's file, insurance policy, and denial of the no-fault claims based on failure to appear at Independent Medical Examinations ("IMEs"); scheduling letters for the IMEs; affirmations from Michael Russ, MD, and Robert Snitkoff, DC, the doctors assigned to conduct the assignor's IMEs, who attest to the assignor's non-appearance and their business practices for ensuring they do not miss patient appearances; and an affidavit of Tracy Simpson, scheduling coordinator and supervisor at Examworks, Inc., attesting to the scheduling of the IMEs and the mailing of the scheduling letters.

A summary judgment movant carries the initial burden of tendering sufficient, admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once a movant meets its initial burden, the burden then shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The failure to appear for a scheduled independent medical examination is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio (*See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). The mandatory personal injury endorsement provides that the eligible injured person shall submit to an independent medical

examination (herein “IME”) by physicians when, and as often as, the insurer may reasonably require (*see* 11 NYCRR 65–1.1).

Plaintiff has demonstrated *prima facie* entitlement to summary judgment against the answering defendants. The affidavit Tracy Simpson, supervisor at Examworks, a third-party vendor who plaintiff hired to schedule IMEs, establishes timely and properly mailing of the IME notices. The affirmation of Michael Russ, MD and Robert Snitkoff, DC establishes that the assignor failed to appear at the initial and follow-up IMEs (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2nd Dept 2006]). As appearances for IMEs were a condition precedent to payment under the policy, and Frank Suero Diaz breached the requirement by failing to appear, there is no basis for coverage to the answering defendants, as assignees. Further, answering defendants have failed to raise an issue of fact for trial.

Accordingly, it is

ORDERED that the court grants plaintiff, American Transit Insurance Company’s motion for summary judgment against defendants Atlas Pharmacy, LLC, Expert Medical Supplies, Brooke Chiropractic of NY PC, and First Spine Chiropractic of NY PC; and it is further

ADJUDGED AND DECLARED that defendant Frank Suero Diaz is not an eligible injured person entitled to no-fault benefits under American Transit policy number B101054; and it is further

ADJUDGED AND DECLARED that defendants Atlas Pharmacy, LLC, Expert Medical Supplies, Brooke Chiropractic of NY PC, and First Spine Chiropractic of NY PC are not entitled to no-fault coverage for the motor vehicle accident that occurred on July 6, 2017, involving individual defendant Suero, for claims submitted under American Transit policy number

B101054 as referenced in the complaint, and plaintiff American Transit 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 6, 2017 accident.

DATED: 2/25/21, 2021
New York, New York

E N T E R:



MELISSA A. CRANE, J.S.C

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ FIDUCIARY APPOINTMENT