

<b>American Tr. Ins. Co. v De Velez</b>
2021 NY Slip Op 30882(U)
March 18, 2021
Supreme Court, New York County
Docket Number: 650819/2019
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

*Justice*

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INDEX NO. 650819/2019

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 004

- v -

JESUSITA VARGAS DE VELEZ, ABA CHIROPRACTIC PC,  
ADVANCED MEDICAL CONCEPTS PC, ALL COUNTY  
LLC, AUTORX, COMMUNITY MEDICAL IMAGING PC,  
CORONA MEDICAL PLAZA PC, ELMONT REHAB PT PC,  
MYRTLE AVENUE TRADING LLC, NEW YORK CITY  
HEALTH AND HOSPITALS CORPORATION, NYH MED  
CNTR. OF QUEENS, QUEENS EMERGENCY MEDICAL  
ASSOCIATES PLLC, UGP ACUPUNCTURE PC, and VIP  
PHARMACY CORP.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 66, 67, 68, 69, 70,  
71, 72, 73, 74, 75, 76, 77

were read on this motion to/for SUMMARY JUDGMENT.

In this declaratory judgment action, plaintiff American Transit Insurance Company (“ATIC”) moves, pursuant to CPLR 3212, for summary judgment against defendant Myrtle Avenue Trading LLC (“MAT”), a provider of medical supplies. MAT opposes the motion. After consideration of the parties’ contentions, as well as the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

The facts of this case are set forth in the orders of this Court entered September 27, 2019 (Doc. 42) and July 17 and October 7, 2020 (Docs. 54 and 64, respectively). Additional relevant facts are set forth below.

This action arises from a motor vehicle accident (“the accident” or “the incident”) on August 18, 2017 in which defendant Jesusita Vargas de Velez (“De Velez”) was injured when the vehicle in which she was a passenger (“the insured vehicle”) collided with another car. Doc. 1 at par. 35. At the time of the incident, the insured vehicle was owned by LIC Limo Service and was covered under ATIC policy number CAP616242 (“the policy”). Id. at pars. 32-34.

As a result of the incident, De Velez received medical services or products from ABA Chiropractic PC (“ABA”), Advanced Medical Concepts PC (“AMC”), All County LLC (“All County”), AUTORX, Community Medical Imaging PC (“CMI”), Corona Medical Plaza PC (“CMP”), Elmont Rehab PT PC (“ERPT”), MAT, New York City Health and Hospitals Corporation (“HHC”), NYH Medical Center of Queens (“NYHQ”), Queens Emergency Medical Associates PLLC (“QEMA”), UGP Acupuncture PC (“UGP”), and VIP Pharmacy Corp. (“VIP”) (collectively “the medical provider defendants”). Doc. 1 at par. 38. De Velez assigned her right to collect no-fault benefits to the medical provider defendants in exchange for their services, and the medical provider defendants in turn submitted no-fault claims to ATIC seeking reimbursement for the medical services they provided. Id. at par. 39.

On or about August 29, 2017, De Velez completed an “Application For Motor Vehicle No-Fault Benefits”, also known as an NF-2 form. Ex. A to Doc. 68. Although the NF-2 bears a stamp suggesting that it was received by ATIC on September 5, 2017, the date stamp does not specifically state that this was, in fact, the day on which ATIC received it. Id.

ATIC hired Independent Physical Exam Referrals, Inc. (“IPER”) to conduct a physical examination of De Velez in connection with the accident. Doc. 1 at pars. 43-44. On October 19, 2017, IPER wrote to De Velez on ATIC’s behalf to schedule a physical examination with Dr. Francisco Santiago on November 16, 2017 at 3 p.m. at the doctor’s office. Id. at par. 46. The

letter was mailed to De Velez and her attorney was copied on the same. Id. at par. 47. However, De Velez failed to appear for the scheduled appointment. Id. at par. 48.

On December 20, 2017, IPER wrote to De Velez on ATIC's behalf to reschedule the examination. Id. This time, IPER instructed De Velez to appear for an examination by Dr. Magda Fahmy on January 15, 2018 at 1:30 p.m. at the doctor's office. Id. at par. 49. The letter was mailed to De Velez and her attorney was copied on the same. Id. at par. 50. However, De Velez once again failed to appear for her scheduled appointment. Id. at par. 51.

On or about January 31, 2018, ATIC denied coverage to De Velez based on her failure to appear for the physical examinations scheduled for November 16, 2017 and January 15, 2018. Doc. 1 at pars. 52-54; Ex. C to Doc. 68.

ATIC then commenced the captioned action by filing a summons and verified complaint against De Velez and the medical provider defendants on February 8, 2019. Doc. 1. In its complaint, ATIC alleged that it was entitled to a judgment declaring that it was not obligated to provide no-fault benefits to De Velez and the medical provider defendants due to De Velez's failure to appear for a physical examination. Id.

By stipulation filed September 10, 2019, ATIC discontinued its claims against ABA, AMC, CMP, ERPT, UGP, and VIP. Doc. 38.

MAT joined issue by its answer filed September 16, 2019. Doc. 39.

By order entered September 27, 2019, this Court (Frank, J.) granted ATIC's motion for a default judgment against De Velez, All County, AUTORX, CMI, NYHQ, and QEMA, declaring that those parties were not entitled to be paid any no-fault benefits arising from the incident. Doc. 42.

On May 13, 2020, plaintiff moved, pursuant to CPLR 3212, for summary judgment against MAT and HHC, the only medical provider defendants remaining in the action. Doc. 47. By order entered July 17, 2020, this Court (Frank, J.) granted ATIC's motion, which was unopposed, holding that MAT and HHC were not entitled to collect no-fault benefits under the policy because ATIC "properly scheduled independent medical examinations of [De Velez]" and she failed to appear for the same. Doc. 54. Thus, held this Court, the policy was void *ab initio*. *Id.* The order further reflected that the case was disposed. *Id.*

On August 5, 2020, MAT moved to vacate its default in responding to ATIC's motion for summary judgment. Docs. 57-58. By order entered October 7, 2020, this Court (Frank, J.) granted the motion, thereby vacating the July 17, 2020 order as against MAT only and rendering MAT the sole medical provider defendant remaining in the action. Doc. 64.

ATIC now moves again for summary judgment, pursuant to CPLR 3212, on its complaint against MAT. Docs. 66-71. In support of the motion, ATIC argues that it is entitled to a declaration that it is not required to provide MAT with no-fault benefits in connection with the accident because De Velez's failure to appear for duly scheduled physical examinations on two occasions constituted a breach of a condition precedent to coverage which rendered the policy void *ab initio*. Doc. 67. It further asserts that it properly denied coverage to MAT in accordance with *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 (1<sup>st</sup> Dept 2011).<sup>1</sup>

Cheryl Glaze, a claim representative for ATIC, submits an affidavit in support of the motion. Doc. 68. Glaze represents, *inter alia*, that: De Velez assigned her right to collect no-fault

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<sup>1</sup> Although ATIC asserts that this Court "has already determined that [it] established a *prima facie* case for declaratory judgment" (Doc. 67 at par. 27), it simultaneously concedes that, since this Court vacated its prior order granting summary judgment to ATIC on default, its motion "is now being refiled against [MAT] only so that the Court can make a determination on the merits." *Id.* at par. 47.

benefits to the medical provider defendants; that De Velez failed to appear for physical examinations on two occasions; and that ATIC issued a denial of coverage to De Velez and the medical provider defendants based on her failure to appear for the examinations. *Id.* Although Glaze notes that De Velez put ATIC on notice of her claim by submitting an NF-2, her affidavit conspicuously omits the date on which ATIC received the said form (although, as noted previously, it bore a stamp with the date 9/5/17). Glaze annexes to her affidavit the NF-2; the police accident report; proof that IPER mailed De Velez notices of the two scheduled examination dates; affidavits of Drs. Santiago and Fahmy attesting to the fact that plaintiff failed to appear for the respective scheduled examinations as directed; and ATIC's denial of coverage. Exs. A – C to Doc. 68.

In opposition to the motion, MAT argues that ATIC failed to establish its prima facie entitlement to summary judgment because it did not demonstrate that its demands for De Velez to appear for a physical examination were timely. Doc. 73.

In reply, ATIC argues, inter alia, that it has the right to deny MAT's claim retroactively to the date of the accident based on De Velez's failure to appear for the two scheduled physical examinations. Doc. 75.

### LEGAL CONCLUSIONS

“[T]he proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]).

Here, Glaze does not state when ATIC received completed NF-2 forms from De Velez or from any of the other defendants. Thus, there is no basis upon which this Court can determine the timeliness of ATIC's request for De Velez's physical examination (11 NYCRR 65-3.5[d]; *See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1<sup>st</sup> Dept 2017] [insurer "failed to supply sufficient evidence to enable the court to determine whether the notices it had served on the injury claimants . . . were subject to the timeliness requirements of 11 NYCRR 65-3.5[b] and 11 NYCRR 65-3.6[b] . . . and, if so, whether the notices had been served in in conformity with those requirements"]; *American Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 [1<sup>st</sup> Dept 2015]; *Bronx Acupuncture Therapy, P.C. v Hereford Ins. Co.*, 53 Misc.3d 137[A] [App Term 1st Dept 2016].

Although the NF-2 received by ATIC from De Velez was stamped "9/5/17", Glaze does not address whether this was the date on which ATIC received the NF-2, as it appears to be. If September 5, 2017 was in fact the day on which ATIC received the NF-2, then ATIC would have had 10 days from that date to send De Velez prescribed verification forms pursuant to 11 NYCRR 65-3.5(a). However, the initial demand for De Velez to appear for a physical examination was not mailed until October 19, 2017. Given Glaze's failure to state whether September 5, 2017 was actually the day on which the NF-2 was received by ATIC, or whether prescribed verification forms were sent to De Velez within 10 days of receipt of the NF-2, this Court cannot determine whether plaintiff complied with 11 NYCRR 65-3.5(a). ATIC thus failed to establish its prima facie entitlement to summary judgment since it neither showed that De Velez's physical examination was not subject to the procedures and time frames set forth in the no-fault regulations nor that it properly noticed the examination in conformity with the terms

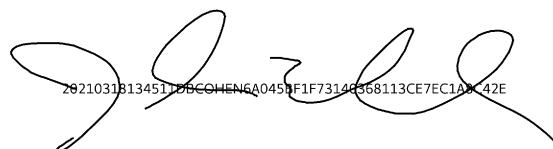
of the same (see *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]).<sup>2</sup>

Moreover, 11 NYCRR 65-3.6(b) requires a no-fault insurer to reschedule a physical examination by mailing a follow up notice within 10 days of a claimant's nonappearance. Here, De Velez failed to appear for her initially scheduled examination on November 16, 2017. However, ATIC did not send De Velez a follow up notice until December 20, 2017. Therefore, ATIC's follow up notice was untimely and further warrants the denial of the motion.

Accordingly, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers, should plaintiff be so advised, within 30 days after entry of this order; and it is further

ORDERED that the parties are to appear for a preliminary conference on May 10, 2021 at 3:30 p.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk) and email the same to the Part 58 Clerk at [SFC-Part58-Clerk@nycourts.gov](mailto:SFC-Part58-Clerk@nycourts.gov) at least two business days prior to that date.



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DAVID BENJAMIN COHEN, J.S.C.

3/18/2021

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

<sup>2</sup> Although ATIC relies on the *Unitrin* decision, that case is clearly distinguishable insofar as the insurer therein established its prima facie entitlement to summary judgment by demonstrating that it requested physical examinations in accordance with the procedures and time-frames set forth in the no-fault regulations. *Unitrin*, 82 AD3d at 560.