

American Tr. Ins. Co. v Dembert
2021 NY Slip Op 30911(U)
March 23, 2021
Supreme Court, New York County
Docket Number: 158482/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

JOHN DEMBERT, AKE SERVICES INC, BURKE
PHYSICAL THERAPY, P.C., CUSTOM RX PHARMACY
LLC, DOS MANOS CHIROPRACTIC P.C, ELMWOOD PARK
MEDICAL GROUP PC, GARA MEDICAL CARE, P.C., HAMID
LALANI, PREFERRED MEDICAL, P.C., RIDGEWOOD
ACUPUNCTURE P.C., UNION DME CORP, VINCENT J.
NUNZIATA, DC, P.C., WELCOME PHYSICAL THERAPY,
P.C.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24

were read on this motion to/for

JUDGMENT - DECLARATORY

Upon the foregoing documents, plaintiff's instant request for a declaratory judgment on default is granted in part, on default and on the merits, and denied in part, solely as moot, and plaintiff's instant request for summary judgment is granted in part, on default and on the merits, and denied in part, solely as moot, for the reasons stated hereinbelow.

Background

On October 25, 2018, the claimant-defendant, John Dembert, was allegedly injured in an accident while he was a passenger in a vehicle that plaintiff, American Transit Insurance Company, insured, and he submitted a claim to plaintiff. The claimant-defendant then apparently sought medical services from the medical provider defendants, namely, AKE Services Inc.; Burke Physical Therapy, P.C.; Custom Rx Pharmacy LLC; Dos Manos Chiropractic P.C.; Elmwood Park Medical Group PC; Gara Medical Care, P.C.; Hamid Lalani, MD; Preferred Medical, P.C.; Ridgewood Acupuncture P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; and Welcome Physical Therapy, P.C. The claimant-defendant assigned his right to collect No-Fault benefits to the medical provider defendants who, in their capacities as the claimant-defendant's assignees under the subject insurance policy, submitted claims to plaintiff. On January 28 and February 14, 2019, the claimant-defendant failed to appear for his scheduled and rescheduled Independent Medical Examination ("IME"). Thus, plaintiff denied coverage to defendants. (NYSCEF Doc. 1).

On August 17, 2019, plaintiff commenced the instant action against the claimant-defendant and the medical provider defendants, seeking a judgment declaring that the claimant-defendant and the medical provider defendants are not entitled to No-Fault coverage, first-party coverage, and/or first party No-Fault benefits under the subject insurance policy arising out of the subject alleged October 25, 2018 accident, as the claimant-defendant breached a condition of the subject insurance policy by failing to appear for his scheduled and rescheduled IME. (NYSCEF Doc. 1).

On December 20, 2019, medical provider defendant Elmwood Park Medical Group PC answered the instant complaint with various admissions, denials, and twelve Affirmative Defenses (NYSCEF Doc. 2). On December 23, 2019, medical provider defendant Burke Physical Therapy, P.C. answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 3).

Plaintiff now moves (1) pursuant to CPLR 3215, for a declaratory judgment on default as against the claimant defendant; and medical provider defendants AKE Services Inc; Custom Rx Pharmacy LLC; Dos Manos Chiropractic P.C.; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; and Welcome Physical Therapy, P.C.; (2) pursuant to CPLR 3212, for summary judgment as against medical provider defendants Ridgewood Acupuncture P.C.; Burke Physical Therapy, P.C.; and Elmwood Park Medical Group PC; (3) for a judgment declaring that that the claimant-defendant is not an eligible injured person entitled to No-Fault benefits under plaintiff's subject insurance policy; and (4) for a judgment declaring that plaintiff is not obligated to honor or pay any current and/or future claims for reimbursement that the medical provider defendants submit and/or will submit as the claimant-defendant's assignees under the subject insurance policy and/or under the subject insurance policy's Mandatory Personal Injury Protection endorsement, arising out of the subject alleged October 25, 2018 accident. (NYSCEF Doc. 8).

On September 2, 2020, medical provider defendants Custom Rx Pharmacy LLC and Dos Manos Chiropractic, PC, answered with various admissions, denials, and twenty-four Affirmative Defenses (NYSCEF Doc. 22).

Pursuant to an August 13, 2020 stipulation, plaintiff discontinued the instant action as against medical provider defendant Gara Medical Care PC, only, with prejudice (NYSCEF Doc. 6). Pursuant to a September 1, 2020 stipulation, plaintiff withdrew its instant motion for summary judgment as against medical provider defendant Burke Physical Therapy, P.C., only (NYSCEF Doc. 25). Pursuant to an October 2, 2020 stipulation, plaintiff discontinued the instant action as against medical provider defendant Elmwood Park Medical Group PC, only, with prejudice (NYSCEF Doc. 26). Pursuant to an October 5, 2020 stipulation, plaintiff discontinued the instant action as against medical provider defendants Custom Rx Pharmacy LLC; and Dos Manos Chiropractic, PC (NYSCEF Doc. 28).

Discussion

Plaintiff's Request for a Declaratory Judgment on Default

Plaintiff has discontinued the instant action as against medical provider defendants Custom Rx Pharmacy LLC and Dos Manos Chiropractic P.C. (two of the defendants against whom plaintiff has moved for a declaratory judgment on default) (NYSCEF Doc. 22).

Plaintiff has established that it is entitled to a declaratory judgment on default as against the claimant-defendant; and medical provider defendants AKE Services Inc; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; and Welcome Physical Therapy, P.C. by complying with CPLR 3215(f) by submitting, inter alia, the following: the subject summons and verified complaint; the subject affidavits of service and CPLR 3215(g)(3) and (4) notices; and the August 26, 2020 affirmation of Ethan A. Rothschild, plaintiff's attorney. To date, the claimant-defendant; and medical provider defendants AKE Services Inc; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; and Welcome Physical Therapy, P.C. have failed to answer the complaint and/or oppose or otherwise respond to the instant motion, and their time to do so has expired. Thus, plaintiff is entitled to a declaratory judgment on default as against the claimant-defendant; and medical provider defendants AKE Services Inc; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; and Welcome Physical Therapy, P.C.

Plaintiff's Request for Summary Judgment

Plaintiff has withdrawn the instant motion for summary judgment as against medical provider defendant Burke Physical Therapy, P.C. (NYSCEF Doc. 25) and has discontinued, with prejudice, the instant action as against medical provider defendant Elmwood Park Medical Group PC (NYSCEF Doc. 26) (two of the three defendants against whom plaintiff moves for summary judgment).

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate that there are no material issues of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 69 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept. 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

Plaintiff has demonstrated that there are no material issues of fact in this matter by submitting the subject appointment letters and supporting affidavits, among other documents (NYSCEF Doc. 11 and 14). To date, medical provider defendant Ridgewood Acupuncture P.C. has failed to answer the instant complaint and/or oppose or otherwise respond to the instant motion for summary judgment. Thus, plaintiff is entitled to summary judgment as against medical provider defendant Ridgewood Acupuncture P.C., only.

Conclusion

Thus, for the reasons stated herein, the instant request of plaintiff, American Transit Insurance Company, for a declaratory judgment on default is hereby granted in part, on default and on the merits, as against the claimant-defendant, John Dembert, and medical provider defendants AKE Services Inc; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; and Welcome Physical Therapy, P.C., only, and is hereby denied, solely as moot pursuant to the aforementioned stipulations of discontinuance, as against medical provider

defendants Custom Rx Pharmacy LLC and Dos Manos Chiropractic P.C. Plaintiff's instant request for summary judgment is hereby granted in part, on default and on the merits, as against medical provider defendant Ridgewood Acupuncture P.C., and is hereby denied, solely as moot pursuant to the aforementioned stipulations withdrawing the instant motion and discontinuing the instant action, respectively, as against medical provider defendants Burke Physical Therapy, P.C. and Elmwood Park Medical Group PC.

Accordingly, the Clerk is hereby directed to enter judgment declaring that (1) the claimant-defendant, John Dembert, and medical provider defendants AKE Services Inc; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; Welcome Physical Therapy, P.C., and Ridgewood Acupuncture P.C. are not entitled to No-Fault coverage, first-party coverage, and/or first party No-Fault benefits under the subject insurance policy, for claims arising out of the subject alleged October 25, 2018 accident, as the claimant-defendant breached a condition of the subject insurance policy by failing to appear for his scheduled and rescheduled Independent Medical Examination; (2) the claimant-defendant, John Dembert, is not an eligible injured person entitled to No-Fault benefits under plaintiff's subject insurance policy; (3) plaintiff is not obligated to honor or pay current and/or future claims for reimbursement that medical provider defendants AKE Services Inc; Hamid Lalani, MD; Preferred Medical, P.C.; Union DME Corp; Vincent J. Nunziata, DC, P.C.; Welcome Physical Therapy, P.C., and Ridgewood Acupuncture P.C. submit and/or will submit as the claimant-defendant John Dembert's assignees under the subject insurance policy and/or under the subject insurance policy's Mandatory Personal Injury Protection endorsement, for claims arising out of the subject alleged October 25, 2018 accident; and awarding costs and disbursements to plaintiff.

The Court requests that the plaintiff and medical provider defendant Burke Physical Therapy, P.C. please contact our part clerk, Margie Ramos-Ciancio, via email at mciancio@nycourts.gov to schedule a preliminary conference, remembering to copy all parties.

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<u>3/23/2021</u> DATE			<u>ARTHUR F. ENGORON, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		