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| American Tr. Ins. Co. v Urena |
| 2021 NY Slip Op 30968(U) |
| March 28, 2021 |
| Supreme Court, New York County |
| Docket Number: 161034/2019 |
| 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 -

JOSE URENA, ABDU METWALLY PT, P.C., ALEXIA'S
PHARMACY INC., ANDES CHIROPRACTIC, P.C., BIRCH
MEDICAL & DIAGNOSTIC, P.C., EASTERN MEDICAL
PRACTICE PC, HEALTH HARMONY ACUPUNCTURE,
P.C., HERSCHEL KOTKES, M.D., P.C., NAM
CHIROPRACTIC, P.C., NYC WELLNESS PHARMACY,
UNION DME CORP, WESTCHESTER RADIOLOGY &
IMAGING, P.C., YEVGENIY MARGULIS, PH.D

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

JUDGMENT - DECLARATORY

Upon the foregoing documents and for the reasons set forth hereinbelow, (1) plaintiff's request for declaratory relief via a default judgment and/or summary judgment is granted; (2) plaintiff's request for a default judgment as against certain defendants is granted in part and denied in part; and (3) plaintiff's request for summary judgment as against a certain defendant is granted.

Background

On May 28, 2019, the claimant-defendant, Jose Jimenez Urena, was allegedly injured in a motor vehicle accident and notified plaintiff, American Transit Insurance Company. The claimant-defendant then sought medical treatment, services and/or products from the medical provider defendants, namely, Abdu Metwally PT, P.C.; Alexia's Pharmacy Inc.; Andes Chiropractic, P.C.; Birch Medical & Diagnostic, P.C.; Eastern Medical Practice PC; Health Harmony Acupuncture, P.C.; Herschel Kotkes, M.D., P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; Westchester Radiology & Imaging, P.C.; and Yevgeniy Margulis, Ph.D. The claimant-defendant assigned his right to collect No-Fault benefits to the medical provider defendants, who then submitted No-Fault claims for reimbursement to plaintiff. On August 8 and 27, 2019, the claimant-defendant failed to appear for a scheduled and rescheduled Independent Medical Examination ("IME"), thus breaching a condition of plaintiff's subject insurance policy. Thus, plaintiff disclaimed coverage. (NYSCEF Doc. 1.)

On October 31, 2019, plaintiff commenced the instant action against defendants, seeking a judgment (1) declaring the claimant-defendant breached a condition of plaintiff's subject

insurance policy, and, thus, (2) declaring the claimant-defendant and medical provider defendants are not entitled to No-Fault coverage, first-party coverage, and/or first-party No-Fault benefits arising out of the subject alleged accident; and (3) awarding costs and disbursements to plaintiff (NYSCEF Doc. 1, at 11).

On July 29, 2020, medical provider defendant Andes Chiropractic, P.C. answered the instant complaint with various admissions, denials, and eleven affirmative defenses (NYSCEF Doc. 5).

Pursuant to a stipulation dated July 31, 2020, plaintiff discontinued the instant action, with prejudice, as against medical provider defendant Herschel Kotkes, M.D., P.C., only (NYSCEF Doc. 7).

Plaintiff now moves (1), pursuant to CPLR 3215, for a declaratory judgment on default as against medical provider defendants Abdu Metwally PT, P.C.; Alexia's Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C.; (2), pursuant to CPLR 3212, for summary judgment as against the answering medical provider defendant, Andes Chiropractic, P.C. ("Andes"); (3) a judgment declaring that the claimant-defendant is not an eligible injured person entitled to No-Fault benefits under plaintiff's subject insurance policy; (4) a judgment declaring that plaintiff is not obligated to honor or pay claims, arising out of the subject alleged accident, for reimbursement that the medical provider defendants submitted to plaintiff in their capacities as the claimant-defendant's assignees under the subject insurance policy, in any current and/or future proceeding, as the claimant-defendant is not an eligible injured person as defined in the subject policy; and (5) a judgment declaring that plaintiff is not obligated to honor or pay current and/or future claims, arising out of the subject alleged accident, for No-Fault benefits under the Mandatory Personal Injury Protection Endorsement (NYSCEF Doc. 9).

Plaintiff is not moving as against the claimant-defendant and/or medical provider defendants Eastern Medical Practice PC and Yevgeniy Margulis, Ph.D due to plaintiff's inability to serve said defendants. Plaintiff is not moving as against medical provider defendant Herschel Kotkes, M.D., P.C., pursuant to the aforementioned stipulation of discontinuance and release. (NYSCEF Doc. 9.)

In opposition to plaintiff's instant request for summary judgment, Andes asserts, inter alia, that plaintiff failed to establish that (1) plaintiff mailed the subject IME scheduling letters (Andes asserts that Cheryl Glaze's affidavit did not meet this burden); (2) plaintiff mailed said IME scheduling letters timely; and (3) the claimant-defendant failed to appear for the subject IMEs (Andes asserts that Dr. Michael Russ's affidavit did not meet this burden). (NYSCEF Doc. 22.)

Pursuant to a stipulation dated November 16, 2020, plaintiff discontinued, with prejudice, the instant action as against medical provider defendant Abdu Metwally PT, P.C (NYSCEF Doc. 26).

Discussion

Plaintiff's Request for a Default Judgment

Plaintiff has established that it is entitled to a default judgment as against medical provider defendants Alexia's Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C by complying with CPLR 3215(f) and (g) by submitting the following, among other documents: copies of the subject pleadings (NYSCEF Doc. 17); copies of the subject affidavits of service and CPLR 3215(g) notice (NYSCEF Documents 18 and 19); and the affidavit of Cheryl Glaze, a No-Fault Claims Supervisor for plaintiff (NYSCEF Doc. 12).

To date, the immediately aforementioned medical provider defendants have failed to answer the instant complaint and/or oppose or otherwise respond to the instant motion, and their time to do so has expired.

Therefore, pursuant to CPLR 3215, plaintiff is entitled to a default judgment as against medical provider defendants Alexia's Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C.

Pursuant to the aforementioned November 16, 2020 stipulation, plaintiff discontinued the instant action as against medical provider defendant Abdu Metwally PT, P.C., against whom plaintiff originally moved, pursuant to CPLR 3215, for a default judgment (NYSCEF Doc. 26). Therefore, plaintiff is not entitled to a default judgment as against said medical provider defendant.

Plaintiff's Request for Summary Judgment

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue 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, 49 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").

This Court is convinced that plaintiff has made out a prima facie case for summary judgment against Andes, including by submitting affidavits of fact by individuals with personal knowledge detailing plaintiff's attempts to notify the claimant-defendant about the scheduled IME and by submitting proof that the claimant-defendant failed to appear at least twice. Andes has submitted boilerplate arguments that plaintiff has failed to provide sufficient detail of these efforts at notifying the claimant-defendant and documenting the claimant-defendant's failure to appear. A common-sense view of plaintiff's statements demonstrates that they are more than sufficient. The judicial system of the State of New York could not survive if it had to conduct trials to determine who worked in plaintiff's mailroom on a given day and what route he or she took through the office to place the appropriate mailings in an outbox to the United States Postal Service. Nor can anyone expect plaintiffs to record the entrance doorway of the doctor's office

on the days in question and to use facial recognition software to determine who entered the offices at the appointed times. Enough is enough.

Conclusion

Thus, for the reasons stated hereinabove, (1) the instant request by plaintiff, American Transit Insurance Company, pursuant to CPLR 3215, for a default judgment is hereby granted as against Alexia’s Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C, and is hereby denied as against medical provider defendant Abdu Metwally PT, P.C., solely as moot pursuant to the November 16, 2020 stipulation of discontinuance as against that medical provider defendant (NYSCEF Doc. 26); and (2) the request by plaintiff, pursuant to CPLR 3212, for summary judgment as against medical provider defendant Andes Chiropractic, P.C. is hereby granted.

Accordingly, the Clerk is hereby directed enter judgment (1) declaring that the claimant-defendant, Jose Jimenez Urena, breached a condition of plaintiff’s subject insurance policy; (2) declaring that medical provider defendants Alexia’s Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C, and Andes Chiropractic, P.C. are not entitled to No-Fault coverage, first-party coverage, and/or first-party No-Fault benefits arising out of the alleged May 28, 2019 accident; (3) declaring that the claimant-defendant is not an eligible injured person entitled to No-Fault benefits under plaintiff’s subject insurance policy; (4) declaring that plaintiff is not obligated to honor or pay claims, arising out of the alleged May 28, 2019 accident, for reimbursement that medical provider defendants Alexia’s Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C, and Andes Chiropractic, P.C. submitted to plaintiff in their capacities as the claimant-defendant’s assignees under the subject insurance policy, in any current and/or future proceeding, as the claimant-defendant is not an eligible injured person as defined in the subject policy; (5) declaring that plaintiff is not obligated to honor or pay current and/or future claims that medical provider defendants Alexia’s Pharmacy Inc.; Birch Medical & Diagnostic, P.C.; Health Harmony Acupuncture, P.C.; Nam Chiropractic, P.C.; NYC Wellness Pharmacy; Union DME Corp; and Westchester Radiology & Imaging, P.C, and Andes Chiropractic, P.C. submitted arising out of the alleged May 28, 2019 accident, for No-Fault benefits under the Mandatory Personal Injury Protection Endorsement; and (6) awarding costs and disbursements to plaintiff.

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3/28/2021
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: