

American Tr. Ins. Co. v Knight
2021 NY Slip Op 32336(U)
November 15, 2021
Supreme Court, New York County
Docket Number: Index No. 650149/2019
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650149/2019

MOTION DATE 09/22/2020

MOTION SEQ. NO. 002

- v -

R CURTIS KNIGHT, ADVANCED MEDICAL SUPPLIES
INC, ADVANTAGE MED INNOVATIONS INC,
COMPREHENSIVE MRI OF NEW YORK PC WP, DONALD
C WALLERSON MD PLLC, DR GREGORI PASQUA, FIFTH
AVENUE SURGERY CENTER, HEALTH CHOICE
PHARMACY INC, IGOR AMIGUD PHYSICIAN PC, LDU
THERAPY INC, MONTEFIORE MEDICAL CENTER, NS
RADIOLOGY PLLC, PROTECMED INC, QUINTERO
PHYSICAL THERAPY PC, ROBERT MARINI, UNITED
PHYSICIANS PLLC, W JOSEPH GORUM MD PC, WALTER
E MENDOZA CHIROPRACTIC PC, and JR
ACUPUNCTURE PC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for summary judgment against defendants Advantage Innovations Inc., Fifth Avenue Surgery Center and W Joseph Gorum MD PC is DENIED; and it is further

ORDERED that the court sua sponte restores this action to the pre-note of issue calendar; and it is further

ORDERED that defendants Advantage Innovations Inc., Fifth Avenue Surgery Center and W Joseph Gorum MD PC shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon such service, the Clerk shall retore this action to the pre-note of issue calendar; and it is further

ORDERED that counsel shall post on NYSCEF a proposed preliminary discovery conference order or proposed competing preliminary discovery conference orders on December 15, 2021; and it is further

ORDERED that any party may file the note of issue with certificate of readiness on or before February 7, 2022.

DECISION

The court shall deny plaintiff's motion for summary judgment. As stated by the First Department:

"Plaintiff no-fault insurer moved for summary judgment declaring that its policy does not provide coverage to the individual defendant for the subject accident based on her failure to appear for scheduled examinations under oath (EUO).

Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage, here defendants-respondents, assignees of the defaulting individual defendant, opposed plaintiff's summary judgment motion on the ground that plaintiff had not established that it had requested the EUO within the time frame set by the no-fault regulations (see 11 NYCRR 65-3.5 [b]). In its reply, plaintiff failed to supply evidence bearing on whether the EUO had been requested within the appropriate time frame. Accordingly, plaintiff's motion for summary judgment was properly denied."

Natl. Liab. & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept 2015).

Similarly, here, plaintiff has failed to establish whether the subject EUOs were requested within the appropriate time frames, i.e., within thirty (30) days of the filing of the claim(s), for which coverage is being sought. Therefore, plaintiff's motion for summary judgment must be denied. To the

extent that plaintiff argues that the court's prior order granting default judgment against other defendants on default determined the timeliness of plaintiff's EUOs, such an argument is misplaced. See Am. Tr. Ins. Co. v Romero-Richiez, 69 Misc3d 1204(A) (Sup Ct, NY County, Oct. 9, 2020, Lebovits, J.).

Debra A. James
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<u>11/15/2021</u> DATE		<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<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