

American Tr. Ins. Co. v Alkins
2022 NY Slip Op 31316(U)
April 22, 2022
Supreme Court, New York County
Docket Number: Index No. 159878/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

INDEX NO. 159878/2020
MOTION DATE 02/22/2022
MOTION SEQ. NO. 001

- v -

TERRANCE ALKINS, ALLEY POND MEDICAL BILLING
LLC, AXIS PT, P.C., BEDFORD MEDICAL, P.C., BV
PHYSICAL THERAPY P.C., ERF PHYSICAL THERAPY,
HEALTHWISE MEDICAL ASSOCIATES P.C., HUN LIFE
PHYSICAL THERAPY P.C., JI ACUPUNCTURE, P.C.,
JORDAN FERSEL M.D, P.C., JWP CHIROPRACTIC P.C.,
LIANA BINNS, LZ MEDICAL DIAGNOSTIC P.C, M & D
ELITE PHARMACY, LLC, MEDPLANET INC, QI GONG
WELLNESS ACUPUNCTURE P.C., S & K WARBASSE
PHARMACY, TENS CHIROPRACTIC, PC,

DECISION + ORDER ON
MOTION

Defendants.

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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, 24, 25, 26

were read on this motion to/for JUDGMENT - DECLARATORY

In this declaratory judgment action, the plaintiff moves (i) pursuant to CPLR 3215 for
leave to enter a default judgment against defendants Terrance Alkins (the individual defendant),
Alley Pond Medical Billing, LLC, Axis PT, P.C., Bedford Medical, P.C., BV Physical Therapy,
P.C., ERF Physical Therapy, Healthwise Medical Associates, P.C., Jordan Fersel M.D, P.C.,
JWP Chiropractic, P.C., Liana Binns, LZ Medical Diagnostic, P.C, M & D Elite Pharmacy, LLC,
Medplanet Inc., Qi Gong Wellness Acupuncture, P.C., S & K Warbasse Pharmacy, and Tens
Chiropractic, PC. (collectively, the non-answering medical provider defendants) and (ii) pursuant
to CPLR 3212 for summary judgment against Hun Life Physical Therapy, P.C., and Ji
Acupuncture, P.C. (collectively, the answering medical provider defendants). The plaintiff seeks
a declaration that it is not obligated to reimburse the medical provider defendants for treatment
they rendered or equipment and supplies they provided to the individual defendant under policy
FPT 007038, claim number 1076036-01, in connection with injuries that the individual defendant
allegedly sustained in a November 15, 2019, motor vehicle accident on the ground that the

individual defendant failed to appear for duly scheduled Independent Medical Examinations (IMEs). Answering medical provider defendant Hun Life Physical Therapy, P.C., opposes the motion. The motion is denied.

Initially, the court notes that by stipulation dated December 16, 2021, the plaintiff has withdrawn its motion insofar as it seeks relief against non-answering medical provider defendants ERF Physical Therapy, Healthwise Medical Associates, P.C., Qi Gong Wellness Acupuncture, P.C., and M & D Elite Pharmacy, LLC. Accordingly, the motion is deemed withdrawn against those defendants only and the term non-answering medical provider defendants, as used hereinafter, shall exclude those defendants.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2nd Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22–3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., *supra*. While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, *supra*.

On a motion for summary judgment, the movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See *id.* (citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). However, if the initial burden is not

met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) (quoting Nesbitt v Nimmich, 34 AD2d 958, 959 [2nd Dept. 1970] [internal citations omitted]).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, an attorney's affirmation, its first IME notice dated January 29, 2020, scheduling an IME for February 12, 2020, at 3:30pm, a subsequent IME notice dated February 13, 2020, scheduling an IME for February 26, 2020, at 4:00pm, the affidavit of Cheryl Glaze, a no-fault claims supervisor for the plaintiff, the affidavit of Luis Campbell, the mail room supervisor of the plaintiff, the affidavit of Charles Campanelli, an employee of the plaintiff's third-party IME provider, the individual defendant's NF-2 form, marked received December 17, 2019, and the plaintiff's NF-10 denial form, dated March 3, 2020, which states, in pertinent part, that the entire claim was denied because the individual defendant failed to appear for scheduled IMEs on the abovementioned dates. The plaintiff also submits the affidavit of Dr. Joseph Margulies, who was scheduled to conduct the IMEs and was present at the location on the dates and times that the individual defendant was scheduled to appear. Dr. Margulies states that the individual defendant did not appear. Notably absent from the plaintiff's submissions are the dates upon which the plaintiffs received any NF-3 forms. Nor are any NF-3 claim forms submitted.

The plaintiff's motion must be denied as it has failed to submit proof establishing that it complied with the timeliness requirements of 11 NYCRR 65-3.5. The record does not establish that the initial notice for an IME was timely mailed to the individual defendant within 30 days of the plaintiff's receipt of a relevant claim form, such as an NF-3, as required by 11 NYCRR 65-3.5(d). Hertz Vehicles, LLC v Best Touch PT, P.C., 162 AD3d 617 (1st Dept. 2018); Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); Am. Transit Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1st Dept. 2015) (citing Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 [1st Dept. 2011] [to meet its *prima facie* burden, insurer must establish it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that the patient did not appear]). To be sure, the only claim form submitted by the plaintiff, the individual

defendant’s NF-2 form, was received more than 30 days prior to the date of the plaintiff’s first IME notice. Thus, the plaintiff has not established its a *prima facie* case. See Kemper Independence Ins. Co., supra; Am. Transit Ins. Co.; supra; Unitrin Advantage Ins. Co., supra. Since the plaintiff has not met its burden, the plaintiff’s motion pursuant to CPLR 3215 and CPLR 3212 is denied.

The parties are encouraged to explore settlement.

Accordingly, it is

ORDERED that the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment and pursuant to CPLR 3212 for summary judgment is deemed withdrawn as against ERF Physical Therapy, Healthwise Medical Associates, P.C., Qi Gong Wellness Acupuncture, P.C., and M & D Elite Pharmacy, LLC; and it is further

ORDERED that the balance of the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment and pursuant to CPLR 3212 for summary judgment is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/22/2022

DATE



NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

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