

American Tr. Ins. Co. v Jorge

2023 NY Slip Op 33059(U)

September 5, 2023

Supreme Court, New York County

Docket Number: Index No. 652316/2022

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

INDEX NO. 652316/2022

MOTION DATE 04/05/2023

MOTION SEQ. NO. 001

ALEXIS BRITO JORGE, BV PHYSICAL THERAPY P.C.,
CHANG HEALTH PHYSICAL THERAPY P.C, DIMITRI
BAZIN, ERF PHYSICAL THERAPY, FULL PSYCHOLOGY,
P.C., HEALTH CHOICE NY MEDICAL, P.C., JP RX CORP,
KIM CHIROPRACTIC, P.C, KYUNGSOOK BU, LACROSS
DRUGS, INC., MARTA MEDICAL SUPPLY INC, MEDAID
RADIOLOGY LLC, MINNIE CHOI, NEW IMAGE
CHIROPRACTIC P.C., PREMIER ANESTHESIA
ASSOCIATES, PA, PRO RECOVERY SERVICES INC, S &
K WARBASSE PHARMACY INC., SCOB, LLC, SYOSSET
ACUPUNCTURE, P.C., TOP CHOICE RX, TOPLAB,

**DECISION + ORDER
ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 29

were read on this motion to/for JUDGMENT - DEFAULT.

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the non-answering defendants BV Physical Therapy P.C., Dimitri Bazin, Full Psychology, P.C., JP Rx Corp, Kyungsook Bu, M.D., Marta Medical Supply Inc., Pro Recovery Services Inc., S & K Warbasse Pharmacy Inc., and Toplab.¹ The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the non-answering defendants under policy number CAP 613828, claim number 1087080-02, in connection with injuries that Alexis Brito Jorge (“the individual defendant”) allegedly sustained in a motor vehicle

¹ The plaintiff’s motion originally also sought a default judgment against defendants Lacross Drugs Inc., Top Choice Rx, and Minnie Choi. However, the plaintiff thereafter withdrew the motion as against Lacross Drugs Inc. and Top Choice Rx by stipulation dated March 27, 2023, accepting the answer interposed by those defendants prior to the filing of the instant motion; and withdrew the motion as against Minnie Choi by stipulation dated April 19, 2023, which extended Choi’s time to answer by 30 days. Choi filed an answer the next day. The plaintiff’s motion is deemed submitted as so amended.

accident on August 6, 2020, on the ground that the individual defendant failed to appear for two duly scheduled Independent Medical Examinations (“IMEs”). No opposition is submitted. The motion against defendant Dimitri Bazin is denied. The motion against the other non-answering defendants is denied without prejudice to renewal within 30 days.

“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 Serv., Inc., 89 AD3d 649, 651 (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, 478 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Serv., Inc., supra. To prove proper service, the movant must also comply with the additional mailing requirements of CPLR 3215(g).

The plaintiff alleges that, on August 6, 2020, the individual defendant was involved in a motor vehicle accident while riding as a passenger in the vehicle of the plaintiff’s insured. The individual defendant submitted a claim to the plaintiff, dated August 7, 2020, seeking no-fault benefits. The non-answering defendants also submitted claims to the plaintiff pursuant to an assignment of benefits from the individual defendant, though the dates these claims were sent and/or received is not alleged. On October 14, 2020, December 1, 2020, and December 29, 2020, the plaintiff sent to the individual defendant notices requesting that she attend IMEs scheduled for November 19, 2020, December 17, 2020, and January 28, 2021, respectively. She failed to appear for the initial IME and, after the IME calendared for December 17, 2020 was rescheduled to January 28, 2021, she failed to appear for that exam as well.

In support of its motion, the plaintiff submits, *inter alia*, the summons and complaint; an attorney’s affirmation, affidavits of service for the summons and complaint as to each of the defaulting defendants, an affidavit of Luis Campbell, the plaintiff’s mail room supervisor, affidavits of Mike Ficalora and Tracy Simpson, mail room supervisors for the company that scheduled Jorge’s medical examinations on behalf of the plaintiff, an affidavit of Cheryl Glaze, a no-fault claims supervisor for the plaintiff; and affidavits of Dr. Eric S. Roth and Dr. Michael

Russ, physicians scheduled to conduct the IMEs who state that the individual defendant failed to appear for her exams. The plaintiff also submits the individual defendant's application for no-fault benefits (NF-2), dated August 7, 2020, the IME notices sent to the individual defendant, and the plaintiff's denial of coverage notice (NF-10), dated February 10, 2021, which states, in pertinent part, that the claim was denied because the individual defendant failed to appear for scheduled IMEs.

The plaintiff fails to establish proof of the facts constituting its claim that it is not obligated to reimburse the non-answering defendants. When an individual submits a claim for no-fault benefits, "the failure to appear for IMEs requested by the insurer is a breach of a condition precedent to coverage under the No-Fault policy." Hereford Ins. Co. v Lida's Med. Supply, Inc., 161 AD3d 442, 442 (1st Dept. 2018); see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 (1st Dept. 2011); 11 NYCRR 65-1.1. Such a breach "voids the policy ab initio," and the insurer has the right to "deny all claims retroactively to the date of loss." Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, *supra*. "The repeated nonappearance effectively cancels the contract as if there was no coverage in the first instance." PV Holding Corp. v Hank Ross Medical, P.C., 188 AD3d 429, 430 (1st Dept. 2020).

To establish a defense to a claim based on failure to attend IMEs, the plaintiff must demonstrate "that it requested [I]MEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations and that the patient did not appear. (Am. Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841, 841-42 [1st Dept. 2015])." Am. Tr. Ins. Co. v Acosta, 202 AD3d 567, 568 (1st Dept. 2022). Pursuant to 11 NYCRR 65-3.5(b) and (d), the insurer must request an IME within 15 days after receipt of an NF-3 claim form from a medical provider seeking payment and must then schedule the IME "within 30 days from receipt of the prescribed verification forms." See State Farm Mut. Auto. Ins. Co. v All City Family Healthcare Ctr., Inc., 206 AD3d 584, 585 (1st Dept. 2022); State Farm Mut. Auto. Ins. Co. v AK Global Supply Corp., 203 AD3d 556, 557 (1st Dept. 2022); Unitrin Direct Ins. Co. v Beckles, 188 AD3d 620, 621 (1st Dept. 2020).

Here, the affidavits of Dr. Roth and Dr. Russ sufficiently demonstrate that the individual defendant failed to appear for her IMEs as scheduled. However, while the complaint and the affirmation in support of the motion include allegations that the plaintiff received claims for payment from the named medical providers, they are silent as to the dates those forms were received, and the NF-3 forms themselves are not attached as exhibits to the motion. The

plaintiff therefore fails to demonstrate that it timely sent an IME notice to the individual defendant per 11 NYCRR 65-3.5(b) or scheduled the initial IME within the allotted time per 11 NYCRR 65-3.5(d). See Am. Tr. Ins. Co. v Acosta, supra; Am. Tr. Ins. Co. v Longevity Med. Supply, Inc., supra. The motion for leave to enter a default judgment must therefore be denied because plaintiff fails to demonstrate, *prima facie*, on the papers submitted that it complied with the requisite time frames for noticing and scheduling the subject IMEs. See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, supra; Joosten v Gale, supra. Because the defect may be cured, the motion is denied without prejudice to renewal within 30 days.

There is an additional reason for denial of the motion as to defendant Dimitri Bazin. The affidavit of service submitted by the plaintiff reveals that service upon him was defective as a matter of law. Per the plaintiff's own allegations, Bazin is a natural person. Consequently, service of process must be made in strict compliance with the statutory methods for effecting personal service upon a natural person pursuant to CPLR 308. The plaintiff, however, did not do so, but instead delivered the summons and complaint on the Secretary of State as if Bazin was a business entity rather than a natural person. See CPLR 311(1); Business Corporation Law §§ 306-b, 306(d). Service upon the Secretary of State is not sufficient to serve an individual defendant since there is no obligation for an individual to identify an agent and keep a current address with the Secretary of State as required of a corporation pursuant to BCL § 306.

Since these defects may be cured, the motion is denied without prejudice to renewal on proper papers within 30 days of the date of this order.


Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against defendants BV Physical Therapy P.C., Dimitri Bazin, Full Psychology, P.C., JP Rx Corp, Kyungsook Bu, M.D., Marta Medical Supply Inc., Pro Recovery Services Inc., S & K Warbasse Pharmacy Inc., and Toplab, as amended by stipulations dated March 27, 2023 and April 19, 2023, is denied without prejudice to renewal upon proper papers within 30 days of the date of this order; and it is further

ORDERED that all remaining parties shall appear for a preliminary conference on December 14, 2023, at 11:30 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/5/2023

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