

**American Transit Ins. Co. v Narvaez**

2014 NY Slip Op 30201(U)

January 21, 2014

Sup Ct, New York County

Docket Number: 152363/2013

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA  
*Justice*

PART 19

Index Number : 152636/2013  
AMERICAN TRANSIT INSURANCE  
vs.  
NARVAEZ, MARIA  
SEQUENCE NUMBER : 002  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 1/21/14  
which disposes of motion sequence(s) no. 002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1/21/14

\_\_\_\_\_, J.S.C.

**SALIANN SCARPULLA**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No.: 152636/2013  
Submission Date: 10/23/13

- against-

MARIA NARVAEZ, ARCE MEDICAL & DIAGNOSTIC SERVICES, P.C., BACK TO LIFE SPORT & SPINE CARE P.C., DR. GARY I. GOLDBERG, ELMHURST HOSPITAL CENTER, LONG ISLAND CONSULTING, P.C., MARK MCMAHON, MD, MOUNT SINAI ELMHURST, STAND UP MRI OF QUEENS, P.C., and WAN MEI WOO LAC,

**DECISION AND ORDER**

Defendants.

-----X  
For Plaintiff: Law Offices of Jason Tenenbaum P.C.  
595 Stewart Avenue, Suite 400  
Garden City, NY 11530  
For Defendant Stand Up MRI of Queens:  
Law Offices of Robert E. Dash  
8 Corporate Center Drive Suite 110  
Melville, NY 11747

For Defendants Narvaez, Arce Medical, Back to Life, Dr. Goldberg, and Wan Mei Woo Lac  
Law Offices of Michael A. Cervini  
40-09 82<sup>nd</sup> Street  
Elmhurst, NY 11373

Papers considered in review of this motion for a default judgment and motion for summary judgment:

Notice of Motion ..... 1  
Aff in Opp ..... 2

**HON. SALIANN SCARPULLA, J.:**

In this action seeking a judgment declaring no entitlement to no-fault benefits, plaintiff American Transit Insurance Company (“American”) moves for a default judgment against defendants Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, and Mount Sinai Elmhurst, and for summary judgment on its claims asserted against defendants Maria Narvaez, Arce Medical & Diagnostic Services, PC, Back to Life Sport & Spine Care P.C., Dr. Gary I. Goldberg, Stand UP MRI of Queens, P.C., and Wan Mei Woo LAC.

American issued an automobile insurance policy to Rolando E. Sigcha under New York policy number A107137 (“the policy”). On December 15, 2010, defendant Maria Narvaez (“Narvaez”) was allegedly involved in a motor vehicle accident and sought coverage under the policy. As a result of her injuries, Narvaez sought medical treatment at Arce Medical & Diagnostic Services, PC, Back to Life Sport & Spine Care P.C., Dr. Gary I. Goldberg, Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, Mount Sinai Elmhurst, Stand UP MRI of Queens, P.C., and Wan Mei Woo LAC (collectively referred to as “the medical provider defendants”). Narvaez completed an application for no-fault benefits under claim number 650015-04. She allegedly assigned the right to pursue reimbursement from American under New York no-fault laws to the medical providers defendants.

On March 22, 2013, American filed a summons and complaint. American seeks a judgment declaring that Narvaez was not an eligible injured person entitled to no-fault benefits under the policy because she failed to appear for independent medical examinations scheduled for February 28, 2011 and March 14, 2011. American further seeks a declaration that the medical provider defendants are not entitled to first-party no-fault benefits.

Maria Narvaez, Arce Medical & Diagnostic Services, PC, Back to Life Sport & Spine care P.C., Dr. Gary I. Goldberg, Wan Mei Woo LAC, and Stand-UP MRI of Queens, P.C. answered the complaint. Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, and Mount Sinai Elmhurst did not answer the complaint.<sup>1</sup>

American now moves for (1) a default judgment against Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, and Mount Sinai Elmhurst as a result of their failure to answer the complaint; and (2) summary judgment on its claims asserted against Maria Narvaez, Arce Medical & Diagnostic Services, PC, Back to Life Sport & Spine Care P.C., Dr. Gary I. Goldberg, Stand Up MRI of Queens P.C., and Wan Mei Woo LAC, on the ground that Narvaez failed to appear for two IMEs scheduled for February 28, 2011 and two IMEs scheduled for March 14, 2011.

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<sup>1</sup> Elmhurst Hospital Center did not file an answer. However, American filed a notice of rejection on August 2, 2013, in which it rejected an answer served by Elmhurst Hospital Center on July 29, 2013, on the grounds that the answer was untimely.

In support of its motion, American submits an affidavit from Lynn Hershman, a supervisor at Independent Physical Exam Referrals, Inc. (“IPER”), a company that handles scheduling of medical examinations for American. Hershman states that, on January 28, 2011, IPER sent a letter to Narvaez requesting that she attend two medical examinations on February 28, 2011. Hershman further states that, on March 1, 2011, IPER sent a second letter to Narvaez requesting that she attend two medical examinations on March 14, 2011. American submits copies of the letters that IPER sent to Narvaez dated January 28, 2011 and March 1, 2011.

American also submits affidavits from Dr. Michael Russ and Dr. Cirino G. Sesto. Both Drs. Russ and Sesto state that Narvaez was scheduled to appear for medical examinations at their offices on February 28, 2011 and March 14, 2011, and that Narvaez “failed to comply with the requests and did not appear on these dates.”

In opposition, Stand Up MRI of Queens, P.C. (“Stand Up MRI”) argues that American fails to prove that it properly mailed the IME notices to Narvaez, and that Narvaez failed to appear for the IMEs.

### **Discussion**

CPLR § 3215(a) provides that a plaintiff may seek a default judgment against a defendant who has failed to appear, plead, or proceed to trial. An application for a default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the merits of the claim; and (3) proof of the default. CPLR § 3215(f). Here,

American submits proper affidavits of service, an affidavit of merit, and proof of the default of defendants Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, and Mount Sinai Elmhurst. American also submits a current non-military affidavit for Mark McMahon, MD. As such, on default, American's motion for a default judgment against Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, and Mount Sinai Elmhurst is granted.

The court further finds that American's motion for summary judgment seeking a declaration that defendants Maria Narvaez, Arce Medical & Diagnostic Services, PC, Back to Life Sport & Spine Care P.C., Dr. Gary I. Goldberg, Stand UP MRI of Queens, P.C., and Wan Mei Woo LAC are not entitled to first-party no-fault benefits is granted. American meets its burden of demonstrating entitlement to judgment as a matter of law by establishing that it timely and properly mailed notices for medical examinations to Narvaez and that she failed to appear.

Contrary to Stand Up MRI's claims, the affidavits submitted by American are sufficient to establish that it sent notices to Narvaez scheduling her medical examinations, and that Narvaez failed to appear. Moreover, Narvaez did not submit any opposition to this motion. The failure to appear for an IME "cancels the contract as if there was no coverage in the first instance and the insurer has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely."

*American Tr. Ins. Co. v. Johnson*, 2012 N.Y. Slip. Op. 32004(U) \*4 (N.Y. Sup. Ct., July 31, 2012); *Unitrin Advantage Ins. Co. v. Bayshore Phys. Therapy, PLLC*, 82 A.D.3d 559 (1st Dep't 2011).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff American Transit Insurance Company's motion for a default judgment against defendants Elmhurst Hospital Center, Long Island Consulting, P.C., Mark McMahon, MD, and Mount Sinai Elmhurst is granted on default; and it is further

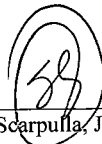
ORDERED that plaintiff American Transit Insurance Company's motion for summary judgment seeking a declaration that defendants Maria Narvaez, Arce Medical & Diagnostic Services, PC, Back to Life Sport & Spine Care P.C., Dr. Gary I. Goldberg, Stand UP MRI of Queens, P.C., and Wan Mei Woo LAC are not entitled to first-party no-fault benefits is granted.

Settle judgment.

This constitutes the decision and order of the Court.

Dated: New York, New York  
January 1, 2014

ENTER:



Saliann Scarpulla, J.S.C.