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

**PRESENT:** HON. KATHRYN E. FREED, J.S.C. **PART** 2
*Justice*

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

ARTIS ALEN, ACCELERATED SURGICAL CENTER, AXIAL CHIROPRACTIC P.C., BARNERT SURGICAL CENTER LLC, BEST TOUCH PT P.C., GARA MEDICAL CARE, P.C., HAYEK CHIROPRACTIC P.C, LIDA'S MEDICAL SUPPLY INC., LUCKY CHIROPRACTIC CARE P.C., MANHATTAN BEACH PHARMACY, INC., MEDICSBURG, P.C., METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, PRO-ALIGN CHIROPRACTIC P.C., RONALD HAYEK D.C, STAND-UP MRI OF BENSONHURST, P.C., and WAVE MEDICAL SERVICES, P.C.,

Defendants.

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**INDEX NO.** 152581/2016

**MOTION DATE**

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this application to/for Default Judgment

**The motion is denied with leave to renew on proper papers.**

In this declaratory judgment action, plaintiff American Transit Insurance Company ("ATIC") moves for an order: (1) pursuant to CPLR 3215, granting it a judgment on default against individual defendant Artis Alen ("Alen") and co-defendants Accelerated Surgical Center, Axial Chiropractic, P.C., Barnert Surgical Center, LLC, Gara Medical Care, P.C., Hayek Chiropractic

P.C., Lucky Chiropractic Care P.C., Manhattan Beach Pharmacy, Inc., Medicsburg, P.C., Metro Pain Specialists Professional Corporation, Pro-Align Chiropractic P.C., Stand-Up MRI of Bensonhurst, P.C., and Wave Medical Services, P.C. ("the defaulting medical providers") for failure to appear or answer in this action;[1] (2) granting it summary judgment against defendant Lida's Medical Supply, Inc. ("Lida's" or "the answering medical provider");[2] 3) granting ATIC a declaratory judgment that Alen is not an "eligible injured person" entitled to no-fault benefits pursuant to ATIC insurance policy number CAP 614937, Claim No. 782672-06; (3) granting ATIC a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by the defaulting medical providers named herein, as assignees of Alen, pursuant to the aforementioned policy number and claim number, nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the subject claim arising from an alleged accident on June 19, 2015 involving Alen, since Alen is not an "eligible injured person" as defined by the policy and/or New York State Regulation 68; (4) a declaratory judgment that ATIC is not required to provide, pay, or honor any current or future claim for no-fault benefits under the Mandatory Personal Injury Protection endorsement under the policy number and claim number set forth above, nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits

[1] Plaintiff does not seek a default against defendants Ronald Hayek D.C. and Best Touch PT P.C. since they concededly were not timely served.
[2] The defaulting medical providers and the answering medical provider will be referred to collectively as "the medical provider defendants."

arising under the subject claim arising from the alleged accident of June 19, 2015, as Alen is not an "eligible injured person" as defined by the ATIC policy referred to above and/or New York State Regulation 68; and (5) for such other and further relief as this Court deems just and proper. The motion is unopposed.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The captioned action arises from an alleged automobile accident on June 19, 2015, in which defendant Alen was allegedly injured while a passenger in a vehicle owned by PLJ Holdings LLC ("PLJ") and insured by ATIC under policy number CAP 614937. Ex. F, at pars. 20, 24, 27.[3] Following the accident, Alen made a claim for no-fault benefits to ATIC as a purported eligible injured person pursuant to claim number 782672-06. Id., at par. 24.

The insurance policy issued to PLJ contained the mandatory no-fault endorsement prescribed by the New York State Department of Financial Services, which states, in part:

> MANDATORY PERSONAL INJURY PROTECTION
>
> [ATIC] will pay first party benefits to reimburse for basic economic loss sustained by an eligible injured person on account of personal injuries caused by an accident arising out of the use or operation of a motor vehicle or a motorcycle during the policy and within the United States...

Ex. B.

[3] Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Justin Rothman, Esq. submitted in support of the application.

Alen alleged that, as a result of the June 19, 2015 accident, he received medical treatment from the medical provider defendants and, although he initially had sought to collect such no-fault benefits in his own right, he assigned the rights to collect no-fault benefits for such treatment under policy number CAP 614937 and claim number 782672-06 to those defendants. Ex. F, at pars. 26-27. ATIC received Alen's claim for no-fault benefits on an NF-2 form on July 23, 2015. Ex. C.

In order to verify that Alen was actually injured and received the medical treatment for which his claims were submitted, ATIC duly requested that he submit to Independent Medical Examinations ("IMEs"). ATIC notes that such IMEs are specifically allowed pursuant to New York Codes of Rules and Regulations 65-1.2, as well as the policy, which provide, in pertinent part:

> CONDITIONS
>
> **Action Against Company.** No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.
>
> Upon request by the Company, the eligible injured person or that person's assignee or representative shall:
>
> (a) Execute a written proof of oath;
>
> (b) As may reasonable be required to submit to examinations under oath by any person maned by the Company and subscribe the same.
>
> (c) Provide authorization that will enable the Company to obtain Medical records; and
>
> (d) Provide any other pertinent information that may assist the Company in determining the amount due and payable.

Additionally, the policy and New York State Insurance Regulation 68 further provide that:

The eligible injured person shall submit to an Independent Medical

> Examination by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require.

Ex. B.

By letter received August 25, 2015, ATIC learned that Alen was represented by counsel. Ex. E. Pursuant to the regulations and the subject insurance policy, ATIC wrote to Alen's attorney requesting that Alen appear for IMEs by two different physicians on September 8, 2015. Ex. D. When Alen failed to appear for those examinations, ATIC again wrote to Alen's counsel, this time asking that Alen appear for these examinations on September 22, 2015. However, Alen again failed to appear. Ex. A.

ATIC submits affidavits (from Iris Hernandez and Luis Campbell, annexed to Exhibit A) attesting to its mailing procedures and with personal knowledge of Alen's failure to appear for IMEs. In addition, ATIC submits the affidavits of Dr. Michael Russ and Dr. Corey Stein, at whose offices Alen failed to appear for his IMEs. Lynn Hershman, an employee of Independent Physical Exam Referrals, Inc., at which office Alen was to appear for his IMEs, also submits an affidavit attesting to the fact that he failed to appear. ATIC's "Denial of Claims Form" (NF-10), dated October 5, 2015, signed by Hernandez, and denying benefits to Alen based on his failure to cooperate and appear for scheduled IMEs, is annexed as Exhibit E.

ATIC commenced the captioned action by filing a summons and verified complaint March 25, 2016. Ex. F. It then purported to serve all defendants except Ronald Hayek D.C. and Best Touch PT P.C. with process within 120 days thereafter in accordance with CPLR 306-b. Ex. G. After all defendants timely served except Lida's failed to answer, ATIC filed the instant motion seeking, inter alia, a default judgment against them.

**POSITION OF PLAINTIFF ATIC:**

ATIC moves for a determination that, by twice failing to appear for properly requested and scheduled IMEs, Alen breached a condition precedent to coverage of the subject policy and thus is not an "eligible injured person" entitled to no-fault benefits under the policy. Additionally, it seeks a declaration that, because Alen breached a condition precedent to coverage under the policy, the policy was thus rendered *void ab initio*. Therefore, since Alen's assignees, the defaulting medical providers, acquire no greater rights than their assignor, Alen, ATIC is entitled to deny the defaulting medical providers payment for any and all claims arising out of the motor vehicle accident of June 19, 2015 as alleged in the verified complaint and under ATIC policy number CAP 614937, claim number 782672-06.

Further, ATIC urges that it is entitled to a default judgment against Alen and the defaulting medical providers insofar as they were all properly served with the underlying papers and have failed to appear in this action. ATIC maintains that, on July 6, 2016, the following medical provider defendants were served via the Secretary of State: Axial Chiropractic P.C., Hayek Chiropractic P.C., Lida's, Lucky Chiropractic Care P.C., Metro Pain Specialists Professional Corporation, Pro-Align Chiropractic P.C., Stand-Up MRI of Bensonhurst, P.C., and Wave Medical Services, P.C. Ex G.

ATIC also claims that Manhattan Beach Pharmacy, Inc., a corporation, was served on July 8, 2016 at 1224 Avenue U, Brooklyn, New York by delivering the summons and complaint to "Julie as Pharmacist"; Associated Surgical Center, a "corporation", was served on July 11, 2016 at 680 Broadway, Paterson New Jersey by delivering the summons and complaint to "Jamie as

Receptionist"; Barnet [sic] Surgical Center LLC, a "corporation", was served on July 11, 2016 at 680 Broadway, Paterson, New Jersey by delivering the summons and complaint to "Jamie as Receptionist"; and Medicsburg, P.C., a "corporation", was served on July 11, 2016 at 680 Broadway, Paterson, New Jersey by delivering the summons and complaint to "Jamie as Receptionist." Id.

Gars Medical Care, P.C. was allegedly served on July 12, 2016 by delivering the summons and complaint to "Varun", an authorized agent. Id.

ATIC asserts that Alen was served with the summons and complaint by substituted service at his "place of abode" on July 18, 2016. Ex. G.

In addition, ATIC submits proof that defendants were served with an additional copy of the summons and verified complaint by mail on December 16. 2016. Ex. H.

ATIC avers that the defendants served with process have failed to appear, plead or proceed in this action and that the time set forth by law for the defendants to answer or appear has expired and has not been extended by the Court. Therefore, ATIC argues that it is entitled to a default judgment against Alen and all of the defaulting medical providers pursuant to CPLR 3215.

**LEGAL CONCLUSIONS**:

ATIC's application for a default judgment against the defaulting medical provider defendants is denied with leave to renew upon proper papers. CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . , the plaintiff may seek a default judgment against him." It is well settled that "[o]n 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 Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, the affidavits of Hernandez, Campbell, Dr. Russ, Dr. Stein, and Hershman set forth the facts constituting the claim, i.e., that Alen failed to appear for duly scheduled IMEs, thereby failing to satisfy a condition precedent to the ATIC policy, a copy of which is annexed to the motion.

"The No-Fault Regulations provide that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage." *Hertz Vehicles, LLC v Delta Diagnostic Radiology, P.C.*, 2015 WL 708610, 2015 NY Slip Op 30242(U), *3 (Sup Ct, NY County, Feb. 18, 2015, No. 158504/12) (Rakower, J.). In particular, 11 NYCRR 65-1.1 states: "No action shall lie against [a No-Fault insurer] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." The Regulation at 11 NYCRR 65-1.1 also mandates that: "Upon request by the Company, the eligible injured person or that person's assignee or representative shall: . . . submit to an Independent Medical Examination by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require."

Given Alen's failure to appear for an IME, thus failing to satisfy this condition precedent to coverage, ATIC had the right to deny all claims by him and the medical provider defendants retroactively to the date of loss. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560-561 (1st Dept 2011).

In regard to proof of timely mailing in compliance with the No-Fault Regulations, this Court stated:

> "[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." *American Transit Insurance Company v. Lucas*, 111 A.D. 3d 423, 424 [1st Dept 2011]. A presumption of mailing "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed." *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D. 679, 680 [2nd Dept 2001].

*Hertz Vehicles, LLC*, 2015 WL 708610, *supra* at *4.

Here, ATIC has demonstrated, through proof of timely mailing in compliance with all no-fault requirements, (both for the scheduling of IMEs and its timely filing of its denials of coverage under the policy), proof of Alen's failure to appear on two occasions for duly noticed and scheduled IMEs and, through the filing of its verified complaint, that it has met its prima facie entitlement to a judgment declaring that Alen is not an "eligible injured person" entitled to no-fault benefits under ATIC policy number 614937, claim number 782672-06 and, thus, the defaulting medical providers which were assigned his rights are not entitled to no-fault coverage for the subject claims due to Alen's breach of a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1.

Further, the affirmation of ATIC's attorney establishes that defendant Alen and defaulting medical provider defendants Accelerated Surgical Center, Axial Chiropractic, P.C., Barnert Surgical Center, LLC, Gara Medical Care, P.C., Hayek Chiropractic P.C., Lucky Chiropractic Care P.C., Manhattan Beach Pharmacy, Inc., Medicsburg, P.C., Metro Pain Specialists Professional Corpoaration, Pro-Align Chiropractic P.C., Stand-Up MRI of Bensonhurst, P.C., and Wave

Medical Services, P.C. failed to appear or otherwise answer in this matter. Rothman Aff., at par. 39. However, since not all of the foregoing defendants have been properly served, including Alen, who allegedly assigned his right to recover no-fault benefits to the medical provider defendants, the motion cannot be granted.

Initially, service on Alen was improper. The affidavit of service relating to Alen reflects that, on July 18, 2016, service was made on a "suitable age person" at Alen's "place of [a]bode" at 2187 Clarendon Road, Brooklyn, New York. Ex. G. However, CPLR 308(2) specifically allows substituted service on "a person of suitable age and discretion" at one's "usual place of abode." Since the affidavit of service does not contain this language, it is defective. Further, after substitute service is made pursuant to CPLR 308(2), the summons and complaint must then be mailed to the person to be served at "his or her last known residence" or to "his or her actual place of business". Id. Although the summons and complaint were mailed to 2187 Clarendon Road, Brooklyn, New York, the affidavit of service does not specify whether that was Alen's last known address or actual place of business. Thus, the affidavit of service is defective in that respect as well. Moreover, the affidavit of service on Alen reflects that he was served with "the Summons and Complaint and Verified Complaint." Since this raises ambiguity as to what papers were actually served on Alen, the affidavit of service is defective for this reason as well.

ATIC's motion must also be denied as against Barnert Surgical Center LLC, an unauthorized foreign limited liability company referred to in the affidavit of service as a "corporation" (Ex. G), since the process server did not strictly comply with the service requirements of Business Corporation Law ("BCL") 307 when it purportedly served that defendant. *See Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57(1990). The procedures set forth in BCL 307 are substantively identical to those set forth in Limited Liability Company Law

("LLCL") § 304 and both apply to business entitles not authorized to do business in New York. *See Interboro Ins. Co. v Tahir*, 129 AD3d 1687 (4th Dept 2015). Additionally, the affidavit of service relating to Barnert refers to service on "*Barnet* Surgical Center LLC" (emphasis added) and is invalid for this reason as well. Ex. G.

Similarly, service on Accelerated Surgical Center, an unauthorized foreign limited liability company referred to in the affidavit of service as a "corporation", was improper because it also did not comply with BCL 307 or LLCL 304. Ex. G.

Since service upon Medicsburg, P.C., an unauthorized foreign corporation, also did not comply with BCL 307, no default can be entered against that entity.[4]

Additionally, service on Manhattan Beach Pharmacy, Inc., a New York corporation, was improper since it was made on an individual designated "Julie as Pharmacist." There is no indication that this individual was an "officer, director, managing or general agent, or cashier or assistant cashier" or "any other agent authorized by appointment or by law to receive service" on behalf of a corporation. CPLR 311(a)(1).[5]

Therefore, in light of the foregoing, it is hereby:

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[4] Even assuming that service on Accelerated Surgical Center, Barnert Surgical Center LLC, and Medicsburg, P.C. had been proper, it is unclear whether this Court would have personal jurisdiction over those entities, which appear to have rendered treatment to Alen in New Jersey.

[5] Given the expiration of the 120-day period in which to serve Alen, Accelerated Surgical Center, Barnert Surgical Center LLC, Medicsburg, P.C., and Manhattan Beach Pharmacy, Inc., which began to run on the date of the commencement of this action (see CPLR 306-b), plaintiff would, at this point, be required to move to extend the time to re-serve these entities, if it be so advised.

ORDERED that the motion is denied with leave to renew on proper papers; and it is further

ORDERED that this constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

6/22/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

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