

<b>American Tr. Ins. Co. v Museau</b>
2017 NY Slip Op 31470(U)
July 12, 2017
Supreme Court, New York County
Docket Number: 152639/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

**PART 2**

-----X

AMERICAN TRANSIT INSURANCE COMPANY,  
  
Plaintiff,

INDEX NO. 152639/2016

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

- v -

RONALD MUSEAU, ADVANCED SPINAL CARE  
REHABILITATION, ALLAY MEDICAL SERVICES, P.C.,  
ATLANTIC CHIROPRACTIC, P.C., B WELLNESS  
ACUPUNCTURE, P.C., BD MEDICAL SERVICES, P.C.,  
BLANO MEDICAL, P.C., CENTURY ACUPUNCTURE  
WELLNESS, P.C., COLUMBUS IMAGING CENTER, GENESIS  
CHIROPRACTIC CARE, P.C., HUMAN TOUCH REHAB PT,  
PLLC, JOY CARE PT, PLLC, FRANCIS LACINA, MAXIM  
TYORKIN, METRO PAIN SPECIALISTS PROFESSIONAL  
CORPORATION, MGAL MEDICAL SERVICES, P.C., MODERN  
REHAB PHYSICAL THERAPY, RA MEDICAL SERVICES,  
UNITED CHIROPRACTIC, P.C., XVV, INC., XYJ  
ACUPUNCTURE PC, YEVGENIY MARGULIS

**DECISION, ORDER and  
JUDGMENT**

Defendant.

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The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this application to/for Default Judgment

Upon the foregoing documents, it is  
ordered that the motion is granted.

In this declaratory judgment action, plaintiff American Transit Insurance Company (“ATIC”) moves for an order: 1) pursuant to CPLR 3215, granting it a default judgment against individual defendant Ronald Museau and co-defendants Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blano Medical, P.C., Century Acupuncture

Wellness, P.C., Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Mgal Medical Services, P.C., Modern Rehab Physical therapy, United Chiropractic, P.C., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D (hereinafter collectively “the defaulting medical provider defendants”) due to their failure to appear in this action; 2) granting ATIC a declaratory judgment that Museau is not an “eligible injured person” entitled to no-fault benefits under ATIC insurance policy number BTC B400742 issued by plaintiff, claim number 661359-02; 3) granting ATIC a declaratory judgment that it is not obligated to honor or pay claims for reimbursement submitted by the defaulting medical provider defendants, as assignees of Museau under ATIC insurance policy number BTC B400742, claim number 661359-02, nor is ATIC required to 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 policy number BTC B400742, claim number 661359-02 from an alleged accident on July 19, 2015 involving Museau, since Museau is not an “eligible injured person” as defined by the ATIC 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 policy number BTC B400742, claim number 661359-02, and that it is not obligated to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitration and/or lawsuits seeking to recover no-fault benefits arising under policy number BTC B400742, claim number 661359-02 in connection with the alleged accident of July 19, 2015 since Museau is not an “eligible injured person” as defined by the policy and/or New York State Regulation 68; and 5) for such other and further relief as this Court deems just and proper. After a review of the motion

papers, and after a review of the relevant statutes and case law, the motion, which is unopposed, is **granted**.

**FACTUAL AND PROCEDURAL BACKGROUND :**

On July 19, 2015, defendant Ronald Museau was allegedly injured while riding a bicycle when he was struck by a vehicle owned by nonparty 718 Enterprises Group LLC (“718”) and insured by ATIC under policy number BTC B400742 . Ex. E, Complt., at pars. 26, 30.

The ATIC policy and New York Insurance Regulation 68 provide as follows:

**CONDITIONS**

Action Against Company. No action shall lie against [plaintiff] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The policy and New York Insurance Regulation 68 also provide as follows:

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, [plaintiff], when, and as often as, [plaintiff] may reasonably require.

On or about July 22, 2015, Museau completed an application for no-fault benefits (“NF-2”) which he sent to ATIC, 718’s no-fault insurer. Ex. B. The NF-2 was received by ATIC the same day. Shepherd Aff., at par. 18.

By correspondence dated August 7, 2015, Examworks, Inc. wrote to Museau at the request of ATIC to request that he appear for an independent medical examination (“IME”) by Pierce Ferriter, M.D., an orthopedic surgeon, on August 26, 2015. Ex. A, Simpson Aff.; Ex. C. When Mureau failed to appear for the IME on August 26, 2015 (Ex. A, Simpson Aff. And Ferriter Aff.), Examworks wrote to plaintiff again on August 28, 2015 requesting that he appear for an IME by Robert Pick, M.D, an orthopedic surgeon, on September 16, 2015. Ex. A, Simpson Aff.; Ex. C.

Again, Museau failed to appear for the IME. Ex. A, Simpson Aff. And Pick Aff. Based on Museau's failure to appear for the scheduled IMEs, Shepherd, on behalf of ATIC, issued him a denial of no-fault benefits on September 30, 2015. Ex. D.

On March 29, 2016, ATIC commenced the captioned declaratory judgment action against Museau, Advanced Spinal Care Rehabilitation, Allay Medical Services, P.C., Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blanco Medical, P.C., Century Acupuncture Wellness, P.C., Columbus Imaging Center, Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Francis Joseph Lacina M.D., Maxim Tyorkin MD, Metro Pain Specialists Professional Corporation, Mgal Medical Services, P.C., Modern Rehab Physical Therapy, RA Medical Services, United Chiropractic, P.C., XVV, Inc., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D. Ex. E.

Plaintiff thereafter served the summons and complaint on defendants Museau, Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blanco Medical, P.C., Century Acupuncture Wellness, P.C., Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Mgal Medical Services, P.C., Modern Rehab Physical therapy, United Chiropractic, P.C., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D. Ex. F. An additional mailing of the summons and complaint was made on the foregoing entities on December 30, 2016. Ex. G.

ATIC concededly failed to timely serve defendants Advanced Spinal Care Rehabilitation and Columbus Imaging Center. Rothman Aff. In Supp., at p. 2, n. 2. Additionally, ATIC filed stipulations discontinuing its claims against defendants Allay Medical Services, P.C., Francis Joseph Lacina M.D., Metro Pain Specialists Professional Corporation, RA Medical Services, Maxim Tyorkin MD, and XVV, Inc. Ex. E; Rothman Aff. In Supp., at p. 2, n. 2.

In its complaint, ATIC alleged, inter alia, that it provided a policy of insurance to 718 (policy no. BTC B400742; claim number 661359-02) (Id., at pars. 26 and 30); Museau was injured on July 19, 2015 while riding a bicycle when he was struck by a vehicle insured pursuant to a policy issued to 718 by ATIC (Id., at par. 30); that, as a result of the accident, Museau received medical treatment and sought no-fault benefits; that Museau assigned his no-fault benefits to the defendant defaulting medical providers; and that Museau breached a condition precedent under the policy by failing to appear for an IME (Id., at pars. 30-35, 38-47, 50-55).

On March 15, 2017, ATIC filed the instant motion for a default against defendants Museau, Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blanco Medical, P.C., Century Acupuncture Wellness, P.C., Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Mgal Medical Services, P.C., Modern Rehab Physical therapy, United Chiropractic, P.C., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D. NYSCEF Doc. 10. The motion is unopposed.

### **LEGAL CONCLUSIONS:**

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 [it].” 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.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be provided by plaintiff’s affidavit or a verified complaint. *See* CPLR 3215(f).

Here, the moving papers establish that plaintiff properly served defendants Museau, Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blanco Medical, P.C., Century Acupuncture Wellness, P.C., Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Mgal Medical Services, P.C., Modern Rehab Physical therapy, United Chiropractic, P.C., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D. and that those defendants have failed to appear. Exs. F and G; Rothman Aff., at pars. 36-37.

Defaults in declaratory judgment actions “will not be granted on the default and pleadings alone” but require that the “plaintiff establish a right to a declaration against . . . a defendant.” *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 902 (3d Dept 1986), quoting *National Sur. Corp. v Peccichio*, 48 Misc2d 77, 78 (Sup Ct Albany County 1965).” *de Beeck v Costa*, 39 Misc3d 347 (Sup Ct New York County 2013). Here, ATIC, through the submission of affidavits by individuals with personal knowledge, has demonstrated the facts constituting its claim. *See Gagen v Kipany Prods. Ltd.*, 289 AD2d 844 (3d Dept 2001). Defendants’ defaults in answering the complaint constitute admissions of the factual allegations therein and any reasonable inferences which may be made from the same. *See Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 778 (1984).

“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: “[u]pon request by the Company, the eligible

injured person or that person's assignee or representative shall: . . . submit to an [IME] by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require."

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

ATIC has demonstrated, through proof of timely mailing in compliance with the no-fault regulations (both for the scheduling of IMEs and its issuance of its denial of coverage under the policy), proof of Museau's failure to appear on two occasions for a duly noticed and scheduled IME and, through the filing of its verified complaint, that it has met its prima facie entitlement to a judgment declaring that the defaulting medical providers are not entitled to no-fault coverage for the subject claims due to Museau's breach of a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1. Thus, Museau is not an "eligible injured person" entitled to no-fault benefits under American Transit policy number BTC B400742, claim number 661359-02.

In light of the foregoing, it is hereby:

ORDERED that plaintiff American Transit Insurance Company's motion, pursuant to CPLR 3215, granting it a judgment on default against individual defendant Ronald Museau and co-defendant medical providers Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blanco Medical, P.C., Century Acupuncture Wellness, P.C., Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Mgal Medical



Services, P.C., Modern Rehab Physical therapy, United Chiropractic, P.C., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D for failure to appear or answer in this action, is granted; and it is further,

ORDERED and ADJUDGED that individual defendant, Ronald Museau is not an “eligible injured person” entitled to no-fault benefits under American Transit policy number BTC B400742, claim number 661359-02, and it is further,

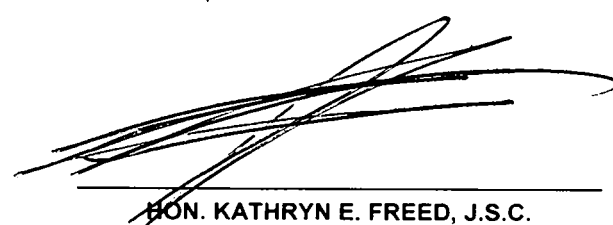
ORDERED and ADJUDGED that plaintiff American Transit Insurance Company is not obligated to honor or pay claims for reimbursement for any and all claims by defendant medical providers Atlantic Chiropractic, P.C., B Wellness Acupuncture, P.C., BD Medical Services, P.C., Blanco Medical, P.C., Century Acupuncture Wellness, P.C., Genesis Chiropractic Care, P.C., Human Touch Rehab PT, PLLC, Joy Care PT, PLLC, Mgal Medical Services, P.C., Modern Rehab Physical therapy, United Chiropractic, P.C., XYJ Acupuncture PC, and Yevgeniy Margulis, Ph.D; and it is further,

ORDERED that plaintiff American Transit Insurance Company is to serve a copy of this order with notice of entry upon all parties and the County Clerk’s Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision, judgment, and order of this Court.

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

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

7/12/2017  
DATE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE