

<b>American Tr. Ins. Co. v Thomas</b>
2019 NY Slip Op 33125(U)
October 21, 2019
Supreme Court, New York County
Docket Number: 153974/2018
Judge: Melissa A. Crane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: MELISSA A. CRANE PART 15**  
Justice

AMERICAN TRANSIT INSURANCE COMPANY

INDEX NO. 153974/2018  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

- v -

CAROLYN THOMAS, COLUMBUS IMAGING  
CENTER, CONCEPT MEDICAL SUPPLY, INC.,  
DR. IBRAHIM FATIHA, CHIROPRACTIC, P.C.,  
MEDICAL MISSION HEALTH CARE P.C., YY  
BALANCE ACUPUNCTURE HEALTH CARE, P.C.

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

**CROSS-MOTION: YES NO**

This case arises from an automobile accident that occurred on May 26, 2017, involving defendant Carolyn Thomas (“Thomas” or “claimant”). Thomas alleges that she sustained serious bodily injuries as a result of the collision that occurred on May 26, 2017. Thomas submitted claims to plaintiff, American Transit Insurance Company (“American Transit”) for no-fault benefits under the insurance policy that plaintiff issued to the insured, TORIBIOESTEV, EZ J.A. Thomas was allegedly a passenger in the insured’s vehicle at the time of the accident. Thomas assigned the rights to collect no-fault benefits to co-defendants/medical providers.

Plaintiff commenced an action on or about April 30, 2018, by a Summons and Complaint, seeking a declaratory judgment against claimant as well as numerous co-defendants/medical providers under American Transit policy number BC B501750, claim no: 680679-05. On September 26, 2018, defendants CONCEPT MEDICAL SUPPLY, INC., DR. IBRAHIM FATIHA CHIROPRACTIC, P.C., MEDICAL MISSION HEALTH CARE, P.C., YY BALANCE ACUPUNCTURE HEALTH

CARE, P.C. (“answering defendants”) served an Answer with counterclaims. On January 2, 2019, plaintiff replied to the answering defendants’ counterclaims. To date, defendants CAROLYN THOMAS and COLUMBUS IMAGING CENTER (the “nonanswering defendants”) have not answered or appeared in this action.

Plaintiff now moves for a default judgment pursuant to CPLR 3215 against the non-answering defendants, and for summary judgment pursuant to CPLR 3212 against the answering defendants.

In this case, plaintiff denied no-fault benefits because of Thomas’s failure to appear for independent medical examinations (“IME”). The failure to appear for a scheduled IME is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). The mandatory personal injury endorsement provides that the eligible injured person (“EIP”) shall submit to an IME by physicians when, and as often as, the insurer may reasonably require (*see* 11 NYCRR 65-1.1). To establish an IME no-show defense, the insurer must establish (1) timely and proper mailing of the IME notices to the EIP; and (2) that the EIP failed to appear for two scheduled IMEs (*see Stephen Fogel Psychological, P.C. v Progressive Cas Ins Co*), 35 AD3d 720 [App Div 2d Dept 2006]). The notices must follow the procedures and time-frames set forth in the No-Fault regulations (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d at 559). 11 NYCRR 65-3.5(d) states, “[i]f the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within **30 calendar days** from the date of receipt of the prescribed verification forms” (emphasis added).

The answering defendants put the timeliness of the scheduled IMEs at issue. Answering defendants argue that plaintiff scheduled the first IME for September 12, 2017, more than 30 days from when plaintiff received the prescribed verification forms. Answering defendants rely on the dates it mailed NF-3 forms to plaintiff, including on July 28, 2017, July 7, 2017, July 12, 2017, July 26, 2017,

and August 11, 2017. Affidavits from billing/mailing/collection supervisor, Michael Berezovsky, attest to the generation and mailing of answering defendants' NF-3 claims, and attach the NF-3s and USPS date stamped mailing logs. Berezovsky mailed the claims over 30-days from when plaintiff scheduled its first IME on September 12, 2017.

Plaintiff instead calculates the 30 days from when it received the NF-2 form, on August 22, 2017. "The prescribed verification form in this instance, which was the NF-2 form (11 NYCRR 65-3.4(c)(3)), was received by Plaintiff on August 22, 2017, within the 30 day time frame in which an insurer may schedule an IME as prescribed in 11 NYCRR 65-3.5(d)" (*see* Pablan Reply, ¶ 12).

The Appellate Division has noted that the phrase "prescribed verification forms" refers to certain forms enumerated in 11 NYCRR 65-3.4, and set forth in Appendix 13 to the Insurance Department regulations (**specifically forms NF-3, NF-4, NF-5, NF-6 and NF-7**) (*see American Transit Ins Co v Longevity Medical Supply, Inc*, 131 AD3d 841 [1st Dept 2105], fn 1) (emphasis added). 11 NYCRR 65-3.4(c)(3) states the NF-2 form is an "Application for Motor Vehicle No-Fault Benefits," and the NF-3 form is a "Verification of Treatment by Attending Physician or Other Provider of Health Service."

Although plaintiff states in its affidavit that it received the NF-2 form on August 22, 2017, it makes no mention of when it received the NF-3 forms (*see American Transit Ins Co v Longevity Medical Supply, Inc*, 131 AD3d at 842 [insurer failed to establish prima facie an IME no-show defense where plaintiff provided no evidence in affidavit form or any form indicating the date that plaintiff received verification from defendant]; *see also, American Transit Ins Co v Vance*, 131 Ad3d 849 [1st Dept 2015]; *Country-Wide Ins Co v Blenman*, 2017 WL 669918 [New York County, Sup Ct 2017]). Defendants supply date-stamped NF-3s that are dated before plaintiff's receipt of the NF-2 on August 22, 2017. The First Department has made clear that an insurer must affirmatively establish that it complied with the no-fault insurance regulations prescribed time frame for requesting an IME. Because plaintiff fails to specify when it received the NF-3 forms from defendant, it failed to establish it mailed the IME notices within regulations prescribing a 30-calendar-day time frame from receipt of the

verification forms that answering defendants mailed. Had plaintiff actually received the NF-2 on August 22, 2017, surely it would have denied coverage as the regulations require a claimant to submit their NF-2 no more than 30 days after the date of accident.

Further, plaintiff proffers an affidavit from Cheryl Glaze, No-Fault Claims Supervisor for plaintiff. However, Cheryl Glaze did not actually review defendants' claims. Plaintiff no longer employs the claims examiner, Mark Armogan, who was assigned to the case, received defendants' bills and NF-2, and had personal knowledge of date at issue. Thus, plaintiff did not provide an affidavit from Armogan, someone with personal knowledge of the dates at issue. Issues of fact exist as to whether the IME notices were sent out within the 30-day time frame (see *American Transit Ins Co v Foster*, 2019 WL 1359767 [New York County, Sup Ct 2019]). Accordingly, the court denies plaintiff's motion for summary judgment.

The court also denies plaintiff's motion for default judgment. Although plaintiff established that it timely mailed two IME notices and that Thomas did not appear, plaintiff failed to show that the it scheduled the first IME within 30-days of the receiving prescribed verification forms.


Accordingly, it is

**ORDERED** that the plaintiff's motion is denied in its entirety.

The parties are directed to appear for a preliminary conference on November 12, 2019 at 2:15p.m. at 71 Thomas Street, New York, New York, Courtroom 304.

DATED: 10-21, 2019  
New York, New York

ENTER:

  
MELISSA A. CRANE, J.S.C

**HON. MELISSA A. CRANE  
J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE ORDER  SUBMIT ORDER   
FIDUCIARY APPOINTMENT