SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

NORMA LINDSAY, GREGORY S. PASQUA, PETER C. KWAN, M.D., P.C., JOHN A. MITAMURA, MD, NS RADIOLOGY, PLLC, PRO FORM PHYSICAL THERAPY P.C., ROBERT A. MARINI, M.D., STAND-UP MRI OF THE BRONX, P.C.,

Defendants.

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INDEX NO. 161835/2018

MOTION DATE 3/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

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

Upon the foregoing documents, the motion of plaintiff American Transit Insurance Company ("Plaintiff") for entry of a default judgment against defendants Norma Lindsay, Gregory S. Pasqua, John A. Mitamura, MD, NS Radiology, PLLC, Pro Form Physical Therapy P.C., Robert A. Marini, M.D., and Stand-Up MRI of the Bronx, P.C. (together, the "Defendants") is denied, in accord with the following memorandum decision.

Background

Plaintiff is the issuer of an insurance policy under an American Transit insurance policy (the "Policy") under which defendant Norma Lindsay ("Lindsay") made claims for no-fault benefits in connection with a motor vehicle collision on May 8, 2016 (the "Collision"). The remaining defendants are medical providers who have made claims to Plaintiff as assignees of Lindsay. On December 18, 2018, Plaintiff commenced this action by filing a summons and

complaint seeking a declaratory judgment that Lindsay violated the terms of the Policy by failing to appear for duly scheduled Examinations Under Oath ("EUOs"), a declaration that it properly denied all no-fault claims due to the alleged violation of the terms of the Policy, and that there is no coverage for any and all party benefits arising out of the Collision. None of the Defendants have answered the complaint or otherwise appeared in the action. Plaintiff now seeks entry of default judgment against the Defendants.[1]

Discussion

On a motion for a default judgment, the Plaintiff must demonstrate proof of service of the summons and complaint upon the defendant, proof of default, and proof of the facts constituting its claim (CPLR 3215). On a motion for summary judgment, the movant bears the burden of demonstrating, *prima facie*, that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Regardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable" (*Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 157 [1st Dept 1996]).

Where a Plaintiff seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an EUO, the Plaintiff must submit proof establishing that it complied

[1] The action was discontinued against the remaining defendant, Peter C. Kwan, M.D., P.C., subsequent to the filing of the motion.

with the timeliness requirements of 11 NYCRR 65–3.5 (b) in order to meet its burden of filing "proof of the facts constituting the claim" for a default judgment (*Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 AD3d 617, 617 [1st Dept 2018]; *Kemper Independence Ins. Co. v. Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]). The claim procedure set forth in 11 NYCRR 65-3.5 requires, in relevant part, that: (1) within ten business days of receipt of an application for no-fault benefits (NYS form NF-2), the insurer shall forward the prescribed verification forms it will require prior to payment of the initial claim to the parties required to complete them, and (2) any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms (11 NYCRR 65-3.5[a-b]).[2]

In support of its motion, Plaintiff submits, *inter alia*, the affirmation of its counsel, Ethan A. Rothschild, Esq., (the "Rothschild Affirmation"), the affidavit Luis Campbell, the Mail Room Supervisor for Plaintiff, and two affidavits of Cheryl Glaze ("Glaze"), a No-Fault Claims Supervisor for Plaintiff. The Rothschild Affirmation, and relevant attachments, demonstrate that all defendants were served with process and that each of has defaulted by failing to appear in the action. Glaze affirms that the form NF-2 submitted by Lindsay was received by Plaintiff on June 9, 2016, and that Lindsay failed to appear for properly requested and scheduled EUOs approximately five months later on November 2, 2016 and December 12, 2016. Plaintiff did not submit any information regarding whether it mailed the required verification forms to any of the defendants or whether they were returned, nor did Plaintiff submit any verification forms into evidence. Absent such evidence, it is not possible to determine whether Plaintiff complied with

[2] And if the additional verification required is an independent 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 (11 NYCRR 65-3.5[d]).

the timeliness requirements of 11 NYCRR 65–3.5. Plaintiff also offers no explanation why it requested an EUO of Lindsay. It is, therefore, unclear whether the EUO was requested in compliance with 11 NYCRR 65-3.5 (e), which requires that "[w]hen an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination." Thus, Plaintiff has failed to meet its burden on the motion.

Accordingly, it is

ORDERED that the motion for entry of a default judgment and summary judgment is denied; and it is further

ORDERED that a telephonic preliminary conference shall be held on August 4, 2020 at 2:00 p.m.

Louis L. Nock

6/29/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE