| **American Tr. Ins. Co. v All City Family Healthcare Ctr., Inc.** |
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| 2020 NY Slip Op 33029(U) |
| September 15, 2020 |
| Supreme Court, New York County |
| Docket Number: 652018/2020 |
| Judge: Nancy M. Bannon |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

***Justice***

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AMERICAN TRANSIT INSURANCE COMPANY

Plaintiff,

- v -

ALL CITY FAMILY HEALTHCARE CENTER, INC. a/a/o ROCHEL SYLVAIN,

Defendant.

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**INDEX NO.** 652018/2020

**MOTION DATE** 09/16/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13

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

In this action pursuant to Insurance Law § 5106(c) for de novo consideration of a claim for no-fault benefits, the plaintiff insurer moves pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendant All City Family Health Care Center a/a/o Rochel Sylvain. No opposition is submitted. The motion is denied.

The plaintiff alleges, in a complaint verified by its attorney, that the defendant provided surgical treatment to Sylvain for injuries allegedly sustained in a motor-vehicle accident involving a vehicle insured by the plaintiff and that Sylvain assigned the defendant any right that he may have had to recover no-fault benefits from the plaintiff in connection with the provision of treatment. The plaintiff further alleges that the defendant submitted a claim in the sum of $7,443.59 for reimbursement for medical services rendered to Sylvain, and that plaintiff timely and properly denied that claim on the grounds of lack of medical necessity, causality and adherence to proper fee schedule. The complaint further alleges that an arbitrator awarded the defendant the sum of $5,971.14. The arbitrator reviewed a peer review report of Dr. Andrew Bazos to rebut the presumption of medical necessity. However, Dr. Bazos admittedly had incomplete records and, in particular, reviewed “no documentation in close proximity to the accident.” He states that “only a single evaluation is made available for review for this

individual." Dr. Bazos nonetheless opined that, based on his review of intraoperative photographs and the single evaluation, there was no evidence of acute traumatic changes in the knee but there were indications of "mild chronic degenerative changes within the knee joint." The defendant submitted a rebuttal peer by Dr. Apazadis, the treating physician who performed the subject arthroscopic surgery on Sylvain's right knee on March 30, 2018. Dr. Apazadis determined, after reviewing all of the medical evidence, that the surgery was medically necessary and casually related to the accident. According to Dr. Azapadis, Sylvain's knee injury was traumatic in nature in that an MRI on August 30, 2017, showed a tear on the posterior horn of the medial meniscus. Dr. Apazadis noted that Sylvain was a 40-year-old restrained driver in a vehicle which was rear-ended. Dr. Apazadis opined that, even if there was some prior degeneration in the knee, this type of collision would exacerbate or aggravate the pre-existing injury or condition. The arbitrator found that the plaintiff failed to submit any evidence in support of its fee schedule defense.

A master arbitrator affirmed the lower arbitrator's award on March 17, 2020. The master arbitrator found that the lower arbitrator carefully considered all of the submitted evidence and that her award should not be disturbed. This action ensued.

Insurance Law § 5106(c) provides that:

> An award by an arbitrator shall be binding except where vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent. The grounds for vacating or modifying an arbitrator's award by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute a court action to adjudicate the dispute de novo.

Since the award affirmed by the master arbitrator was greater than $5,000, the plaintiff commenced this action against the defendant to adjudicate the dispute de novo. The defendant was served with process but has not answered the complaint or appeared in the action.

CPLR 3215 requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." While the "quantum of proof necessary to support an application for a default judgment is not exacting … some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). In a de novo action to determine the validity of a no-fault disclaimer made on the ground that the services provided by a physician are not medically necessary, a motion for leave to enter a default judgment must be supported by an expert affirmation or affidavit, which may be in the form of a peer review or a review of medical reports. See Global Liberty Ins. Co. v W. Joseph Gorum, M.D., P.C., 143 AD3d 768 (2nd Dept. 2016).

As to proof of the facts constituting its claim, the plaintiff submissions include the summons and complaint, proof of service, the denial of claim forms, an attorney's affirmation, and the arbitration awards. The plaintiff also submits the sworn Peer Review report dated July 26, 2018, signed by Dr. Andrew Bazos. The plaintiff has not met its burden on the motion. Neither the peer review of Dr. Bazos nor any other submission sufficiently addresses the report of Dr. Azapadis, that was also considered by the arbitrator, who found Bazos' report "factually insufficient." The plaintiff submits no proof in regard to its fee schedule argument.

The plaintiff also relies upon a complaint verified only by the plaintiff's attorney and an affirmation by the plaintiff's attorney. However, a complaint verified by an attorney is insufficient to support entry of judgment pursuant to CPLR 3215. See Feffer v Malpeso, 210 AD2d 60 (1st Dept. 1994). Likewise, an attorney's affirmation is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." Beltre v Babu, 32 AD3d 722, 723 (1st Dept. 2006); see also Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Thus, the plaintiff has failed to submit sufficient proof of the facts constituting the claim. (see CPLR 3215[f]), requiring denial of the motion.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment is denied and the complaint is dismissed, and it is further

ORDERED that the Clerk shall enter judgment accordingly, and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendant within 30 days of the date of this order.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/15/2020
DATE

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