

<b>American Tr. Ins. Co. v Joyner</b>
2020 NY Slip Op 33137(U)
September 23, 2020
Supreme Court, New York County
Docket Number: 160828/2018
Judge: Louis L. Nock
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: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

- v -

MARQUIS JOYNER, COLUMBUS IMAGING CENTER,
CONCEPT MEDICAL SUPPLY, SUMMONS INC, DR.
IBRAHIM FATIHA, CHIROPRACTIC, P.C., HARLEM
MEDICAL ASSOCIATES P.C., MEDICAL MISSION
HEALTH CARE P.C., YY BALANCE ACUPUNCTURE
HEALTH CARE P.C.,

Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and a large text box containing 'DECISION + ORDER ON MOTION'.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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 Marquis Joyner ("Joyner"), Columbus Imaging Center, and Harlem Medical Associates P.C. (the "Non-Appearing Defendants") is denied.<sup>1</sup>

Plaintiff is the issuer of an insurance policy issued to non-party Abner Simeon under Policy No. 9401184 (the "Policy"), under which Joyner made claims for no-fault benefits in connection with an alleged motor vehicle collision on May 28, 2017. The remaining defendants are medical providers who have made claims to Plaintiffs as assignees of Joyner. On November

<sup>1</sup> Plaintiff also moved for summary judgment against defendants Concept Medical Supply, Inc., Dr. Ibrahim Fatiha, Chiropractic, P.C., Medical Mission Health Care P.C., YY Balance Acupuncture Health Care P.C., but that portion of the motion was withdrawn by stipulation (NYSCEF Doc. No. 23).

20, 2018, Plaintiffs commenced this action by filing a summons and complaint seeking declaratory and injunctive relief for present and future claims arising from the collision. Plaintiff now moves for entry of a default judgment against Joyner and the Non-Appearing Defendants on the basis of Joyner's failure to appear at an independent medical examination ("IME") requested by Plaintiff.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer the complaint must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215[a], [f]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]). Where an insurer seeks a default in connection with claims made for no-fault benefits, it must also demonstrate compliance with applicable no-fault law.

The failure to appear for an IME or Examination Under Oath ("EUO") requested by the insurer "is a breach of a condition precedent to coverage under the no-fault policy" (*Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017] [EUO]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [IME]). Therefore, when a defendant's assignor fails to appear for a requested IME

or EUO, the plaintiff has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*id.*). Where, as here, an insurer seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an IME or EUO, the Plaintiff must submit proof establishing that it complied 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, supra*, 147 AD3d at 438).

On this motion, Plaintiff has demonstrated proof of service of the summons and complaint upon all defendants and proof of default; but has failed to submit adequate proof of the facts constituting its claim. By virtue of affidavits submitted in support of the motion, Plaintiff attests that it received an application for motor vehicle no-fault benefits from Joyner (NYS Form NF-2) on June 27, 2017 (Billups aff ¶ 18), and that on March 12, 2018, it mailed a request to Joyner for an IME to be held on April 10, 2018, and, when Joyner failed to appear at the first IME, Plaintiff mailed a second request to Joyner on April 11, 2018 for an IME to be held on May 8, 2018 (Hershaun aff ¶ 3-4). However, Plaintiff submits no information regarding when it received claims from the Non-Appearing Defendants, whether or when it mailed the prescribed verification forms to the parties required to complete them, and if or when it received responses to those requests for verification. As such, the court cannot determine whether Plaintiff complied with the timeliness requirements of 11 NYCRR 65-3.5 (b), and Plaintiff has failed to meet its burden for entry of a default judgment (*Hertz v Best Touch*, 162 AD3d at 617; *Kemper Independence, supra*, 147 AD3d at 438; *see also American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 [1st Dept 2015]; *Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]).

Accordingly, it is

ORDERED that Plaintiff's motion for entry of a default judgment is denied; and it is further

ORDERED that the parties are directed to attend a conference on October 23, 2020 at 11 a.m. by telephone. Plaintiff is directed to circulate a dial-in number to all parties and the court at lfurdyna@nycourts.gov in advance of the call.

<u>9/23/2020</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE