SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

GREGORY GARCIA, 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.

Defendant.

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INDEX NO. 161180/2018

MOTION DATE 12/14/2020

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, 14, 15, 16, 17, 18, 19, 20, 22

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

Upon the foregoing documents, plaintiff's motion seeking a default judgment against the non-answering defendants and summary judgment against all other defendants is as follows:

Plaintiff commenced the instant action by filing a summons and complaint on November 29, 2018, seeking a declaratory judgment that Gregory Garcia is not an eligible injured person entitled to no-fault benefits under ATIC insurance policy B622267, Claim No.: 1011348-01 and granting American Transit Insurance Company ("ATIC") a declaratory judgment that ATIC is not obligated to honor or pay claims for reimbursement submitted by the defendant medical providers, as assignees of Garcia, under ATIC insurance policy B622267, Claim No.: 1011348- 01, nor is ATIC required to provide, 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 ATIC insurance policy B622267, Claim No.: 1011348-01 from the alleged accident of October 19, 2017. On April 18, 2019, defendants, Concept Medical Supply,

Inc., Dr. Ibrahim Fatiha Chiropractic, PC, Medical Mission Healthcare, PC and YY Balance Acupuncture Health Care, PC interposed an Answer with Counterclaims. Defendant Gregory Garcia was served pursuant to CPLR 308(4) on March 29, 2019 and defendant, Columbus Imaging was served pursuant to CPLR 311 on March 27, 2019. On March 10, 2020, Garcia and Columbus Imaging were mailed an additional copy of the summons and complaint pursuant to CPLR 3215(g). Plaintiff now moves for summary judgment against the answering defendants and a default judgment against the non-answering defendants.

Pursuant to CPLR 3215(f), On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint and proof of the facts constituting the claim. Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989).

Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavits of Cheryl Glaze, a no-fault claims supervisor employed by plaintiff, Luis Campbell, plaintiff's mail room supervisor, an affidavit from Signet Claims Solutions and medical affirmations, together with the relevant automobile insurance policy and IME scheduling letters, which establish as follows: ATIC issued a policy of insurance to its insured Harry Genadalall, under a New York policy of insurance numbered B622267, which was in force on October 19, 2017, the date of the relevant accident. ATIC received a New York Motor Vehicle No-Fault Insurance Law Application for Motor Vehicle No-Fault Benefits (NF-2) on November 16, 2017 on behalf of Garcia, claiming benefits under the Policy from Claimant's attorney, Harmon, Linder, and Rogowsky. The medical provider defendants have submitted claims to the plaintiff with an assignment of benefits from Garcia and alleging that they had rendered services that are compensable under the terms of the policy. On April 19, 2018 ATIC's agent allegedly sent to the Claimant Defendant and his attorney a notice requesting that he attend an IME on May 9, 2018, at 3:15 PM at the office of Dr. Joseph Margulies, which Garcia did not attend. On May 10, 2018 ATIC's agent allegedly sent to the Claimant Defendant and his attorney, a notice requesting that he attend an IME on May 23, 2018, at 4:00 PM at the office of Dr. Joseph Margulies, which Garcia did not attend. ATIC subsequently denied all claims retroactive to the date of the accident.

As discussed in *Kemper Indep. Ins. Co. v. Adelaida Physical Therapy, P.C.*, 147 A.D.3d 437, 438 (1st Dept. 2017),

> Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (see 11 NYCRR 65–1.1; see also *Hertz Corp. v. Active Care Med. Supply Corp.*, 124 A.D.3d 411,

1 N.Y.S.3d 43 [1st Dept.2015]; *Allstate Ins. Co. v. Pierre*, 123 A.D.3d 618, 999 N.Y.S.2d 402 [1st Dept.2014]), plaintiff failed to supply sufficient evidence to enable the court to determine whether the notices it had served on the injury claimants for EUOs were subject to the timeliness requirements of 11 NYCRR 65–3.5(b) and 11 NYCRR 65–3.6(b) (see *Mapfre Ins. Co. of N.Y. v. Manoo*, 140 A.D.3d 468, 470, 33 N.Y.S.3d 54 [1st Dept.2016]) and, if so, whether the notices had been served in conformity with those requirements (see *National Liab. & Fire Ins. Co. v. Tam Med. Supply Corp.*, 131 A.D.3d 851, 16 N.Y.S.3d 457 [1st Dept.2015]). Specifically, plaintiff failed to provide copies of any completed verification forms it may have received from any of the health service provider defendants or any other evidence reflective of the dates on which plaintiff had received any such verification forms, or otherwise assert that it never received such forms. Thus, plaintiff failed to meet its burden of establishing either that the EUOs were not subject to the procedures and time frames set forth in the no-fault implementing regulations or that it properly noticed the EUOs in conformity with their terms (see *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 918 N.Y.S.2d 473 [1st Dept.2011], lv. denied 17 N.Y.3d 705, 2011 WL 2535157 [2011]; *Allstate Ins. Co. v. Pierre*, 123 A.D.3d at 618, 999 N.Y.S.2d 402).

As such, plaintiff's motion is hereby DENIED in its entirety.

12/21/2020
DATE

LAURENCE L. LOVE, 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**