SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiffs,

- against -

LAMINE L. DIAKITE, ST. LUKES/ROOSEVELT HOSPITAL CENTER, DR. TAREK MARDAM-BEY, DR. STEVEN M. YAGER, DPM, FACFAS and DHD MEDICAL, P.C.,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 9390/11
Motion Seq. No.: 01
Motion Date: 02/08/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3215, for entry of a default judgment against defendants St. Lukes/Roosevelt Hospital Center ("St. Lukes"), Dr. Tarek Mardam-Bey ("Mardam-Bey") and Dr. Steven M. Yager, DPM, FACFAS ("Yager"), ordering, adjudging and decreeing that said defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on March 9, 2010. Defendant Lamine L. Diakite ("Diakite") opposes the motion. Defendants St. Lukes, Mardam-Bey, Yager and DHD failed to submit any opposition to

the motion.

Initially, plaintiff indicates that the instant matter has been discontinued as to defendants Diakite and DHD.

Plaintiff proves jurisdiction over defendants St. Lukes, Mardam-Bey and Yager by annexing copies of the Affidavits of Service of the Summons and Verified Complaints upon said defendants. *See* Plaintiff's Affirmation in Support Exhibit 2. Plaintiff states that more than thirty days have elapsed since the Summons and Complaint were served upon the aforementioned defendants and said defendants have failed, refused and neglected to serve an Answer upon plaintiff or otherwise appear in this action.

Plaintiff submits that it provided a policy of insurance to its insured, Soutra Limousine, Inc., under a New York policy of insurance numbered CAP608686. Said insurance policy provided Soutra Limousine, Inc. a no-fault endorsement which provided coverage to an insured or an eligible injured person in the amount of at least $50,000.00 for all necessary expenses resulting from a motor vehicle accident. Said policy was in effect on March 9, 2010. On that date, defendant Diakite was allegedly involved in a motor vehicle accident and made claims, as purported eligible injured person of the above referenced insurance policy, to plaintiff under claim number 757972-02. As a result of the aforementioned motor vehicle accident, defendant Diakite sought no-fault benefits from defendants St. Lukes, Mardam-Bey, Yager and DHD. Defendant Diakite assigned his right to collect no-fault benefits to defendants St. Lukes, Mardam-Bey, Yager and DHD.

Plaintiff contends that defendant Diakite has independent rights to collect no-fault benefits in his own right.

Plaintiff further submits that, on July 29, 2010, it sent defendant Diakite a letter, at the address stated on the application for benefits, requesting that he attend an Examination Under

Oath ("EUO") on August 30, 2010, at a court reporting center. Defendant Diakite failed to attend the duly scheduled EUO. On September 3, 2010, plaintiff sent defendant Diakite a letter, to at the address stated on the application for benefits, requesting that he attend an EUO on September 17, 2010, at a court reporting center. Defendant Diakite failed to attend the duly scheduled EUO. On September 27, 2010, the claim was denied based upon defendant Diakite's failure to attend the aforementioned duly scheduled EUOs. All of defendant Diakite's providers' bills were denied on September 27, 2010. Those bills received after September 27, 2010 were denied within thirty days from the receipt of the particular bill.

Plaintiff argues that defendant Diakite's failure to attend the scheduled EUOs absolves it from providing coverage to the defendants. The failure to attend two EUOs is a violation of a condition precedent to coverage and allows plaintiff to disclaim coverage to an eligible injured person and to his assignees, retroactive to the date of the loss.

Defendant Diakite, a minor born on October 12, 1998, submitted an Affirmation in Opposition opposing a default judgment being entered against defendants St. Lukes, Mardam-Bey, Yager and DHD. Defendant Diakite argues that, even though the instant action has been withdrawn against him, if plaintiff is granted leave to enter a default judgment against defendants St. Lukes, Mardam-Bey, Yager and DHD then the Court will be effectively granting plaintiff permission to deny coverage to him.

Defendant Diakite submits that, on March 9, 2010, at approximately 5:15 p.m., he was crossing 123rd Street in Manhattan between Morningside and Amsterdam Avenues. He was walking from Morningside Park, returning to his school at the end of the day. As defendant Diakite was crossing the street, a cab driver struck him with his car, causing defendant Diakite to fall to the ground and suffer a fractured leg. Defendant Diakite further submits that the cab driver drove off without stopping, however witnesses chased after him and retrieved his license

plate number. A search of the license plate number was conducted and it was determined that the driver that struck defendant Diakite was an individual named Ibrahima Bakayoko who was driving a car owned by Soutra Limousine, Inc. and insured by plaintiff. Defendant Diakite contends that he submitted a No-Fault Claim with plaintiff under the name of "Lamine Diakite, by his father and natural guardian, Mamadi Diakite." *See* Plaintiff's Affirmation in Support Exhibit 3. Defendant Diakite states that, due to the injuries he sustained as a result of the subject accident, he was treated by defendants St. Lukes, Mardam-Bey, Yager and DHD.

Defendant Diakite argues that plaintiff addressed and mailed the alleged notices of the scheduled EUOs to the minor, defendant Diakite, and not to Mamadi Diakite as father and natural guardian of Lamine L. Diakite. *See* Plaintiff's Affirmation in Support Exhibit 3. Defendant Diakite further argues that, since said notices were not addressed and mailed to Mamadi Diakite as the minor defendant Diakite's father and natural guardian, they are defective. Both defendant Diakite and his father state that they never received the notices of the EUOs. *See* Defendant Diakite's Affirmation in Opposition Exhibits F and G. Furthermore, counsel for defendant Diakite states that his office never received said notices (even though they were allegedly mailed to his office) until they were produced after the within lawsuit was commenced.

Defendant Diakite contends that, as he has rebutted the presumption of proper mailing in this case, plaintiff cannot deny coverage in this matter and the within motion must therefore be denied.

Defendant Diakite's counsel adds, "[f]urther, since ATIC [plaintiff] voluntarily discontinued the within action as against LAMINE L. DIAKITE, it cannot possibly be granted any relief as against LAMINE L. DIAKITE. The relief ATIC seeks as against LAMINE L. DIAKITE's treating healthcare providers is derivative in nature to its claims against LAMINE L. DIAKITE, which were discontinued. Granting the leave ATIC requests against these treating healthcare providers would have the effect of granting judgment against LAMINE L. DIAKITE

after the claims against him have been discontinued."

In reply, plaintiff argues that "[t]he first issue that is presented in this matter involves whether Defendant Diakite's attorney, Stefano A. Filipazzo, Esq., has standing to oppose this motion. Mr. Diakite is not a party to this action anymore, and his personal injury attorney upon this record does not represent any of the named Defendants. Mr. Diakite also has failed to implead himself in this matter. As such, the opposition must be denied based upon a threshold finding that personal injury counsel Filipazzo lacks standing." Plaintiff next argues that, "assuming this Court wishes to grant Mr. Diakite non-party standing, then the next questions is whether he has established a reasonable excuse and meritorious defense for the vacatur of the default."

Plaintiff further states, "assuming the Court were inclined to examine the merits of the claim, it would be hard-pressed to find the existence of any merits. The application for benefits, which is being reproduced herein, states that the address was 200 West 148th Street Apt. 2C, NY, NY 10039. It was signed by the 'F/N/G' Mamadi Diakite....The affidavits indicate that the letters were mailed to that address....Alternatively, Defendant argues that he has a meritorious defense based upon the potential claim that the EUO letters were sent to the minor child directly. Interestingly, if they were sent to the mother of the child, counsel would complain they should have been sent to the father because he has residential custody of the minor child. Alternatively, if the letters were sent to the father, counsel would complain that they should have been sent to the mother of the child because she has residential custody of the minor child. As a minor, the guardian is responsible for the well-being of the child. Thus, is it too much to ask for the parent to open up the mall of its minor child? Furthermore, since this child was 12 years old when the EUO process began, it would be reasonable for the child to open up the received mail."

Even though plaintiff chose to discontinue the instant action against defendant Diakite because it "does not want a judgment entered against a 14 year old minor," the Court finds that

the action against remaining defendants St. Lukes, Mardam-Bey and Yager is predicated upon the failure of the minor defendant Diakite to appear for scheduled EUOs. Plaintiff is seeking a declaration that defendants St. Lukes, Mardam-Bey and Yager are not entitled to no-fault coverage for the motor vehicle accident that occurred on March 9, 2010 due defendant Diakite's failure to attend the scheduled EUOs. Clearly, defendant Diakite's Affirmation in Opposition is of import in this matter as it speaks to the merits of plaintiff's case or lack thereof. According, the Court will entertain defendant Diakite's Affirmation in Opposition.

CPLR § 3215(f) states, "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and *proof of the facts constituting the claim*, the default and the amount due by affidavit made by the party....Where a verified complaint has been served, it may be used as the as the affidavit of facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney (emphasis added)." Plaintiff submitted a copy of the Verified Complaint as proof of the facts in the instant matter. *See* Plaintiff's Affirmation in Support Exhibit 1. Paragraph 3 of the Verified Complaint begins "[a]t all times hereinafter mentioned, the defendant Lamine L. Diakite by his parent and natural guardian, Mamadi Diakite,..." *See* Plaintiff's Affirmation in Support Exhibit 1 ¶ 3. The Court notes that the Verified Complaint continues to refer to defendant Diakite as "the defendant Lamine L. Diakite by his parent and natural guardian, Mamadi Diakite." *See* Plaintiff's Affirmation in Support Exhibit 1 ¶ 15, 16, 17, 18, 20. However, according to paragraph 21 of the Verified Complaint, "[o]n July 29, 2010, American Transit Insurance Company (on behalf of Plaintiff AMERICAN TRANSIT INSURANCE COMPANY) sent to Lamine L. Diakite (and his/her attorney if one was retained) at the address stated on the application for benefits a letter requesting that he/she attend an Examination Under Oath ("EUO") on August 30, 2010, at a court reporting center." *See* Plaintiff's Affirmation in Support Exhibit 1 ¶ 21. Paragraph 23 of the Verified Complaint states,

"[o]n September 3, 2010, American Transit Insurance Company (on behalf of Plaintiff AMERICAN TRANSIT INSURANCE COMPANY) sent to Lamine L. Diakite (and his/her attorney if one was retained) at the address stated on the application for benefits a letter requesting that he/she attend an Examination Under Oath ("EUO") on September 17, 2010, at a court reporting center." *See* Plaintiff's Affirmation in Support Exhibit 1 ¶ 23. While plaintiff properly referred to the minor defendant Diakite as "the defendant Lamine L. Diakite by his parent and natural guardian, Mamadi Diakite." in the earlier paragraphs of the Verified Complaint, when it came to mailing the notices for the EUOs plaintiff incorrectly addressed them to "Lamine L. Diakite", not to "Lamine L. Diakite by his parent and natural guardian, Mamadi Diakite" as have would have been proper. Mailing the EUO notices to a minor and not to his parent and natural guardian makes them defective. The minor defendant Diakite's subsequent failure to report for the EUOs provided for in said notices is the basis for which plaintiff has brought the instant action and denied all coverage for the medical treatment received as a result of the subject accident. Basing this action on defective notices causes the Court to call into question the merit of instant action. The Court finds that the "proof of the facts constituting the claim" to wit, the Verified Complaint, demonstrates that the minor defendant Diakite was not properly served with the notices to appear for an EUO. Therefore, his failure to do so cannot be the basis for denying payment to defendants St. Lukes, Mardam-Bey and Yager and, in turn, bringing the instant action and asking for a default against said defendants. Furthermore, the Court finds plaintiff's argument, "Interestingly, if they were sent to the mother of the child, counsel would complain they should have been sent to the father because he has residential custody of the minor child. Alternatively, if the letters were sent to the father, counsel would complain that they should have been sent to the mother of the child because she has residential custody of the minor child. As a minor, the guardian is responsible for the well-being of the child. Thus, is it too much to ask for the parent to open up the mail of its minor child? Furthermore, since this child was 12 years old when the EUO process began, it would be

reasonable for the child to open up the received mail" to be incredible and completely without merit.

Accordingly, based upon the facts before the Court, plaintiff's motion, pursuant to CPLR § 3215, for entry of a default judgment against defendants St. Lukes, Mardam-Bey and Yager, ordering, adjudging and decreeing that said defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on March 9, 2010 is hereby **DENIED**. Plaintiff is further ordered to serve proper notice for a scheduled EUO upon defendant Lamine L. Diakite by his parent and natural guardian, Mamadi Diakite. If defendant Diakite once again fails to appear for the scheduled EUO, plaintiff has permission from this Court to renew this instant application.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 7, 2012