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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF BRONX: PART 23A**

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American Transit Insurance Company,

Plaintiff,

-against-

Pierre Kevin Browning, Boai Zhong Yi Acupuncture Services, P.C., Bojana S. Krgin, MD, LLC, Comprehensive MRI of New York, P.C., Darcy Chiropractic, P.C., Eden Medical, P.C., Epic Pain Management and Anesthesia, LLC, Excel Surgery Center, LLC, Kinetics Physical Therapy, P.C., Medical and Surgical Associates of Queens & Long Island, P.C., North Bronx Medical Health Care, P.C., Throgs Neck Multi Care, P.C., and Tremont Chemist,

Defendants.

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Index No.: 22185/12E

Decision and Order

**HON. ALEXANDER W. HUNTER, JR.**

Plaintiff's motion for an order, pursuant to CPLR 3215, directing that a default judgment be entered against individual defendant Pierre Kevin Browning ("Browning") and co-defendants Boai Zhong Yi Acupuncture Services, P.C., Bojana S. Krgin, MD, LLC, Comprehensive MRI of New York, P.C., Darcy Chiropractic, P.C., Eden Medical, P.C., Epic Pain Management and Anesthesia, LLC, Excel Surgery Center, LLC, Kinetics Physical Therapy, P.C., Medical and Surgical Associates of Queens & Long Island, P.C., North Bronx Medical Health Care, P.C., Throgs Neck Multi Care, P.C. (collectively "providers"), is granted. Plaintiff does not move for a default judgment as against co-defendant Tremont Chemist at this time.

Plaintiff's motion for an order, declaring that Browning is not an eligible injured person entitled to no-fault benefits under American Transit Insurance Company automobile insurance policy CAP 610354 ("policy"), Claim No. 765222-03 ("subject claim"), declaring that plaintiff is not obligated to honor or pay any current or future claims for reimbursement under the subject claim, and declaring that plaintiff is not required to pay or honor any current or future claims for no-fault benefits under the subject claim, is granted. Plaintiff's motion for an order, permanently staying any pending or future no-fault lawsuits and/or arbitration proceedings brought by Browning or the providers with respect to the December 22, 2011 motor vehicle accident in which Browning was allegedly injured ("accident"), is granted.

Plaintiff issued the policy to Sunrise Limo Enterprise and assigned Claim No. 765222-03 to the claims Browning brought against plaintiff for his injuries sustained in the accident. Browning filed a New York motor vehicle no-fault insurance law application for motor vehicle no-fault benefits (NF-2 form), dated January 20, 2012, claiming benefits under the policy.

The providers provided medical treatment, therapy, and/or medical supplies to Browning due to his injuries caused by the accident. Browning assigned his right to recover no-fault benefits under the policy to the providers. The providers have submitted claims to plaintiff for the medical treatment, therapy, and/or medical supplies provided to Browning.

The policy provides liability coverage for bodily injury and property damage claims brought against covered persons and mandatory personal injury protection for eligible injured persons ("no-fault benefits"). The policy and New York Insurance Regulation 68 provides that an injured person or that person's assignees must submit to examinations under oath and/or medical examinations as the insurance company reasonably requires in order to be eligible for coverage. In the instant action, the terms and conditions of the policy were breached because Browning failed to appear for properly requested and scheduled medical examinations on April 26, 2012 and May 24, 2012. Therefore, plaintiff asserts that Browning is not an eligible injured person entitled to no-fault benefits under the policy. In support of the instant motion, plaintiff submits an affidavit of merit by Chevan Douglas, a claim representative employed by plaintiff, and an affirmation by plaintiff's counsel attesting to the above facts.

The failure to appear for an independent medical examination requested by an insurer is a breach of the insurance policy, which entitles an insurer to deny claims submitted by medical providers. **See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 AD3d 559, 2011 NY Slip Op 01948 (1st Dept 2011); Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 34 Misc 3d 150(A), 2012 NY Slip Op 50271(U) (1st Dept 2012)**. Where there is a failure to comply with the terms of the policy, there is no right to assign benefits because there is no right to benefits. **See New York & Presbyt. Hosp. v. Country-Wide Ins. Co., 17 NY3d 586, 2011 NY Slip Op 07149 (2011)**. Accordingly, the providers have no right to benefits assigned to them by Browning because he does not have a right to no-fault benefits under the policy due to his breach.

Plaintiff's counsel asserts that Browning was served with a copy of the summons and verified complaint on September 27, 2012, and the providers were served on October 22, 2012. To date, all defendants have failed to appear in this action or request an extension of time to answer. Additionally, pursuant to CPLR 3215 (g), plaintiff mailed an additional copy of the summons to all defendants on November 29, 2012. Plaintiff attaches an affidavit attesting to the mailing of the additional copies. As such, plaintiff's counsel argues that a default judgment should be entered against all defendants except Tremont Chemist.

In support of the instant motion, plaintiff submits affidavits of service indicating service of the summons and verified complaint on defendants. The first affidavit of service indicates that Browning was served pursuant to CPLR 308 by delivering a copy of the summons and complaint to co-resident Enet Thomas at Browning's dwelling place located at 930 Fox Street, Apt 2F, Bronx, NY 10459, on September 27, 2012 at 2:16 P.M. and mailing a copy to Browning's dwelling place. The providers, all domestic corporations, were served pursuant to Business Corporation Law § 306 by serving the New York Secretary of State on October 22, 2012 at 9:30 A.M.

The only paper this court received in opposition to the instant motion was an affirmation in opposition from co-defendant Comprehensive MRI of New York, P.C. ("Comprehensive

MRI"). The affirmation in opposition states that Comprehensive MRI rendered services to Browning but all bills for Browning have already been paid by plaintiff. Comprehensive MRI argues that plaintiff's declaratory judgment action is moot as against Comprehensive MRI because Browning's claim have already been paid and are therefore not the subject of plaintiff's claim. In support of the affirmation in opposition, Comprehensive MRI submits an affidavit by Carmen Rodriguez, billing manager for Comprehensive MRI, which states that there are no bills outstanding for Browning.

The affidavit of service for Comprehensive MRI's affirmation in opposition indicates that it was served by mailing a copy to plaintiff's counsel on January 16, 2013. The affirmation in opposition does not set forth an excuse or otherwise explain in any way why Comprehensive MRI did not timely appear or interpose an answer. This court has not received any other supporting papers from Comprehensive MRI. In addition, Comprehensive MRI does not move to extend its time to appear or plead, or to compel acceptance of its untimely served answer. **CPLR 3012**.

"It is well established that to avoid entry of a default judgment upon a failure to appear or answer, a defendant is required to demonstrate both a justifiable excuse for the default and a meritorious defense." **Young v. Richards, 26 AD3d 249, 250, 2006 NY Slip Op 01252 (1st Dept 2006)**. While Comprehensive MRI does have a meritorious defense, it has not demonstrated a justifiable excuse for the default.

CPLR 3215 (f) provides that a party moving for a default judgment "shall file proof of service of the summons and complaint...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 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."

Based on the foregoing, this court finds that plaintiff has submitted the requisite proof necessary for the entry of a default judgment. Accordingly, plaintiff's motion for an order, pursuant to CPLR 3215, entering a default judgment against individual defendant Browning and co-defendants Boai Zhong Yi Acupuncture Services, P.C., Bojana S. Krgin, MD, LLC, Comprehensive MRI of New York, P.C., Darcy Chiropractic, P.C., Eden Medical, P.C., Epic Pain Management and Anesthesia, LLC, Excel Surgery Center, LLC, Kinetics Physical Therapy, P.C., Medical and Surgical Associates of Queens & Long Island, P.C., North Bronx Medical Health Care, P.C., Throgs Neck Multi Care, P.C., is granted; and it is further

ORDERED, that plaintiff's motion for an order, declaring that defendant Browning is not an eligible injured person entitled to no-fault benefits under American Transit Insurance Company automobile insurance policy CAP 610354, Claim No. 64838-03, declaring that plaintiff is not obligated to honor or pay any current or future claims for reimbursement under the subject claim, and declaring that plaintiff is not required to pay or honor any current or future claims for no-fault benefits under the subject claim, is granted; and it is further

ORDERED, that plaintiff's motion for an order, permanently staying any pending or future no-fault lawsuits and/or arbitration proceedings brought by Browning or the providers with respect to the December 22, 2011 motor vehicle accident in which Browning was allegedly injured, is granted.

Dated: March 15, 2013

ENTER:

J.S.C.
ALEXANDER W. HUNTER JR