

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>American Tr. Ins. Co. v Johnson</b>                                                                                                                                                                                         |
| 2018 NY Slip Op 31248(U)                                                                                                                                                                                                       |
| June 14, 2018                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 159853/2016                                                                                                                                                                                                     |
| Judge: Kathryn E. Freed                                                                                                                                                                                                        |
| 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 COUNTYPRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

*Justice*

-----X

INDEX NO.

159853/2016

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO.

001

- V -

VALENCIA JOHNSON, BLUE BELL ACUPUNCTURE, P.C.,  
GERARD AVENUE MEDICAL, P.C., JOHN PALEMIRE, D.C.,  
LIDA'S MEDICAL SUPPLY INC., SUN CHIROPRACTIC  
SERVICES P.C.

## DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10,  
11, 12, 13, 14, 15, 16

were read on this motion to/for

DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied with leave to renew on proper papers.

In this declaratory judgment action, plaintiff American Transit Insurance Company ("ATIC") moves, pursuant to CPLR 3215, for a default judgment against defendants Valencia Johnson ("the claimant"), Blue Bell Acupuncture, P.C., Gerard Avenue Medical, P.C., John Palemire, D.C., Lida's Medical Supply Inc., and Sun Chiropractic Services P.C. (collectively "the medical provider defendants"). After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is **denied with leave to renew on proper papers.**

On October 5, 2015, the claimant was allegedly injured in a motor vehicle accident while a passenger in a vehicle owned by Cabrera A. Dominguez and insured by ATIC. Doc. 12.<sup>1</sup> Claimant allegedly underwent treatment by the medical provider defendants and submitted an NF-2 claim to ATIC which was received on November 17, 2015. Docs. 9 and 12. She also assigned her right to collect no-fault benefits to the medical provider defendants. Doc. 12. On February 12, 2016, ExamWorks, Inc., on behalf of ATIC, requested that claimant appear for an independent medical examination (“IME”) on March 3, 2016. Doc. 10. When claimant failed to appear, ExamWorks sent claimant another letter, this time requesting that she appear for an IME on March 17, 2016. Doc. 10. Claimant failed to appear on the second scheduled IME date as well.

By summons and verified complaint dated October 31, 2016 and filed with this Court on November 23, 2016, ATIC commenced this action against the claimant and the medical provider defendants. Doc. 12. ATIC thereafter served each of the defendants with process. Docs. 2 and 3. ATIC also served each defendant with an additional copy of the summons and complaint in compliance with CPLR 3215(g). Doc. 14. In its complaint, ATIC sought a declaration that the claimant’s failure to appear for an IME constituted a breach of a condition precedent to coverage under the ATIC policy, and that the claimant and the medical provider defendants were thus not entitled to coverage under the policy. Defendants have neither answered the complaint nor otherwise appeared herein. Doc. 6.

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is

---

<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, ATIC has established that it served the claimant and the medical provider defendants and that they failed to answer. However, ATIC is not entitled to the declaratory relief sought because it has failed to demonstrate whether its demand for the claimant to appear for an IME was timely. This omission is critical given the strict procedural and time constraints associated with New York's no-fault law, which is designed "to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists". *Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 317 (2007), quoting *Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 860 (2003).

New York's no-fault regulations contain specific time frames for requesting and scheduling IMEs. 11 NYCRR 65-3.5(a) provides that "within 10 business days after receipt" of an NF-2 form, an insurer shall forward verification forms to those required to complete the same. 11 NYCRR 65-3.5(b) provides that "[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms" and, pursuant to 11 NYCRR 65-3.5(d), "[i]f the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms."

In order for a plaintiff to obtain a judgment declaring that no coverage exists due to the failure of a claimant to appear for an IME, an insurer must prove that it complied with these strict procedures and time frames. *American Transit Ins. Co. v Vance*, 131 AD3d 849 (1st Dept 2015); *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015); *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 (1st Dept 2015). However, ATIC has failed to make this showing here.

Although ATIC submits the claimant's application for no-fault benefits, which it received on November 17, 2015 (Doc. 9), it did not demand that the claimant appear for an IME until February 12, 2016 (Doc. 10), after the 30-day period prescribed by 11 NYCRR 65-3.5(d).

Further, although ATIC submits affidavits in support of the motion, including two from its own employees, it fails to provide proof that the claimant was treated by any of the medical provider defendants, when such treatment occurred, and whether or when the medical provider defendants filed verifications for reimbursement under the policy. Given the absence of this information, which is instrumental in determining whether ATIC has complied with the time frames and procedures set forth in the no-fault regulations, it cannot establish its entitlement to a declaration that it is not obligated to provide coverage to the claimant and the medical provider defendants.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff American Transit Insurance Company is denied with leave to renew within 30 days from the date of entry of this decision and order, failing which this action shall be dismissed in its entirety; and it is further

ORDERED that this constitutes the decision and order of the court.

6/14/2018

DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

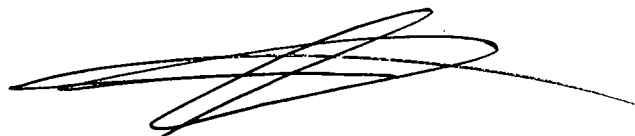
OTHER

☐

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:



KATHRYN E. FREED, J.S.C.