

<b>American Tr. Ins. Co. v Thomas</b>
2019 NY Slip Op 33695(U)
December 17, 2019
Supreme Court, New York County
Docket Number: 160109/2018
Judge: Nancy M. Bannon
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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

INDEX NO. 160109/2018
MOTION DATE 08/05/2019, 08/05/2019
MOTION SEQ. NO. 001 001

- v -

JASON THOMAS, 21 CENTURY CHIROPRACTIC CARE,
ALEXIOS APAZIDIS, M.D. P.C., ALL CITY FAMILY
HEALTHCARE CENTER, INC., ALL COUNTY,
LLC, AMERICAN ACUPUNCTURE P.C., AVISHAI T.
NEUMAN MD, PLLC, BACK TO LIFE HEALTH AND
WELLNESS, P.C., BRONX CHIROPRACTIC HEALTH
SERVICES, P.C., BS KINGS COUNTY MEDICAL P.C., DNA
PHARMACY INC., EXCELL CLINICAL LABORATORY,
INC., KZ PHARMACY INC, METROPOLITAN MEDICAL &
SURGICAL P.C., NEW YORK AMERICAN ACUPUNCTURE
P.C., OPEN PHYSICAL THERAPY P.C., P&D
MERCHANDISE CORP., PARAMOUNT MEDICAL
SERVICES, P.C., PSYCHOLOGY AFTER ACCIDENT
P.C., S.A. P.T. P.C., TOWN SUPPLY, INC.

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - DECLARATORY

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - DEFAULT

In this action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Jason Thomas (the individual defendant) 21 Century Chiropractic Care, Alexios Apazidis M.D. P.C., All City Family Healthcare Center Inc., All County LLC, American Acupuncture P.C., Avishai T. Neuman MD PLLC, Bronx Chiropractic Health Services P.C., BS Kings Country Medical P.C., DNA Pharmacy Inc., Excell Clinical Laboaratory Inc., KZ Pharmacy Inc., Metropolitan Medical & Surgical P.C., New York American Acupuncture P.C., Paramount Medical Services P.C., Psychology After Accident P.C., and Town Supply Inc. (the non-answering health-care defendants), declaring that it is not obligated to pay no-fault

benefits to the individual defendant or the health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on February 8, 2018 on the grounds that eligible injury party defendant failed to appear for duly scheduled Examinations Under Oath (EUOs). No opposition was submitted. The motion is denied without prejudice.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1<sup>st</sup> Dept 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1<sup>st</sup> Dept 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "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 [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a prima facie case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

Here, plaintiff submits, *inter alia*, the individual defendant's completed NF-2 form, marked received February 21, 2018 an EUO verification request sent on April 10, 2018 scheduling an EUO on May 10, 2018, a notice rescheduling the EUO, and verification that the individual defendant failed to appear for both scheduled EUOs. The plaintiff's submissions fail to establish that the initial notice for examination under oath (EUO) was timely mailed to the individual defendant within 15 days of its receipt of a relevant claim form, such as the NF-2 or an NF-3, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1<sup>st</sup> 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 AD3d 411 [1st Dept. 2015]; Allstate Ins. Co. v. Pierre, 123 AD3d 618 [1st Dept. 2014]), here the plaintiff has failed to supply evidence sufficient for the court to determine whether the EUO requests served on the individual defendant 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 AD3d 468 [1st Dept. 2016]) and, if so, whether the requests had been served in conformity with those requirements (see National Liab. & Fire Ins. Co. v. Tam Med. Supply Corp., 131 AD3d 851 [1st Dept. 2015]). Specifically, the plaintiff did not provide copies of any completed NF-3 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. As such, the plaintiff has not met its burden to establish that the EUOs were not subject to the timeliness requirements 11 NYCRR 65–3.5(b) and 11 NYCRR 65–3.6(b) or made a *prima facie* showing that the EUOs were properly noticed within the prescribed timeframe. Kemper Indep. Ins. Co. v. Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017).

Accordingly, it is,

ORDERED that the plaintiff's motion for leave to enter a default judgment against the Jason Thomas (the individual defendant) 21 Century Chiropractic Care, Alexios Apazidis M.D. P.C., All City Family Healthcare Center Inc., All County LLC, American Acupuncture P.C., Avishai T. Neuman MD PLLC, Bronx Chiropractic Health Services P.C., BS Kings Country Medical P.C., DNA Pharmacy Inc., Excell Clinical Laboaratory Inc., KZ Pharmacy Inc., Metropolitan Medical & Surgical P.C., New York American Acupuncture P.C., Paramount Medical Services P.C., Psychology After Accident P.C., and Town Supply Inc. (the non-answering health-care defendants) is denied without prejudice to renewal upon the proper paperwork.

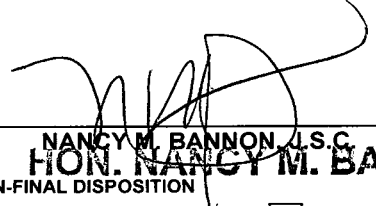
This constitutes the Decision and Order of the Court.

12/17/2019  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

  
 \_\_\_\_\_  
 NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**