

<b>American Tr. Ins. Co. v Paula</b>
2020 NY Slip Op 32007(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 161942/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

*Justice*

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

ANA PAULA, BROOK CHIROPRACTIC OF NY P.C.,  
COLUMBUS IMAGING CENTER, GC CHIROPRACTIC  
P.C., GRAHAM WELLNESS MEDICAL, P.C., JIANG  
ACUPUNCTURE P.C., SIGMA MED CARE INC.,  
VINCENTIU POPA, M.D., VLADIMIR SHUR, MD, WYCOFF  
HEIGHTS MEDICAL CENTER, XIAOYAN JIANG, LAC,

Defendants.

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INDEX NO.	161942/2018
MOTION DATE	3/4/2020
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, 21, 22, 23

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

Upon the foregoing documents, the motion of plaintiff American Transit Insurance Company (“Plaintiff”) for entry of a default judgment against defendants Ana Paula, Graham Wellness Medical, P.C., Jiang Acupuncture P.C., Sigma Med Care Inc., Vincentiu Popa, M.D., Vladimir Shur, MD, Xiaoyan Jiang, LAC, and for summary judgment against defendants Brook Chiropractic of NY P.C., Columbus Imaging Center, GC Chiropractic P.C., and Wycoff Heights is denied, in accord with the following memorandum decision.

**Background**

Plaintiff is the issuer of an insurance policy under American Transit insurance policy issued to defendant Ana Paula (“Paula”) with policy number CS B506078 (the “Policy”), under which Paula made claims for no-fault benefits in connection with a motor vehicle collision on November 9, 2016 (the “Collision”). The remaining defendants are medical providers who have

made claims to Plaintiff as assignees of Paula. On December 12, 2018, Plaintiff commenced this action by filing a summons and complaint seeking a declaratory judgment that Paula violated the terms of the Policy by failing to appear for duly scheduled independent medical examinations (“IMEs”), a declaration that it properly denied all no-fault claims due to the alleged violation of the terms of the Policy, and that there is no coverage for any and all party benefits arising out of the Collision. On June 24, 2019, Defendants Wyckoff Heights Medical Center (“Wyckoff”) appeared in the action by filing an answer, and defendants Brook Chiropractic of NY, P.C., Columbus Imaging Center, GC Chiropractic, P.C. (the “Brook Defendants”), appeared by filing an answer on August 5, 2019. The remaining defendants (the “Non-Answering Defendants”) have not answered or otherwise appeared in the action. On the motion, Plaintiff seeks entry of a default judgment against the Non-Appearing Defendants and summary judgment against Wyckoff and the Brook Defendants. The Brook Defendants oppose the motion on the grounds that Plaintiff has failed to meet its *prima facie* burden because it has not demonstrated that it requested the IMEs in accordance with the procedures and time frames required by pertinent No-Fault regulations.

### Discussion

On a motion for a default judgment, the Plaintiff must demonstrate proof of service of the summons and complaint upon the defendant, proof of default, and proof of the facts constituting its claim (CPLR 3215). On a motion for summary judgment, the movant bears the burden of demonstrating, *prima facie*, that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion

for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Regardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable” (*Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 157 [1st Dept 1996]).

Where a Plaintiff seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an IME, the Plaintiff must submit proof establishing that it complied with the timeliness requirements of 11 NYCRR 65–3.5(b) in order to meet its burden of filing “proof of the facts constituting the claim” for a default judgment (*Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 AD3d 617, 617 [1st Dept 2018]; *Kemper Independence Ins. Co. v. Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]) or to make a *prima facie* showing on summary judgment (*American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 842 [1st Dept 2015]). The claim procedure set forth in 11 NYCRR 65-3.5 requires, in relevant part, that: (1) within ten business days of receipt of an application for no-fault benefits (NYS form NF-2), the insurer shall forward the prescribed verification forms it will require prior to payment of the initial claim to the parties required to complete them, (2) 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 (3) if the additional verification required is an IME, the insurer shall schedule the IME to be held within 30 calendar days from the date of receipt of the prescribed verification forms (11 NYCRR 65-3.5[a-b, d]). Contrary to Plaintiff’s contention, 11 NYCRR 65-3.5(p) does not obviate its obligation to demonstrate, on a motion for a default judgment, that it timely requested that the non-answering defendant appear at an IME

(see, *Hertz Vehicles, LLC v Cliffside Park Imaging & Diagnostic Center, LLC*, 2017 N.Y. Slip Op. 32947[U] at \*2, [Sup Ct, NY County 2017]; see also, *Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 618 [1st Dept 2018]).

In support of its motion, Plaintiff submits, *inter alia*, the affirmation of its counsel, Ethan A. Rothschild, Esq. (the “Rothschild Affirmation”), the affidavit of Uriel McLeish, a No-Fault Claims Supervisor for Plaintiff (the “McLeish Affidavit”), the affidavit of Luis Campbell, the Mail Room Supervisor for Plaintiff (the “Campbell Affidavit”), the affidavit of Michael Russ, the doctor that was scheduled to conduct the IMEs (the “Russ Affidavit”), and the affidavit of Lynn Hershawn (the “Hershawn Affidavits”), an employee of Independent Physical Exam Referrals, Inc., a third-party engaged by Plaintiff to serve notices of the IMEs. The Rothschild Affirmation, and relevant attachments, demonstrate that all defendants were served with process and that each of the Non-Appearing Defendants has defaulted by failing to appear in the action. The McLeish Affidavit indicates that the form NF-2 submitted by Paula was received on December 12, 2016 and the first EBT was scheduled for January 11, 2017, exactly thirty days later. However, a copy of the form NF-2 attached to the affidavit is stamped “RECEIVED DEC 02 2016 By Mail Room.” This notation suggests that the form NF-2 was received by Plaintiff on December 2, 2016, forty days before the first scheduled IME. Plaintiff did not submit any information regarding whether it mailed the required verification forms to any of the defendants or whether they were returned, nor did Plaintiff submit any verification forms into evidence. There is, therefore, a question of fact regarding the date on which Plaintiff received the form NF-2 and whether the EBT was scheduled in compliance with the timeliness requirements of 11 NYCRR 65–3.5(b). Plaintiff does not attest to the dates that it received claim forms from the

remaining defendants, nor has it produced copies of same. Thus, Plaintiff has failed to meet its burden on both prongs of its motion.

Accordingly, it is

ORDERED that the motion for entry of a default judgment and summary judgment is denied; and it is further

ORDERED that a telephonic preliminary conference shall be held on July 22, 2020 at 2:00 p.m.

*Louis L. Nock*

<u>6/26/2020</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE