SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

YASSINE MAKBOUL, ARIEL CHIROPRACTIC P.C.,BAY MEDICAL, P.C.,BELAM ACUPUNCTURE P.C.,COMPREHENSIVE MEDICAL ASSIST P.C.,ECLIPSE MEDICAL IMAGING P.C.,EMUSC, LLC,EZ RELIEF MEDICAL, P.C, HANK ROSS MEDICAL P.C.,LAXMIDHAR DIWAN, NEIGHBORHOOD CHIROPRACTIC CENTER, LLC,LUTHERAN MEDICAL CENTER, LUTHERAN MEDICAL CENTER, QUEENS ARTHROSCOPY AND SPORTS MEDICINE, P.C.,QUEENS MEDICAL DIAGNOSTIC P.C, SEYMOUR EDELSTEIN, SHERMAN ABRAMS LABORATORY

Defendant.

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INDEX NO. 156164/2019

MOTION DATE 07/13/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

In this declaratory judgment action brought pursuant to article 51 of the Insurance Law, the plaintiff moves (1) pursuant to CPLR 3215 for leave to enter a default judgment against non-answering defendants BELAM ACUPUNCTURE P.C.,COMPREHENSIVE MEDICAL ASSIST P.C.,ECLIPSE MEDICAL IMAGING P.C.,EMUSC, LLC,EZ RELIEF MEDICAL, P.C, HANK ROSS MEDICAL P.C.,LAXMIDHAR DIWAN, NEIGHBORHOOD CHIROPRACTIC CENTER, LLC,LUTHERAN MEDICAL CENTER, LUTHERAN MEDICAL CENTER, QUEENS ARTHROSCOPY AND SPORTS MEDICINE, P.C.,QUEENS MEDICAL DIAGNOSTIC P.C, SEYMOUR EDELSTEIN, SHERMAN ABRAMS LABORATORY and (2) pursuant to CPLR 3212 for summary judgment against the answering defendants YASSINE MAKBOUL, ARIEL CHIROPRACTIC P.C. and BAY MEDICAL, P.C. The plaintiff seeks a judgment declaring that it is not obligated to pay no-fault benefits to the individual defendant or the health-care defendants to reimburse them for medical supplies and/or treatment rendered to the individual defendant for injuries allegedly sustained in a motor vehicle accident. The motion is denied.

In her application for no-fault benefits, individual defendant Yassine Makboul states that she was injured in a motor vehicle accident in Manhattan on April 28, 2018, when she was driving a vehicle insured by the plaintiff. She thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment, as assignees of the individual defendant, for no-fault benefits under insurance policy number CAP608757. The plaintiff assigned claim number 1026532-01 to the file. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff denied benefits based upon Makboul's failure to appear for an Examination Under Oath. This action and motion ensued.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is 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 (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). "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 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., supra. 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 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, supra. As such, "[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default." Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

Here, the plaintiff provides no affidavit of someone with personal knowledge regarding the scheduling, mailing of notices or the failure to of Makboul to appear for the EUOs. The plaintiff submits an affirmation of an attorney. Since counsel claims no personal knowledge of the underlying facts, her affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st

Dept. 2010). In the affirmation, counsel refers to affidavits of Cheryl Glaze and Luis Campbell of the plaintiff being attached exhibits. However, no such exhibits are attached or submitted with the motion. While the complaint is verified by Uriel McLeish of the plaintiff, he claims no personal knowledge regarding the scheduling, mailing of notices or the failure to of Makboul to appear for the EUOs.

For the same reason, the branch of the motion seeking summary judgment pursuant to CPLR 3212 must also be denied. It is well settled that on a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

As the plaintiff fails to meet its burden in the first instance of establishing, by proof in admissible form, that defendant Makboul failed to appear for an EUO, the plaintiff cannot establish the absence of any material, triable issues of fact, and the motion must be denied regardless of the sufficiency of the opposing papers. See Alvarez v Prospect Hosp., supra. Indeed, "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Therefore, even assuming that the plaintiff submitted sufficient proof of service of the summons and complaint and proof of the defendant's default, it has failed to submit sufficient proof of the facts constituting its claim as required for relief under CPLR 3215(f), and similarly failed to meet its burden under CPLR 3212. Since the defects may be cured, denial of the motion is without prejudice to renew on proper papers, if timely made pursuant to CPLR 3215[c] as to the defaulting defendants.

Accordingly, it is

ORDERED that the plaintiff's motion is denied without prejudice to renew on proper papers.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

7/16/2020
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE