

<b>American Tr. Ins. Co. v Miot</b>
2020 NY Slip Op 32692(U)
August 18, 2020
Supreme Court, New York County
Docket Number: 162098/2018
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15**

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AMERICAN TRANSIT INSURANCE COMPANY,

Index No. 162098/2018  
[Mot. Seq. No. 001]

Plaintiff,

-against-

RAYMONDE MIOT, ALL COUNTY, LLC,  
CHOI ACUPUNCTURE P.C., JEFFREY COHEN,  
M.D. & MARK KRAMER, M.D., P.C.,  
COMMUNITY RADIOLOGY SERVICES, P.C.,  
HARVEY R. MANES, M.D., P.C., HILLCREST  
MEDICAL CARE, P.C., RX FOR YOU CORP,  
YOUR CHOICE CHIROPRACTIC P.C.,

Defendants.

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**HON. MELISSA A. CRANE:**

This case arises from an automobile accident that occurred on August 15, 2016, involving individual defendant Raymonde Miot (“Miot”). Miot alleges that he sustained serious bodily injuries as a result of the collision that occurred on August 15, 2016, involving a vehicle that the insured, F CORP, owned in which Miot was a passenger. Miot submitted a claim to plaintiff, American Transit Insurance Company (“American Transit”) for no-fault benefits under the insurance policy that plaintiff issued to the insured, F CORP. Miot assigned the rights to collect no-fault benefits to co-defendants/medical providers. Plaintiff commenced an action on or about December 24, 2018, by a Summons and Complaint, seeking a declaratory judgment against claimant as well as numerous co-defendants/medical providers under American Transit insurance policy CAP 609247, claim number 790774-03.

Defendant COMMUNITY RADIOLOGY SERVICES, P.C., filed its answer on or about January 28, 2020.

Plaintiff now moves for summary judgment pursuant to CPLR 3212 against defendant COMMUNITY RADIOLOGY SERVICES, P.C. based on Miot’s failure to appear for scheduled

Independent Medical Examinations (“IMEs”). Plaintiff also moves for default judgment pursuant to CPLR 3215 against the following non-answering defendants: ALL COUNTY, LLC, CHOI ACUPUNCTURE P.C., JEFFREY COHEN, M.D. & MARK KRAMER, M.D., P.C., HARVEY R. MANES, M.D., P.C., HILLCREST MEDICAL CARE, P.C., RX FOR YOU CORP, and YOUR CHOICE CHIROPRACTIC P.C. (the “non-answering defendants”) for their failure to answer the summons and complaint. Both branches of the motion are unopposed.

“The failure to appear for IMEs requested by the insurer . . . is a breach of a condition precedent to coverage under the no-fault policy” (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). Therefore, when a defendants’ assignor fails to appear for requested IMEs, the plaintiff has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*see id.*).

In order to meet its prima facie burden on summary judgment, an insurer must establish that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, including 11 NYCRR 65-3.5, and that the patient did not appear (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]; *American Tr. Ins. Co. v Vance*, 131 AD3d 849, 850 [1st Dept 2015]; *American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841-842 [1st Dept 2015]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559).

“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’”

(*American Tr. Ins. Co. v Morales*, 2018 NY Slip Op 32441[U], \*\*4 [Sup Ct, NY County 2018];  
*see Unitrin Advantage Ins. Co. v Better Health Care Chiropractic, P.C.*, 2016 NY Slip Op  
30837[U] [Sup Ct, NY County, 2016]).

Here, plaintiff submits proof that it received an application for motor vehicle no-fault benefits (NYS Form NF-2) on September 12, 2016 (*see* Saleem Affidavit at ¶ 18, NYSCEF Doc. No. 9; NF-2 Form, NYSCEF Doc. No. 11). It also submits proof that it sent the first request for an IME, scheduled to take place on November 21, 2016, by mail on November 12, 2016 (Hershman Affidavit, NYSCEF Doc. No. 9; Appt Letters, NYSCEF Doc. No. 12) and that it sent the second request for an IME, scheduled to take place on December 5, 2016, by mail on November 22, 2016 (*id.*). There is no information as to whether, or when, plaintiff mailed out the prescribed verification forms to the parties required to complete them, and if, or when, it received responses to those requests for verification. As such, the court is unable to determine whether plaintiff complied with the timeframes set forth in the regulations for requesting and scheduling the IMEs.<sup>1</sup> Accordingly, that branch of plaintiff's motion, which is for summary judgment against defendant COMMUNITY RADIOLOGY SERVICES, P.C. is denied (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d at 841-842; *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d at 438]; *see also Yonkers Ave. Dodge, Inc. v BZ Results, LLC*, 95 AD3d 774, 774-775 [1st Dept 2012] ["an unopposed summary judgment motion will be denied upon a movant's failure to establish prima facie entitlement to summary judgment"]).

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<sup>1</sup> The court notes that although plaintiff submits the affidavit of Junaid Saleem, a claim representative employed by American Transit, who describes the IMEs as "properly requested and scheduled" (Saleem Affidavit at ¶ 21, NYSCEF Doc. No. 9), Saleem does not allege facts that would establish that plaintiff complied with the procedures and time frames set forth in the no-fault implementing regulations.

As to that branch of plaintiff's motion which seeks a default judgment against the non-answering defendants, "[o]n 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 its 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]; see CPLR 3215 [f]). Here, plaintiff submitted proof of service of the summons and complaint and proof of defendants' failure to answer or appear. However, because plaintiff did not submit proof establishing that it requested and scheduled the IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, it fails to establish the facts constituting its claim (see *Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 617-618 [1st Dept 2018]; *Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013]; *American Tr. Ins. Co. v Camille*, 2019 NY Slip Op 33560[U], \*4 [Sup Ct, NY County 2019]; *American Tr. Ins. Co. v Morales*, 2018 NY Slip Op 32441[U], at \*\*3). Accordingly, that branch of plaintiff's motion which seeks a default judgment against the non-answering defendants is also denied.

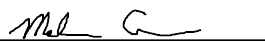
Accordingly, it is

**ORDERED** that plaintiff American Transit Insurance Company's motion is denied; and it is further

**ORDERED THAT** the parties are directed to attend a conference on 9/15/2020 at 10:30 AM via phone. Plaintiff is directed to circulate a call in number to all parties and the court at macrane@nycourts.gov.

Dated: 8/18/2020

ENTER:

  
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J.S.C.