

<b>American Tr. Ins. Co. v Jaroslawitz</b>
2020 NY Slip Op 33066(U)
September 17, 2020
Supreme Court, New York County
Docket Number: 150697/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. W. FRANC PERRY **PART** **IAS MOTION 23EFM**

*Justice*

-----X

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

MINDY JAROSLAWITZ, DOV M. KOLKER, M.D.,  
P.C., KEVIN KANG, MD, MAIMONIDES MEDICAL CENTER,  
MMC EMERGENCY PHYSICIAN, MMC RADIOLOGY FPP,  
OREY EREZ MD, PINNACLE DIAGNOSTIC RADIOLOGY

Defendant.

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**INDEX NO.** 150697/2019

**MOTION DATE** 03/16/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

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

In this declaratory judgment action, Plaintiff American Transit Insurance Company (“Plaintiff”) moves for a default judgment pursuant to CPLR 3215 against Defendants Dov M. Kolker, MD, PC; Kevin Kang, MD; Maimonides Medical Center; MMC Emergency Physician; MMC Radiology FPP; and Orey Erez, MD (“Providers”). The motion has been submitted unopposed.

**BACKGROUND**

Plaintiff is the automobile insurer for Arbey Ramirez. On May 17, 2016, Mr. Ramirez was involved in a motor vehicle accident with Ms. Jaroslawitz, a pedestrian. Subsequent to the accident, Ms. Jaroslawitz received medical treatment from the Providers. On June 7, 2016, Plaintiff received an NF-2 form from Ms. Jaroslawitz claiming no-fault benefits under the insurance policy and assigning her rights to collect no-fault benefits to the Providers. (NYSCEF Doc No. 21.)

On September 28, 2016, Plaintiff requested Ms. Jaroslawitz to attend an Independent Medical Examination (“IME”) scheduled for October 24, 2016. Plaintiff alleges that she failed to attend. On October 25, 2016, Plaintiff requested Ms. Jaroslawitz to attend a second IME scheduled for November 30, 2016. Plaintiff alleges that she failed to attend this second IME as well. Plaintiff then sent a general denial of all no-fault benefits to Ms. Jaroslawitz on December 12, 2016. (NYSCEF Doc No. 23.)

Plaintiff commenced this action on January 23, 2019 with the filing of the Verified Complaint, seeking a declaratory judgment that it properly denied all no-fault coverage arising out of the May 17, 2016 accident. Pursuant to stipulations, Plaintiff has discontinued the action as against Ms. Jaroslawitz and Pinnacle Diagnostic Radiology and no longer seeks relief from those parties. (NYSCEF Doc Nos. 9, 14.) Plaintiff now seeks an entry of default against the remaining Defendants on its cause of action for a declaratory judgment that it properly denied all no-fault benefits relating to the accident.

### DISCUSSION

CPLR 3215(a) provides, in relevant part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” “On a default motion, the movant must demonstrate proof of service of the complaint, the defaulting party’s failure to answer or appear, as well as proof of the underlying facts supporting the claim.” (*PV Holding Corp. v Anesthesia Services, LLC*, 2019 WL 6916073, \*2-3 [Sup Ct, NY County 2019], citing *Katz v Blau*, 173 AD3d 987, 988 [2d Dept 2019].)

Pursuant to the no-fault regulations, an “eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the [insurance] Company, when, and as often as, the Company may reasonably require.” (11 NYCRR 65-1.1.) “The appearance of the

insured for IMEs *at any time* is a condition precedent to the insurer's liability on the policy.” (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 722 [2d Dept 2006] [emphasis added].) The failure to appear for an IME constitutes “a breach of a condition precedent to coverage . . . [giving the insurer] the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued.” (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [citation omitted].)

As the First Department has explained . . . for a no-fault insurer to establish its prima facie entitlement to judgment as a matter of law in a declaratory judgment action on the ground that a claimant failed to appear for an IME or Examination Under Oath (EUO), it must show that it mailed its initial request for verification to the claimant or his/her health care providers within 10 days of receipt of the NF-2 benefits claim form submitted by the claimant (*see* 11 NYCRR 65-3.5[a]), and mailed an additional request for verification, such as a request for an IME or EUO, within 15 days of receipt of the patient's response to the initial request for verification (*see* 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v Significant Care. PT, P.C.*, 157 AD3d 600 [1st Dept 2018]; *see also* 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing follow up notice within 10 days of claimant's nonappearance]).

The demand for an IME constitutes a request for an additional verification (*see* 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient's or provider's initial response to the verification request (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]; *American Tr. Ins Co. v Jaga Med. Servs. P.C.*, 128 AD3d 441, 441 [1st Dept 2015]).

(*PV Holding Corp.*, 2019 WL 6916073, at \*2-3, quoting *PV Holding Corp. v Hank Ross Med. P.C.*, 2019 WL 4600813, \*2-3 [Sup Ct, NY County 2019].)

Here, Plaintiff has demonstrated proof of service of process (NYSCEF Doc No. 25) on all of the defaulting Defendants, as well as their failure to appear. However, Plaintiff has failed to establish the facts constituting its claim for declaratory judgment because it has not shown

compliance with the procedural and timeliness requirements of 11 NYCRR 65-3.5, and as such, Plaintiff has not met its burden for default judgment.

The record shows that Plaintiff received an NF-2 benefits claim form from Ms. Jaroslawitz on June 7, 2016 and that Plaintiff scheduled Ms. Jaroslawitz's initial IME by letter dated September 28, 2016. (NYSCEF Doc Nos. 21, 22.) However, "there is nothing in the record (whether in the form of an affidavit or documentary evidence) that might establish when American transit sent the necessary verification forms to [Ms. Jaroslawitz] or when American Transit received the completed verification forms back *from* [Ms. Jaroslawitz]." (*Am. Trans. Ins. Co. v Hayes*, 67 Misc 3d 1208[A], \*1 [Sup Ct, NY County 2020].) "Plaintiff thus cannot establish that it requested a medical examination within 15 business days of receiving claimant's verification forms (*see* 11 NYCRR § 65-3.5 [b]), or that plaintiff scheduled that medical examination to be held within 30 calendar days from receipt of the verification forms (*see id.* § 65-3.5 [d])." (*Am. Trans. Ins. Co. v Schenck*, 2020 WL 5290820, \*1 [Sup Ct, NY County 2020].) "Absent that information, American Transit has failed to satisfy all the elements of its claim for declaratory relief." (*Am. Trans. Ins. Co. v Bookman*, 67 Misc 3d 1221[A], \*1 [Sup Ct, NY County 2020].) Accordingly, it is hereby

ORDERED that Plaintiff's motion for default judgment is denied in its entirety for failure to establish proof of the underlying facts of its claim for declaratory judgment.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

09/17/20  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE