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| American Tr. Ins. Co. v Small |
| 2020 NY Slip Op 33138(U) |
| September 23, 2020 |
| Supreme Court, New York County |
| Docket Number: 160943/2018 |
| 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 -

BRITTANY SMALL, AKE SERVICES INC, COLIN CLARKE
MD, P.C., COLUMBUS IMAGING CENTER,
COMPASSIONATE CHIROPRACTIC CARE, P.C., DOS
MANOS CHIROPRACTIC, P.C., HEALTHCRAFT PT, P.C.,
INTEGRATED CHIROPRACTIC OF NY P.C., JLL
ACUPUNCTURE, P.C., MANHATTAN'S HANDS OF HOPE
P.T., P.C., MEDICAL SUPPLY OF NY, CORP., MMA
PHYSICAL THERAPY, P.C., NEW TIMES ACUPUNCTURE,
P.C.

Defendants.

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| INDEX NO. | 160943/2018 |
| MOTION DATE | 11/6/2019 |
| MOTION SEQ. NO. | 001 |

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

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 Brittany Small (“Small”), AKE Services, Inc., Colin Clarke, MD, P.C., Columbus Imaging Center, Compassionate Chiropractic Care, P.C., Dos Manos Chiropractic, P.C., Healthcraft PT, P.C., Integrated Chiropractic of NY P.C., KKL Acupuncture, P.C., Manhattan’s Hands of Hope P.T., P.C., Medical Supply of NY, Corp., MMA Physical Therapy, P.C., New Times Acupuncture, P.C. (together, “the Medical Provider Defendants”) is denied.

Plaintiff is the issuer of an insurance policy issued to non-party Nelson Cruz Morrobel under Policy No. BC 514810 (the “Policy”), under which Small made claims for no-fault benefits in connection with an alleged motor vehicle incident on February 7, 2018. The

remaining defendants are medical providers who have made claims to Plaintiff as assignees of Small. On November 23, 2018, Plaintiff commenced this action by filing a summons and complaint seeking declaratory and injunctive relief for present and future claims arising from the incident. Small and all of the Medical Provider Defendants were served with process and none have answered or otherwise appeared in the action. Plaintiffs now move for entry of a default judgment against all defendants.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer the complaint must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215[a], [f]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, "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" (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]). Where a insurer seeks a default in connection with claims made for no-fault benefits, it must also demonstrate compliance with applicable no-fault law.

The failure to appear for an Independent Medical Examination ("IME") or an Examination Under Oath ("EUO") 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] [IME];) *Kemper Independence Ins. Co. v Adelaida*

Physical Therapy, P.C., 147 AD3d 437 [1st Dept 2017] [EUO]). Therefore, when a defendant's assignor fails to appear for a requested IME or EUO, the plaintiff has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*id.*).

Where, as here, an insurer seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an IME or EUO, 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]).

On this motion, Plaintiff has demonstrated proof of service of the summons and complaint upon all defendants and proof of default; but has failed to submit adequate proof of the facts constituting its claim. By virtue of affidavits submitted in support of the motion, Plaintiff attests that it received an application for motor vehicle no-fault benefits from Small (NYS Form NF-2) on March 23, 2016 (Kosakowski aff ¶ 18), and that, on April 5, 2018, it mailed a request to Small for an IME to be held on April 26, 2018, and, that when Small failed to appear at the first IME, on April 30, 2018, it mailed a second request to Small for an IME to be held on May 24, 2018 (Pontrello aff ¶ 3-4). However, Plaintiff submits no information regarding when it received claims from the Medical Provider Defendants, whether or when it mailed 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 cannot determine whether Plaintiff complied with the timeliness requirements of 11 NYCRR 65–3.5 (b), and Plaintiff has failed to meet its burden for entry of 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]).¹

Accordingly, it is

ORDERED that Plaintiff’s motion for entry of a default judgment is denied; and it is further

ORDERED that the parties are directed to attend a conference on October 23, 2020 at 10:30 a.m. by telephone. Plaintiff is directed to circulate a dial-in number to all parties and the court at lfurdyna@nycourts.gov in advance of the call.

This will constitute the decision and order of the court.

ENTER:



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| <u>9/23/2020</u> | | | <u>LOUIS L. NOCK, J.S.C.</u> |
| DATE | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| APPLICATION: | <input type="checkbox"/> GRANTED | <input checked="" type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> OTHER |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> REFERENCE |

¹ Plaintiff also fails to state the basis for its request for an IME.