

American Tr. Ins. Co. v Mena
2020 NY Slip Op 33345(U)
October 7, 2020
Supreme Court, New York County
Docket Number: 656525/2019
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 -

NICO MENA, HEALTHY RX, INC., ISLAND,
MUSCULOSKELETAL CARE, M.D., P.C., METRO
POINT MEDICAL, PC, NEW MILLENNIUM PAIN &
SPINE MEDICINE, PLLC, ORTHOCARE SURGICAL, NEW
QUANTUM PHYSICAL THERAPY & CHIROPRACTIC YORK
CARE, PLLC, SEASIDE MASSAGE THERAPY, PLLC,
TOTAL ORTHOPEDICS and ZWANGER AND PESIRI
RADIOLOGY GROUP, LLP,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28,
29, 30, 31, 32

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 Nico Mena, Healthy Rx, Inc., Metro Point Medical, PC, Orthocare Surgical, Seaside Massage Therapy, PLLC, and Zwanger and Pesiri Radiology Group, LLP (all together, “Defendants”) is denied, in accord with the following memorandum decision.¹

Plaintiff is the issuer of an insurance policy issued to non-party Robert Day under Policy No. CAP 616048 (the “Policy”), under which defendant Nico Mena (“Mena”) made claims for no-fault benefits in connection with an alleged motor vehicle incident on December 14, 2017 (the “collision”). The remaining defendants are medical providers who have made claims to

¹ Plaintiff’s motion was also made against defendant New Millennium Pain & Spine Medicine, PLLC, but was later withdrawn and the action discontinued against this Defendant.

Plaintiff as assignees of Mena (the “Medical Provider Defendants”). On November 5, 2019, Plaintiffs commenced this action seeking declaratory and injunctive relief against Defendants on the grounds that Mena failed to satisfy a condition precedent to coverage by failing to appear for two independent medical examinations (“IME”) requested by Plaintiff. Plaintiff now moves for entry of a default judgment against 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]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]). Where an insurer seeks a declaratory judgment regarding the denial of no-fault benefits for a failure to appear at an IME, it must also submit proof establishing that it complied with the timeliness requirements of 11 NYCRR 65–3.5 in order to meet its burden of filing “proof of the facts constituting the claim” for a default judgment (*American Transit 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 [1st Dept 2011]).

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 (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]).

In support of its motion, Plaintiff submits, *inter alia*, the affirmation of its counsel, William Larkin, Esq., the affidavit of Cheryl Glaze, a claim representative with Plaintiff, the affidavit of Dr. David Manevitz, the doctor that was scheduled to conduct the IMEs, and the affidavit of Ronni McLaughlin, an employee of National Claim Evaluations, a third-party engaged by Plaintiff to serve notices of the IMEs. The Larkin affirmation, and relevant attachments, demonstrate that all Defendants were served with process and that each has defaulted by failing to appear in the action.

By her affidavit, Glaze attests that, after the collision, Mena submitted an application for no-fault benefits (Form NF-2) and assigned his rights to the Medical Provider Defendants, who then submitted no-fault claims to Plaintiff for reimbursement. Glaze does not set forth the date that the application for no-fault benefits was received, but the attached exhibit is dated January 5, 2018 and stamped “received” on January 8, 2018 (Glaze aff, exhibit A). Glaze also attests, as confirmed by Plaintiff’s other submissions, that National Claim Evaluations mailed, on Plaintiff’s behalf, a letter dated February 27, 2018 to Mena requesting that he attend an IME on March 13, 2018. After Mena failed to appear at the IME, Plaintiff requested, by a second letter dated March 16, 2018, that he appear for an IME on April 3, 2018. After Mena failed to attend the second IME, Plaintiff denied Defendants’ no-fault claims. Neither the Glaze affidavit nor the remainder of Plaintiff’s submissions demonstrate the dates on which it received the claims for no-fault benefits, whether and when it forwarded the required verification forms to Defendants, and whether and when it received responses to those verification forms. Absent this information, the court is unable to determine whether Plaintiff complied with the timeliness requirements of 11 NYCRR 65-3.5, and Plaintiff has failed to meet its burden of proof on the motion (see *American Transit v Vance*, 131 AD3d at 849). Therefore, the motion is denied.

Accordingly, it is

ORDERED that the motion of plaintiff American Transit Insurance Company for entry of a default judgment is denied; and it is further

ORDERED that a preliminary conference will be held telephonically on November 18, 2020 at 2 p.m.

Louis L. Nock

<u>10/7/2020</u>		<u>LOUIS L. NOCK, J.S.C.</u>	
DATE			
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