SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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PV HOLDING CORP. INCLUDING ALL OF ITS SUBSIDIARIES AND AFFILIATES, INCLUDING BUT NOT LIMITED TO AVIS BUDGET, LLC, AVIS CAR RENTAL, LLC, BUDGET CAR RENTAL, LLC, BUDGET TRUCK RENTAL, LLC, PAYLESS CAR RENTAL, INC. and ZIPCAR, INC.,

Plaintiff,

- v -

ALL CITY FAMILY HEALTHCARE

Defendant.

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INDEX NO. 153594/2020

MOTION DATE 08/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

Plaintiff brings this action pursuant to Insurance Law § 5106[c] for de novo consideration of a claim for no-fault benefits. In motion sequence 001, Plaintiff moves for default judgment against Defendant All City Family Healthcare. The motion is submitted unopposed.

Background

On December 7, 2017, Claimant Evelyn Lopez was allegedly involved in an accident while occupying a motor vehicle owned by Avis. She was allegedly treated by Defendant, as reflected by three bills, each for $5,407.40, dated April 12 and 13, 2018, and June 21, 2018.

Plaintiff investigated the claims and arranged for Claimant to receive an independent medical examination ("IME") from Dr. John Iozzio on May 30, 2018. Dr. Iozzio found that there was no medical necessity for further chiropractic and acupuncture treatment, leading Plaintiff to deny the June 21, 2018 claim from Defendant.

Plaintiff alleges that it received the two claims dated April 12 and 13, 2018 on August 17, 2018, and thus they were denied as untimely submitted, as more than 45 days had passed since the dates of service.

Defendant demanded arbitration, which was held on August 1, 2019. The lower arbitrator awarded Defendant the full amount sought, $16,222.20 (NYSCEF Doc No. 16), which was affirmed by a master arbitrator. (NYSCEF Doc No. 17.)

Discussion

Insurance Law § 5106 ("Fair claims settlement") provides that:

> An award by an arbitrator shall be binding except where vacated or modified by a master arbitrator in accordance with simplified procedures to be promulgated or approved by the superintendent. The grounds for vacating or modifying an arbitrator's award by a master arbitrator shall not be limited to those grounds for review set forth in article seventy-five of the civil practice law and rules. The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive of interest and attorney's fees, the insurer or the claimant may institute a court action to adjudicate the dispute de novo.

Because the award affirmed by the master arbitrator was greater than $5,000.00, Plaintiff commenced this action to adjudicate the dispute de novo.

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant's default in answering or appearing. *(SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, New York County 2016], *quoting Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Plaintiff submits proof that it properly served the Defendant with the summons and complaint pursuant to Business Corporation Law § 306. (NYSCEF Doc No. 8.) To date, Defendant has failed to appear.

> While a defendant in default is deemed to have admitted all traversable allegations in the complaint (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Browny Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), "CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has 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." (*Feffer v Malpeso*, 210 AD2d 60, 60 [1st Dept 1994].) As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exists (*Woodson*, *supra* at 70-72).

(*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].) "Since the 'quantum of proof necessary to support an application for a default judgment is not exacting,' the submission of an expert affidavit in the form of a peer review constitutes 'some firsthand confirmation of the facts forming the basis of the claim,' even though this form of proof would be insufficient to support a motion for summary judgment." (*Allstate Ins. Co. v Graziosa, M.D.*, 2018 WL 3115844, at *2, *quoting Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006].)

Plaintiff has met its burden. As proof of the facts constituting the claim, Plaintiff submits an affidavit of merit verified by Zach Weber, a claims specialist employed by Plaintiff (NYSCEF Doc No. 6 at 12-18), the claims at issue (NYSCEF Doc No. 18), Plaintiff's denial forms (NYSCEF Doc No. 14), an attorney's affirmation (NYSCEF Doc No. 6 at 1-6), and the report of Dr. Iozzio. (NYSCEF Doc No. 11.) "Having failed to timely answer, the defendant is deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them."

(*American Transit Ins. Co. v EMU Surgical Center LLC*, 2020 WL 4517775, at *2 [Sup Ct, NY County 2020].) Thus, it is hereby

ORDERED that Plaintiff's motion sequence 001 for leave to enter a default judgment is granted; and it is further

ADJUDGED and DECLARED that PV Holding Corp. is not obligated to pay no-fault benefits pursuant to Article 51 of the Insurance Law to All City Family Healthcare Center, Inc., as assignee of Evelyn Lopez, in connection with a claim submitted under claim number 178058650-002 for services allegedly rendered from April 12, 2018 through June 21, 2018, in any action or arbitration proceeding; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon the Defendant within 30 days of the date of this order.

3/1/2022
DATE

WILLIAM PERRY, J.S.C.

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