

American Tr. Ins. Co. v Halliday
2022 NY Slip Op 30661(U)
March 2, 2022
Supreme Court, New York County
Docket Number: Index No. 159436/2020
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

SAMANTHA HALLIDAY, ADVANCED ORTHOPAEDICS,
P.L.L.C., ALAN MEDICAL SERVICES P.C., AMILOR
ACUPUNCTURE P.C., CPM MED SUPPLY INC,
KARAKIZIS DEMETRIOS, DYNAMIC SUPPLIERS LLC,
ENERGETIC REHAB PT, P.C., EXCELL CLINICAL LAB,
INC., GOLDSTAR EQUIPMENT INC., ICONIC WELLNESS
SURGICAL SERVICES LLC, THE JAMAICA HOSPITAL,
THE JAMAICA HOSPITAL MEDICAL CENTER
DIAGNOSTIC AND TREATMENT CENTER
CORPORATION, JULES PARISIEN, LI CHIROPRACTIC,
P.C., M EL SAYED PHYSICAL THERAPY, P.C.,
MUSCULOSKELETAL PAIN MANAGEMENT, P.C.,
PROTECHMED INC, ROXBURY ANESTHESIA, LLC, SKY
RADIOLOGY P.C., SP ORTHOTIC SURGICAL & MEDICAL
SUPPLY, INC., SUNNYSIDE PHARMACY INC,
SURGICORE OF JERSEY CITY, LLC

Defendants.

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INDEX NO. 159436/2020
MOTION DATE 02/22/2022
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 DEFAULT JUDGMENT/SUMMARY JUDGMENT .

In this declaratory judgment action, the plaintiff moves (i) pursuant to CPLR 3215 for leave to enter a default judgment against defendants Samantha Halliday (the individual defendant), Alan Medical Services P.C., Amilor Acupuncture P.C., CPM Med Supply Inc, Karakizis Demetrios, D.C., Dynamic Suppliers LLC, Energetic Rehab PT, P.C., Excell Clinical Lab, Inc. Jules Francois Parisien MD, M El Sayed Physical Therapy, P.C., Musculoskeletal Pain Management, P.C., ProTechMed Inc, Roxbury Anesthesia, LLC, Sky Radiology P.C., SP Orthotic Surgical & Medical Supply, Inc., Sunnyside Pharmacy Inc. (collectively, the non-answering medical provider defendants) and (ii) pursuant to CPLR 3212 for summary judgment against Advanced Orthopaedics, P.L.L.C and Surgicore of Jersey City, LLC. (collectively, the answering medical provider defendants). The plaintiff seeks a declaration that it is not obligated

to reimburse the medical provider defendants for treatment they rendered or equipment and supplies they provided to the individual defendant under policy FPT 002302, claim number 1026534-03, in connection with injuries that the individual defendant allegedly sustained in an April 20, 2018 motor vehicle accident on the ground that the individual defendant failed to appear for duly scheduled Independent Medical Examinations (IMEs). No opposition is submitted. The motion is denied.

On 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 the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2nd Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). "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 [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22–3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept. 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept. 2013); Beltre v Babu, 32 AD3d 722 (1st Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., *supra*. While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, *supra*.

On a motion for summary judgment, the movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See *id.* (citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because "summary judgment is a drastic

remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) (quoting Nesbitt v Nimmich, 34 AD2d 958, 959 [2nd Dept. 1970] [internal citations omitted]).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, an attorney’s affirmation, its first IME notice dated September 28, 2018, scheduling an IME for October 15, 2018, at 3:00pm, a subsequent IME notice dated October 12, 2018, scheduling an IME for November 7, 2018, at 3:00pm, the affidavit of Cheryl Glaze, a no-fault claims supervisor for the plaintiff, the affidavit of Luis Campbell, the mail room supervisor of the plaintiff, the NF-2 form, marked received May 8, 2018, and the NF-10 denial form, dated December 7, 2018, which states, in pertinent part, that the entire claim was denied because the individual defendant failed to appear for scheduled IMEs on the abovementioned dates. The plaintiff also submits the affidavit of Dr. Michael Russ, who was scheduled to conduct the IMEs and was present at the location on the dates and times that the individual defendant was scheduled to appear. Dr. Russ states that the individual defendant did not appear. Notably absent from the plaintiff’s submissions are the dates upon which the plaintiffs received any NF-3 forms. Nor are any NF-3 claim forms submitted. This is fatal to the plaintiff’s motion.

The plaintiff’s motion must be denied as it has failed to submit proof establishing that it complied with the timeliness requirements of 11 NYCRR 65-3.5. The record does not establish that the initial notice for an IME was timely mailed to the individual defendant within 30 days of its receipt of a relevant claim form, such as an NF-3, as required by 11 NYCRR 65-3.5(d). Hertz Vehicles, LLC v Best Touch PT, P.C., 162 AD3d 617 (1st Dept. 2018); Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); Am. Transit Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1st Dept. 2015) (citing Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 [1st Dept. 2011] [to meet its *prima facie* burden, insurer must establish it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that the patient did not appear]).

Although the plaintiff does establish that the IME notices were generated and that the individual defendant did not appear on either date, the plaintiff fails to demonstrate that the scheduling of the IMEs complied with 11 NYCRR 65-3.5(d) and thus does not establish a *prima facie* case. See Kemper Independence Ins. Co., *supra*; Am. Transit Ins. Co.; *supra*; Unitrin

Advantage Ins. Co., supra. Since the plaintiff has not met its burden, the plaintiff's motion pursuant to CPLR 3215 and CPLR 3212 is denied.

By stipulation filed July 8, 2021, the plaintiff discontinued the action as against defendant LI Chiropractic, P.C. By stipulation filed July 12, 2021, the plaintiff discontinued the action as against defendant Jamaica Hospital Medical Center s/h/a The Jamaica Hospital Medical Center Diagnostic Treatment Center Corporation. By stipulation filed August 10, 2021, the plaintiff discontinued the action as against defendant Iconic Wellness Surgical Services LLC.

The remaining appearing parties are encouraged to explore settlement.

Accordingly, it is

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice and without costs, as against defendants LI Chiropractic, P.C., Jamaica Hospital Medical Center s/h/a The Jamaica Hospital Medical Center Diagnostic Treatment Center Corporation, and Iconic Wellness Surgical Services LLC pursuant to stipulations filed May 11, 2021 and February 11, 2022; and it is further

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment and pursuant to CPLR 3212 for summary judgment is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

03/02/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART