

American Tr. Ins. Co. v Boston
2022 NY Slip Op 30724(U)
March 4, 2022
Supreme Court, New York County
Docket Number: Index No. 159438/2020
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 -

BRESHEY BOSTON, AINSWORTH INSTITUTE OF PAIN
MANAGEMENT, PLLC, HANDS ON PHYSICAL THERAPY
CARE P.C., JONATHAN SPITZ, KOLB RADIOLOGY P.C.,
LARISSA LEMPERT, METROTECH CHIROPRACTIC
OFFICE P.C., THE NEW YORK COMMUNITY HOSPITAL
OF BROOKLYN, INC., NEW YORK SPINE SPECIALISTS,
LLP, ORTHOPRO SERVICES, INC., PROMPT MEDICAL
SPINE CARE, PLLC

Defendants.

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INDEX NO. 159438/2020
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) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 35 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 Breshey Boston (the individual defendant), Hands On Physical Therapy Care P.C., Kolb Radiology P.C., M.D., New York Spine Specialists, LLP, OrthoPro Services, Inc., Prompt Medical Spine Care, and Ainsworth Institute of Pain Management, PLLC (collectively, the non-answering medical provider defendants) and (ii) pursuant to CPLR 3212 for summary judgment against defendant The New York Community Hospital of Brooklyn, Inc. (the answering medical provider defendant). 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 TNC000085, claim number 1046958-01, in connection with injuries that the individual defendant allegedly sustained in a December 26, 2018 motor vehicle accident, or to pay no-fault benefits to the individual defendant directly in connection with that accident. The ground alleged is that the individual defendant failed to appear for duly scheduled Independent Medical Examinations (IMEs). No opposition is submitted. The motion is denied.

As an initial matter, the court notes that the plaintiff discontinued this action as against defendants New York Spine Specialists, LLP, OrthoPro services, Inc., and Prompt Medical Spine Care, PLLC, by stipulation filed December 15, 2021. The plaintiff also discontinued this action against defendant Ainsworth Institute of Pain Management, PLLC by stipulation filed January 21, 2022. Thus, the plaintiff's motion pursuant to CPLR 3215 is deemed withdrawn as against these defendants. Additionally, the plaintiff discontinued this action as against defendant The New York Community Hospital of Brooklyn, Inc. by stipulation filed February 18, 2022. Since the branch of plaintiff's motion seeking summary judgment pursuant to CPLR 3212 only seeks relief against this defendant, that branch of the plaintiff's motion is deemed withdrawn in its entirety.

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*.

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, an attorney's affirmation, its first IME notice dated January 2, 2020, scheduling an IME for January 20, 2020, at 2:15pm, a subsequent IME notice dated January 21, 2020, scheduling an IME for February 5, 2020, at 3:30pm, 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, dated January 4, 2019 and marked received February 4, 2019, and the NF-10 denial form, dated March 10, 2020, 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 affirmations of Dr. Frank Oliveto and Dr. Jay Eneman, who were scheduled to conduct the first and second IME, respectively, and were present at the location on the dates and times that the individual defendant was scheduled to appear. The doctors state 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 plaintiff 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, its motion pursuant to CPLR 3215 is denied.

Accordingly, it is


ORDERED that (i) the branch of the plaintiff's motion pursuant to CPLR 3215 as against defendants New York Spine Specialists, LLP, OrthoPro services, Inc., Prompt Medical Spine Care, PLLC, and Ainsworth Institute of Pain Management, PLLC is deemed withdrawn; and (ii) the branch of the plaintiff's motion pursuant to CPLR 3215 as against defendants Breshey Boston, Hands On Physical Therapy Care P.C., and Kolb Radiology P.C., M.D. is denied; and

(iii) the branch of the plaintiff's motion pursuant to CPLR 3212 as against defendant The New York Community Hospital of Brooklyn, Inc. is deemed withdrawn; and it is further

ORDERED that the action is discontinued and the complaint is dismissed, with prejudice and without costs, as against defendants New York Spine Specialists, LLP, OrthoPro services, Inc., and Prompt Medical Spine Care, PLLC, Ainsworth Institute of Pain Management, PLLC, and New York Community Hospital of Brooklyn, Inc., pursuant to the stipulations filed December 15, 2021, January 21, 2022, and February 18, 2022; 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

03/04/2022
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE