

<b>Country-Wide Ins. Co. v Kai Zhang</b>
2022 NY Slip Op 31277(U)
April 11, 2022
Supreme Court, New York County
Docket Number: Index No. 653718/2021
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

*Justice*

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INDEX NO. 653718/2021

COUNTRY-WIDE INSURANCE COMPANY,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

KAI ZHANG,  
LENOX HILL RADIOLOGY AND MEDICAL IMAGING  
ASSOCIATES, P.C.,  
YM ACUPUNCTURE, P.C.,  
DR. XU'S COMPREHENSIVE MEDICAL, PLLC,  
DANADA INTERNAL MEDICINE, P.C.  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

**DEFAULT JUDGMENT**

In this declaratory judgment action, plaintiff seeks to deny no-fault benefits relating to a motor vehicle accident on November 21, 2019 involving claimant defendant KAI XIONG ZHANG, based on his failure to appear for duly scheduled examinations under oath ("EUOs"). (NYSCEF Doc. No. 1, *summons and verified complaint*.) Plaintiff now moves this court, pursuant to CPLR 3215, for a default judgment against defendants KAI XIONG ZHANG ("claimant"), LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C., YM ACUPUNCTURE, P.C., DR. XU'S COMPREHENSIVE MEDICAL, PLLC, and DANADA INTERNAL MEDICINE, P.C. ("defaulting defendants"), for a declaration that plaintiff is not required to pay no-fault benefits to the defaulting defendants since claimant breached a condition precedent to coverage pursuant to the policy of insurance. (NYSCEF Doc. No. 10, *affirmation in support of motion*.)

Despite service of the motion, the defaulting defendants have failed to appear or oppose the motion. (NYSCEF Doc. No. 11, *affidavit of service*.)

CPLR 3215(a) provides, in pertinent part, that when "a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him [or her/them]." To establish his/her/their entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (See *PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt v. North Shore-LIJ Health Sys.*, 140 AD3d 417, 317 [1st Dept 2016].) An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person

with actual knowledge of the facts surrounding the claim. (See *Zelnick v Biderman Indus. U.S.A., Inc.*, 242 AD2d 227, 229 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422, 422 [2d Dept 1996].)

“Pursuant to the Insurance Regulations, an insurer may request that an eligible injured party appear for an EUO to verify the no-fault claim, and may deny no-fault benefits if the eligible injured party fails to appear for the EUO” since “[c]ompliance with an EUO request is a condition precedent to no-fault coverage.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U], \*7 [Sup Ct, NY County 2019] [citation omitted].) “To establish the failure of the party to appear for duly scheduled EUOs, the insurer must establish as a matter of law that it twice duly demanded an examination under oath, that the party twice failed to appear and that the insurer issued a timely denial.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U] at \*8; see *Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014].) “It is also incumbent upon the insurer to submit proof by someone with personal knowledge of the non-appearance.” (*Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op 30444[U] at \*10.)

Here, the default is established by the affirmation of Carl J. Gedeon, Esq. (NYSCEF Doc. No. 10, *affirmation in support*). Plaintiff submits affidavits of service demonstrating that claimant defendants were duly served with the summons and complaint in accordance with CPLR 308(2). (NYSCEF Doc. No. 13, *affidavit of service*). The affidavit of service for claimant includes a statement regarding non-military service. (NYSCEF Doc. No. 13, *affidavit of service*). Affidavits of service submitted in support of the motion also reflect that the remaining defaulting defendants were served with the summons and complaint via the Secretary of State. (NYSCEF Doc. No. 14, *affidavits of service*). Plaintiff further submitted that it complied with the additional mailing requirements of CPLR 3215(g)(4)(i) and (ii) as to LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.S., YM ACUPUNCTURE, P.C., DR. XU’S COMPREHENSIVE MEDICAL, PLLC, and DANADA INTERNAL MEDICINE, P.C. (NYSCEF Doc. No. 14, *notice pursuant to CPLR 3215[g]*.)

Plaintiff further establishes the facts constituting the claim. It submits affidavits, letters/notices scheduling EUOs and transcripts regarding the two non-appearances. In support of its motion, plaintiff annexed thereto the affidavit of Kyaw Kyein (NYSCEF Doc. No. 23, *affidavit*) and another of Annie Persaud (NYSCEF Doc. No. 24, *affidavit*). Kyein is a No-Fault Claim Supervisor and bases her affidavit upon being the supervisor “responsible for the claim ... and from a review of the file.” (NYSCEF Doc. No. 23, *affidavit*, ¶¶ 2, 3). In her statement, Kyein describes plaintiff’s office procedures as to mailing, and about referring a claimant to be scheduled for EUOs, like occurred here. (NYSCEF Doc. No. 23, *affidavit*, ¶¶ 4-8, 10-11). Kyein affirms that, after two noticed EUOs were rescheduled due to COVID, an EUO was scheduled for August 31, 2020, at which ZHANG failed to appear. (NYSCEF Doc. No. 23, *affidavit*, ¶¶ 10-18). ZHANG appeared with his attorney at the next EUO, on September 23, 2020, but that was rescheduled because ZHANG or his representatives failed to confirm his attendance in advance. (NYSCEF Doc. No. 23, *affidavit*, ¶¶ 19, 20). Finally, Kyein states in her affidavit that another EUO was scheduled for October 14, 2020, at which ZHANG again failed to appear. (NYSCEF Doc. Nos. 23, *affidavit*, ¶¶ 22, 23; 22, *EUO nonappearance transcript*). An additional affidavit was submitted by Ms. Persaud, an “EUO Clerk” whose responsibility is “to receive requests from the Claims Department to schedule EUOs, confirm their appearances,

maintain a file for each EUO request and notify plaintiff whether or not the EUO went forward.” (NYSCEF Doc. No. 24, *affidavit*, ¶ 3). In her affidavit, Persaud describes personally generating and signing the EUO notice letters containing the dates of the scheduled EUOs and describes plaintiff’s regular practice of mailing the notice letters. (NYSCEF Doc. No. 24, *affidavit*, ¶¶ 5-7). She further affirms that when ZHANG failed to appear at the EUOs dated August 31, 2020, and later October 14, 2020, “pursuant to plaintiff’s office procedure, a statement was placed on the record detailing the dates for the EUO’s and the eligible injured party’s nonappearance.” (NYSCEF Doc. No. 24, *affidavit* ¶¶ 11, 13). Persaud’s affidavit further similarly refers to the two transcripts generated on each of the two days when ZHANG failed to appear for the noticed EUOs. (NYSCEF Doc. Nos. 18, 22, *statements on the record*).

Plaintiff’s submissions show that plaintiff demanded several EUOs - two which were adjourned due to COVID-19, one at which claimant appeared but could not go forward because he had failed to confirm his attendance in advance, and the second, where claimant failed to appear entirely - and that plaintiff thereafter issued a timely denial. (NYSCEF Doc. No. 23, *affidavit*, ¶¶ 17-23; NYSCEF Doc. No. 24, *affidavit*, ¶¶ 11-13; 17, *letter notice for August 31, 2020 EUO*; 21, *letter notice for October 14, 2020 EUO*; 18, *transcript of non-appearance on August 31, 2020*; 22, *transcript of non-appearance on October 14, 2020*). Plaintiff timely issued a claim denial on October 15, 2020, one day after the last noticed EUO. (NYSCEF Doc. No. 23, *affidavit*, ¶ 24; 25, *denial of claim form*). Based on the foregoing, it is hereby

**ORDERED**, that plaintiff’s motion seeking a default judgment against KAI XIONG ZHANG, LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.S., YM ACUPUNCTURE, P.C., DR. XU’S COMPREHENSIVE MEDICAL, PLLC, and DANADA INTERNAL MEDICINE, P.C. is granted; and it is further

**ORDERED, ADJUDGED and DECLARED** that plaintiff owes no duty to pay any no-fault benefits in the form of sums, monies, damages, awards or benefits to KAI XIONG ZHANG, LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.S., YM ACUPUNCTURE, P.C., DR. XU’S COMPREHENSIVE MEDICAL, PLLC, and DANADA INTERNAL MEDICINE, P.C., their agents, employees, assignees or heirs arising out of any current or future proceeding, including without limitation, arbitration and lawsuits seeking to recover no-fault benefits with respect to the accident that occurred on November 21, 2019, referenced in the complaint; and it is further

**ORDERED, ADJUDGED and DECLARED** that all no-fault lawsuits, arbitrations, including uninsured motorist, awards and claims filed by KAI XIONG ZHANG, LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.S., YM ACUPUNCTURE, P.C., DR. XU’S COMPREHENSIVE MEDICAL, PLLC, and DANADA INTERNAL MEDICINE, P.C., arising from or related to the November 21, 2019 accident referenced in the complaint are stayed; and it is further

**ORDERED** that, within twenty (20) days after this order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, upon all parties, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

**ORDERED** that, service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "e-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

April 11, 2022

  
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HON. VERNA L. SAUNDERS, JSC

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