

**American Tr. Ins. Co. v Unicorn Acupuncture, P.C.**

2023 NY Slip Op 33008(U)

July 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 504134/2022

Judge: Sharon A. Bourne-Clarke

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This opinion is uncorrected and not selected for official publication.

At **DEFAULT JUDGMENT MOTION PART** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Borough of Brooklyn, City and State of New York, on the **10<sup>th</sup> of July, 2023**

**PRESENT: HON. SHARON A. BOURNE-CLARKE**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: DJMP

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

UNICORN ACUPUNCTURE, P.C. A/A/O SANTOS  
GARCIA,

Defendant(s).

**DECISION AND ORDER**

Calendar No.  
Index No. 504134/2022

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers

NYSCEF Doc. Nos.

Notice of Motion – Order to Show Cause – Exhibits and Affidavits Annexed	No(s). 9-28
Answering Affidavits and Exhibits	No(s).
Replying Affidavits and Exhibits	No(s).

**FACTS**

Plaintiff, American Transit Insurance Company (ATIC), is a New York corporation. Defendant Unicorn Acupuncture, P.C. (Unicorn Acupuncture), is also a New York corporation. On August 7, 2016, claimant Santos Garcia, was riding a bicycle, when he was struck by a vehicle insured by ATIC. The claimant then received medical care from defendant Unicorn Acupuncture, which included acupuncture and cupping services.

Defendant later brought three arbitration actions against ATIC for reimbursement of the medical services provided. After arbitration Defendant was granted three awards. Award 17-19-1127-6113 (Award 1) of \$2,838.63, for medical services billed between May 1, 2017, and

December 27, 2017. Award 17-19-1127-6132 (Award 2) of \$4,349.67, for medical services billed between March 1, 2018, and February 28, 2019. Award 17-20-1155-3865 (Award 3) of \$1,811.80 for medical services billed between March 15, 2019, and November 19, 2019.

All three awards were affirmed in their entirety upon review by master arbitrator Marilyn Felenstein, Esq. Plaintiff disputes that they are required to pay the defendant's no-fault benefits. Plaintiff submits that an independent medical exam (IME) conducted by one Dr. Michael Russ, found no objective evidence of disability from an acupuncture point of view. Plaintiff disputes the necessity of the medical services provided by the defendant. Plaintiff submits that Santos Garcia's injuries were not causally related to the collision on August 7, 2016. Plaintiff submits that the defendant billed excessively. Plaintiff further submits that they do not owe anything to the defendant on the billing in question in this matter.

Plaintiff initiated this cause of action on February 9, 2022, seeking judgment against the defendant, and for this Court to adjudicate the dispute de novo. Plaintiff filed a notice of motion for default judgment on September 1, 2022, notifying that they would be moving for a default judgment on October 5, 2022, due to the defendant's failure to appear or answer. On November 4, 2022, Defendant filed an answer with counterclaims. On November 8, 2022, Defendant filed a notice of cross-motion, in opposition to the plaintiff's default judgment motion, seeking to move for dismissal of the complaint. On November 17, 2022, Plaintiff filed a letter rejecting the defendant's answer as late.

Defendant submits that their default was excusable as they were improperly served. Defendant also submits that they have a meritorious defense in that all three of the awards at issue were under \$5000.00, which fall below the threshold for de novo review under Insurance Law §5106 (c).

Insurance Law § 5106 (c) states "...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".

#### OPINION

Defendant Unicorn Acupuncture's motion to dismiss is **GRANTED**.

The issue before this Court is when under Insurance Law § 5106 (c) a party can combine three arbitration awards, each under the \$5000.00 threshold for de novo review, if the claimant, the medical provider, and the insurer are the same.

Defendant cites the case of *American Tr. Ins. Co. v Health Plus Surgery Ctr., LLC*, 192 AD3d 497 [2021], in which the court found that a master arbitrator's awards could not be combined to meet the \$5000.00 threshold for the purposes of de novo review. Although in that case only the claimant and the insurer were the same, the medical providers were different. In the present case the claimant, the insurer, and the medical provider are the same.

Plaintiff cites the case of *American Tr. Ins. Co. v Surgicore of Jersey City LLC*, 133 N.Y.S.3d 785 [2020], in which the court combined two master arbitrator's awards for the purposes of de novo review, one of which was under the \$5,000.00 threshold. Although in *Surgicore* both awards arose from treatments performed on the same day, and by the same medical provider. In the present case the awards in question cover a treatment period of about two and a half years.

As the case law shows, there is no bright line rule as to when arbitration awards should be combined for the purposes of de novo review. Consideration is given to whether the parties involved in the arbitration actions are the same, and whether the arbitration actions are such

that this Court should find reason to give to substance over form in granting de novo review. To this end the billing period, and the length of time the services provided are assessed in whether the arbitration awards should be considered distinct from each other.

The awards in this case were for separate treatments given over a period of two and a half years, this is a significantly longer period of time than the treatment and billing period of one day in the *Surgicore* case which the plaintiff cites. As such this Court considers the three arbitration awards separate and distinct. None of the awards in question reach the \$5,000.00 threshold for de novo review, and therefore this Court does not have jurisdiction to review the awards.

Defendant Unicorn Acupuncture's motion to dismiss is **GRANTED**, this Court does not have subject matter jurisdiction for de novo review under Insurance Law § 5106 (c). As such, plaintiff American Transit's motion for default judgment is **DENIED**, and the matter is **DISMISSED**.

**This constitutes the Decision and Order of the Court.**

ENTER:



**HON. SHARON A. BOURNE-CLARKE**