

**American Tr. Ins. Co. v Whitted**

2025 NY Slip Op 33518(U)

September 15, 2025

Supreme Court, New York County

Docket Number: Index No. 650890/2024

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 39M

Justice

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INDEX NO. 650890/2024

AMERICAN TRANSIT INSURANCE COMPANY,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

ANGELA WHITTED, ATLANTIC MEDICAL & DIAGNOSTIC, P.C., ATHENA CHIROPRACTIC, P.C., BL PAIN MANAGEMENT, PLLC, BNT-AMS CORP., BOWEN MD, PLLC, BRONX DIAGNOSTIC RADIOLOGY, P.C., CENTRAL RX PHARMACY CORP., COMPREHENSIVE DIAGNOSTICS AND IMAGING, P.C., DR. SIMEON ISAACS, FINESSE CARE PHYSICAL THERAPY, P.C., HARVEY LEVITAN MEDICAL, P.C., MALAGA MEDICAL, P.C., MULTIWAVE DIAGNOSTICS, INC., OPAQUE NY, INC., PARK CHEMISTS, LLC, TIARILLIE, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - DEFAULT

In this action, plaintiff American Transit Insurance Company ("American Transit") seeks a declaratory judgment that it is not required to pay no-fault benefits to defendants Angela Whitted ("Claimant") and the numerous medical providers. Claimant was a passenger in a vehicle that was allegedly involved in an accident on March 16, 2023. The vehicle was covered by a no-fault insurance policy issued by American Transit. The numerous medical providers applied for no-fault benefits as assignees of Claimant.

Plaintiff now moves pursuant to CPLR § 3215 for a default judgment against the non-answering defendants: Atlantic Medical & Diagnostic, P.C., Athena Chiropractic, P.C., BL Pain Management, PLLC, BNT-AMS Corp., Bowen MD, PLLC, Bronx Diagnostic Radiology, P.C., Central RX Pharmacy Corp., Comprehensive Diagnostics and Imaging, P.C., Dr. Simeon Isaacs, Finesse Care Physical Therapy, P.C., Malaga Medical, P.C., Multiwave Diagnostics, Inc., Opaque NY, Inc., Park Chemists, LLC, and Tiarillie, Inc (collectively "Defaulting Defendants"). The

remaining two defendants, namely Claimant and Harvey Levitan Medical, P.C., filed their respective answers.

Defendants Athena Chiropractic, P.C. and Finesse Care Physical Therapy, P.C. cross move, pursuant to CPLR § 3012(d) and CPLR § 2004, to compel acceptance of defendants' answer or grant defendants leave to serve their late answer.

#### DISCUSSION

Pursuant to CPLR § 3215, on a motion for leave to enter a default judgment against a defendant for failure to answer or appear, plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting such claim, and proof of the defendant's default (*Bigio v Gooding*, 213 AD3d 480, 481 [1st Dept 2023]). With respect to proof of the facts constituting the claim, the application must contain sufficient proof "to enable a court to determine that a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). In undertaking this review, the Court is mindful that "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*id.*).

#### Proof of Service

In support of its motion, plaintiff proffered Affidavits of Service to establish that the summons and complaint were properly served, pursuant to BCL § 306(b), upon the following defendants via the Secretary of State on March 8, 2024: Atlantic Medical & Diagnostic, P.C., Athena Chiropractic, P.C., BNT-AMS Corp., Bronx Diagnostic Radiology, P.C., Central RX Pharmacy Corp., Comprehensive Diagnostics and Imaging, P.C., Finesse Care Physical Therapy, P.C., Malaga Medical, P.C., Multiwave Diagnostics, Inc., Opaque NY, Inc., and Tiarillie, Inc. (NYSCEF Doc Nos. 11, 13-15, 17-19, 21-23, 26).

Plaintiff proffered Affidavits of Service to establish that the summons and complaint were properly served, pursuant to LLC Law § 303(b), upon the following defendants via the Secretary of State on March 8, 2024: BL Pain Management, PLLC, Bowen MD, PLLC, and Park Chemists, LLC (NYSCEF Doc. No. 12, 20, 28).

Plaintiff also submitted additional affirmations/affidavits of service to provide that an additional copy of the summons and complaint were personally delivered to an individual authorized to accept service on behalf of the following defendants respectively: Atlantic Medical

& Diagnostic, P.C., Athena Chiropractic, P.C., BL Pain Management, PLLC, Bowen MD, PLLC, Central RX Pharmacy Corp., Multiwave Diagnostics, Inc., and Park Chemists LLC (NYSCEF Doc. Nos. 4, 6-8, 10, 25, 27).

Plaintiff further proffered an Affidavit of Service to establish that an additional copy of the summons and complaint were served upon the defendants named above, pursuant to CPLR 3215(g)(4) (NYSCEF Doc. No. 35).

According to the Affidavit of Service dated March 8, 2024, defendant Dr. Simeon Isaacs was served pursuant to CPLR 308(4) (NYSCEF Doc. No. 9). Service was attempted on February 29, 2024, and March 5, 2024, before the deponent affixed the summons and complaint on the door of Dr. Isaacs' usual place of abode on March 7, 2024 (*id.*). Deponent also states that the summons and complaint were mailed to the defendant by first-class mail to the same address (*id.*). However, plaintiff did not provide a non-military affidavit for Dr. Simeon Isaacs in accordance with the Soldiers' and Sailors' Civil Relief Act of 1940 (50 USC Appendix § 520, NY Military Law § 303). The affidavit must set forth the following: (1) the facts showing that the defendant is not in military service of either the United States or an ally; (2) that the investigation was done after the default occurred; and (3) that the investigation was performed shortly before it was submitted (*Metro Loft Management, LLC v Ho*, 2022 WL 4447267, \*2 [Sup Ct, NY County, Sept. 21, 2022, Index No. 654454/2020]).

### Proof of Facts

American Transit asserts that Claimant's alleged injuries were not causally related to the March 16, 2023 accident, and therefore, plaintiff is not obligated to pay for any damages or injuries that Claimant asserted she suffered as a result of the accident.

A no-fault insurer seeking a declaration of no coverage based on a conclusion that the plaintiff's alleged injuries did not result from the motor vehicle incident must establish as a "fact or founded belief that the alleged injury does not arise out of an insurer incident" (*Central Gen. Hosp. v Chubb Grp. Of Ins. Cos.*, 90 NY2d 195, 199 [1997]). Here, plaintiff solely relies on a Biomechanical Analysis Report ("Biomechanical Report") to support its conclusion that the claimant's alleged injuries were not causally related to the accident. The report is prepared by Zachary Merrill, a Biomechanical Engineering Consultant of BioEx Consulting, LLC, who earned a Doctor of Philosophy in Bioengineering from the University of Pittsburg. That report, however,

is insufficient to meet American Transit's burden. The report is based largely on inadmissible evidence, namely the unsigned transcript of defendant Whitted's examination under oath (EUO).

The Biomechanical Report relies on Whitted's EUO transcript, but that transcript is not signed or notarized (*see* NYSCEF Doc. No. 44 at p. 58). American Transit fails to show that it attempted to establish that it ever provided the transcript to Claimant to review and sign, as required by CPLR 3116 (a). Therefore, a significant part of the Biomechanical Report is based on hearsay and is insufficient to support the entry of a default judgment (*see Liberty Mut. Ins. Co. v. Martin*, 67 Misc 3d 1211[A], 2020 NY Slip Op 50511[U] [Sup Ct, NY County 2020]).

Furthermore, the Biomechanical Report that American Transit identifies as the basis for this conclusion is a summary report that is neither sworn nor notarized, as required for it to qualify as a non-hearsay affidavit (*see* NYSCEF Doc. No. 45). As a result, this court cannot rely on the report as plaintiff's basis for its proof of facts constituting such claim (*American Tr. Ins. Co. v. Sky Limit Physical Therapy, P.C. et al*, 67 Misc 3d 1215[A], 2020 NY Slip Op 50558[U] [Sup Ct, NY County 2020]). The Biomechanical Report concludes that Claimant's alleged injuries to her "shoulders, elbows, knees, and spine, with the exception of minor strains or sprains" could not have been a result of the incident on March 16, 2023 (*see* NYSCEF Doc. No. 45 at p. 9). The Biomechanical Report indicates that this conclusion was based on the Report of Motor Vehicle Accident (NYSCEF Doc. No. 43), Emergency Department notes from Harlem Hospital Center dated March 16, 2023 (NYSCEF Doc. No. 31), Transcript of Claimant's Examination Under Oath dated October 26, 2023 (NYSCEF Doc. No. 44), and other reports and notes including a Chiropractic examination, Physical Therapy Initial Evaluation, Ultrasound reports, MRI Report, and more. However, these other reports and notes referenced in the Biomechanical Report were not included as part of plaintiff's motion and thus, is not available for the court to review at this time.

Accordingly, plaintiff failed to meet its burden and is not entitled to a default judgment against the Defaulting Defendants.

Cross Motion of Defendants Athena Chiropractic, P.C. and Finesse Care Physical Therapy, P.C.

In addition to opposing plaintiff's default judgment motion, defendants Athena Chiropractic, P.C. and Finesse Care Physical Therapy, P.C. (collectively "Moving Defendants")

separately cross-move under CPLR 3012(d) and CPLR 2004 to compel acceptance of their answer or, in the alternative, grant the defendants leave to serve their late answer (NYSCEF Doc. No. 53).

In plaintiff's Affirmation in Opposition to the Cross Motion, plaintiff accepts Moving Defendants' Answer and withdraws its motion for a default judgment against defendants Athena Chiropractic, P.C. and Finesse Care Physical Therapy, P.C.

As such, the relief that moving defendants seek is deemed resolved to the extent that plaintiff has conceded to accepting defendants' Answer, and as discussed above, plaintiff's is not entitled to a default judgment against the Defaulting Defendants.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment pursuant to CPLR § 3215 is denied, without prejudice to renew upon proper papers. Any future application for this relief must contain a copy of this decision and order and show strict compliance with the above statutory requirements; and it is further

ORDERED that the cross-motion of defendants Athena Chiropractic, P.C. and Finesse Care Physical Therapy, P.C., pursuant to CPLR § 3012(d) and CPLR § 2004, is deemed resolved.

9/15/2025  
DATE

  
JAMES G. CLYNES, J.S.C.

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