SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **39M**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

DAGOBERTO BATEN, APPLE ACUPUNCTURE P.C., ATLANTIC MEDICAL & DIAGNOSTIC, P.C., BANAY PHYSICAL THERAPY P.C., HEALTH BALANCE MEDICAL, P.C., HEALTH HEAVEN SERVICES INC, METROPOLITAN MEDICAL & SURGICAL P.C., SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, SENIORCARE EMERGENCY MEDICAL SERVICES INC., SHEMESH CHIROPRACTIC P.C., STAR MEDICAL IMAGING P.C., TREBOR MULTI SERVICES INC, TRIBOROUGH ASC, LLC, UNION RX PHARMACY INC.

Defendant.

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INDEX NO. 653317/2024

MOTION DATE 05/30/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Defendant Dagoberto Baten, the claimant for the subject insurance policy, was involved in a motor vehicle accident. Following the provision of medical services, the medical provider defendants submitted claims to plaintiff American Transit Insurance Company. Citing the claimant's breach of the policy terms, plaintiff denied coverage to defendants. Plaintiff filed suit seeking declaratory judgment that plaintiff is not required to reimburse defendants for no-fault claims arising out of the subject accident (NYSCEF 1). Plaintiff now moves for an order pursuant to CPLR § 3215 granting default judgment against the defaulting defendants for failure to timely answer or appear (NYSCEF 13).

"A party seeking a default judgment must submit proof of service of the summons and complaint and 'proof of the facts constituting the claim, the default and the amount due.' To demonstrate 'facts constituting the claim,' the movant need only proffer proof sufficient 'to enable a court to determine that a viable cause of action exists.' The movant may do so either by

submission of an affidavit of merit or by verified complaint, if one has been properly served." Bigio v. Gooding, 213 A.D.3d 480, 481 (1st Dept 2023) (citations omitted).

Here, plaintiff demonstrated proof of service in accordance with CPLR § 3215, BCL § 306, and LLC § 303, as evidenced by the affidavits of service (NYSCEF 3, 7, 24). See LF USA, Inc v. The Eurostyle Group, Ltd., 2014 WL 344048, at *2 (Sup. Ct. New York 2014) ("The affidavit of service is *prima facie* evidence that defendant was properly served."); Hyman v. 400 W. 152nd St. Hous. Dev. Fund Corp., 159 A.D.3d 606, 606–07 (1st Dept 2018) (holding there was a "presumption of proper service created by the affidavit of service reflecting service through the Secretary of State."). As such, plaintiff is entitled to seek default judgment against those defendants who failed to timely answer or appear: Dagoberto Baten, Banay Physical Therapy P.C, Health Balance Medical, P.C., Health Heaven Services INC., Metropolitan Medical & Surgical P.C., Sedation Vacation Perioperative Medicine PLLC, Seniorcare Emergency Medical Services Inc., Star Medical Imaging P.C., Triborough ASC, LLC, and Union RX Pharmacy Inc.[1]

The timeline for this case is as follows: on May 11, 2023, claimant was involved in a motor vehicle accident; on June 9, 2023, claimant submitted the no-fault benefits application; on June 12, 2023, plaintiff received the no-fault benefits application (NYSCEF 17); on October 19, 2023, plaintiff received a bill from one of the medical provider defendants and, on this basis, scheduled an Independent Medical Examination (IME) (NYSCEF 15); on October 27, 2023, plaintiff mailed claimant a letter scheduling an IME for November 13, 2023, which claimant failed to attend; on November 14, 2023, plaintiff mailed claimant another letter scheduling an IME for December 11, 2023, which claimant failed to attend (NYSCEF 19); on December 19, 2023, plaintiff denied the claims (NYSCEF 18).

New York's insurance "regulations require an accident victim to submit a notice of claim to the insurer as soon as practicable and no later than 30 days after an accident. Next, the injured party or the assignee . . . must submit proof of claim for medical treatment no later than 45 days after services are rendered. Upon receipt of one or more of the prescribed verification forms used to establish proof of claim . . . an insurer has 15 business days within which to request 'any additional verification required by the insurer to establish proof of claim.' . . . Significantly, an insurance company must pay or deny the claim within 30 calendar days after receipt of the proof

[1] On June 6, 2025, plaintiff entered into a stipulation of discontinuance as to defendant Health Balance Medical, P.C. (NYSCEF 28).

of claim. If an insurer seeks additional verification, however, the 30-day window is tolled until it receives the relevant information requested." Hosp. for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 317–18 (2007) (citations omitted). Plaintiff's contention that it properly scheduled an IME on the basis of a bill received from one of the medical providers is misplaced. The relevant regulations require an insurer to act within a specified timeframe following receipt of an *application for no-fault benefits*, not when plaintiff receives *a bill* from the medical provider. As such, the record shows plaintiff did not abide by the relevant timeframe.

Where both the insurer and the claimant failed to abide by the relevant no-fault regulations, that is, the insurer failed to timely schedule the IME and the claimant failed to appear, some courts have found the insurer is not entitled to relief. See Hertz Vehicles, LLC v. Charles Deng Acpuncture, P.C., 2016 WL 1222168, at *2 (Sup. Ct. New York 2016) ("In no-fault cases such as this, involving the failure of a claimant to appear for an [IME], a default judgment will not be granted without proof that the [IME] scheduling letters were mailed in accordance with the no-fault regulations."); Hertz Vehicles, LLC v. Best Touch PT, P.C., 162 A.D.3d 617, 617–18 (1st Dept 2018). Similarly, courts in other departments have held an insurer is precluded from asserting nonappearance as a defense when the scheduling letters were not timely sent. See Westchester Med. Ctr. v. Lincoln Gen. Ins. Co., 60 A.D.3d 1045, 1045–47 (2d Dept 2009); Nationwide Affinity Ins. Co. of Am. v. Jamaica Wellness Med., P.C., 167 A.D.3d 192, 197–98 (4th Dept 2018). Nevertheless, to the extent the above caselaw is controlling, it appears to represent a minority position.

Indeed, it is well-settled that "the failure to disclaim coverage does not create coverage which the policy was not written to provide . . . ." Zappone v. Home Ins. Co., 55 N.Y.2d 131, 134 (1982). Therefore, this court must conclude that "[t]he failure to attend duly scheduled medical exams voids the policy ab initio. Accordingly, when [claimant] failed to appear for the requested medical exams, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued . . . There is no requirement to demonstrate that the claims were timely disclaimed since the failure to attend medical exams was an absolute coverage defense." Am. Transit Ins. Co. v. Lucas, 111 A.D.3d 423, 424–25 (1st Dept 2013) (citations omitted). See also Hertz Vehicles, LLC v. Delta Diagnostic Radiology, P.C., 2015 WL 708610, at *3 (Sup. Ct. New York 2015); Mapfre Ins. Co. of New York v. Manoo, 140 A.D.3d 468, 469–70 (1st Dept 2016); Hereford Ins. Co. v. Lida's Med. Supply, Inc., 161 A.D.3d 442, 442–43 (1st Dept

2018); PV Holding Corp. v. Hank Ross Med., P.C., 188 A.D.3d 429, 430 (1st Dept 2020). Accordingly, it is hereby

ORDERED that plaintiff's motion is granted.

The Clerk is directed to enter a judgment declaring that plaintiff is not obligated to provide no-fault insurance for Defendant Dagoberto Baten or assignees in connection with the May 11, 2023, motor vehicle accident.

This constitutes the decision and order of the court.

9/26//2025
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE