SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Index Number : 112423/2011
HERTZ VEHICLES, LLC.
vs
ALLEVIATION MEDICAL SERVICES
Sequence Number : 002
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
JUL 16 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/1/14

_____, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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HERTZ VEHICLES, LLC,

Plaintiff,

-against- Index No.: 112423/2011

ALLEVIATION MEDICAL SERVICES, P.C., CHARLES DENG ACUPUNCTURE, P.C., COMPAS MEDICAL, P.C., DELTA DIAGNOSTIC RADIOLOGY, P.C., GREAT HEALTH CARE CHIROPRACTIC, P.C., KAPPA MEDICAL, P.C., METROPOLITAN DIAGNOSTIC MEDICAL CARE, P.C., NEW WAY MEDICAL SUPPLY, CORP., T & J CHIROPRACTIC, P.C., VLADIMIR SHUR, M.D., BILLY PREVILON, MARIE PIERRE and CLIFFORD GOURDET,

Defendants.

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YORK, J.:

Defendants Alleviation Medical Services, P.C., Charles Deng Acupuncture, P.C., Compas Medical, P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., New Way Medical Supply, Corp., and T & J Chiropractic, P.C., move, pursuant to CPLR 3103, for a protective order to prevent plaintiff Hertz Vehicles, LLC, from taking the depositions of defendants.

Plaintiff Hertz Vehicles, LLC, cross-moves, pursuant to CPLR 3126, to strike defendants' answer due to outstanding discovery, and moves, pursuant to Title 22, Part 130-1.1, of the New York Code, Rules and Regulations, for sanctions, attorneys fees, and costs. Plaintiff also moves, pursuant to Title 22, Part 202.21 of the New York Code, Rules and Regulations, to extend the time for plaintiff to file the note of issue.

FACTUAL ALLEGATIONS

In this action, plaintiff, an automobile rental company which self-insures its vehicles, seeks a declaratory judgment, declaring that it has no obligation to pay no-fault claims to any of defendants for claims which arise from injuries that Billy Previlon, Marie Pierre, and Clifford Gourdet (the claimants), allegedly suffered in a motor vehicle accident. The claimants allege that on March 20, 2011, the vehicle in which they were driving, which was owned by plaintiff, was sideswiped by a taxi owned by Noho Taxi, Inc. Plaintiff maintains that the police report made at the scene of the accident indicates that the claimants refused medical attention; however all three claimants later claimed to have sustained bodily injuries.

Plaintiff subsequently received several claims from defendants, seeking to recover no-fault benefits from plaintiff for their services. Plaintiff maintains that defendants, who were the medical providers for the claimants' alleged injuries, have submitted over $67,000 in bills for the claimants' medical treatment, including months of physical therapy, acupuncture, chiropractic care, diagnostic testing, and medical supplies. Plaintiff scheduled examinations under oath (EUO's) of the claimants to ensure that they were injured from the accident and received the alleged medical treatment from the medical providers.

Despite being scheduled by plaintiff, claimants Marie Pierre and Clifford Gourdet failed to appear for their EUO's, which plaintiff contends is a material breach of the no-fault regulations. Plaintiff contends that claimant Billy Previlon (Previlon) appeared for his examination, however his testimony was "conflicting, suspicious, and indicated a strong likelihood that the loss was staged." (Boucher Affirmation, at 7). Plaintiff further contends that Previlon's testimony revealed that much of the treatment which he received was unnecessary,

excessive, and abusive of the no-fault system; that the billing was duplicative, boilerplate, and disengenuous; and that the claims were nearly identical for all three claimants, despite the fact that each claimed different types of injuries. Plaintiff maintains that the claimants' alleged injuries were not casually related to the insured incident, and denied all claims.

On November 1, 2011, plaintiff filed a complaint seeking to disclaim all no-fault coverage which the defendants allege is owed. On September 4, 2013, the parties attended a preliminary conference at which dates were agreed to for documentary discovery, depositions were scheduled, and the discovery end date was set for December 30, 2013. Plaintiff contends that it provided discovery to defendants and that it produced Maureen Stromberg, the claims handler assigned to the file, for a deposition.

Defendants were to appear for depositions on November 19 and 20, 2013, however plaintiff was notified that defendants sought an adjournment of those dates. On November 20, 2013, a compliance conference took place, at which the depositions of defendants were rescheduled for December 6, 2013. However, counsel for plaintiff maintains that defendants alerted him that they could not appear on those dates. Shortly thereafter, defendants served a subpoena on plaintiff seeking documentary discovery. Plaintiff objected to the subpoena on multiple grounds. On December 12, 2013, plaintiff received a letter from defendants withdrawing the subpoena, but advising plaintiff that it may move to compel another deposition.

Plaintiff argues that defendants have conducted a deposition of plaintiff, and that plaintiff has provided defendant with documentary discovery, yet defendants have provided no discovery to plaintiff. Plaintiff maintains that defendants have ignored the preliminary conference order, have failed to comply with the compliance conference directives, and, as of February 6, 2014,

have not provided any discovery. Plaintiff argues that it has attempted to schedule depositions with defendants several times, and that, due to defendants non-compliance, defendants answer should be stricken, or alternatively, defendants should pay reasonable attorneys fees to compensate plaintiff for the additional time and expense incurred in seeking to compel the previously ordered discovery.

Defendants argue that plaintiff cannot demonstrate that they were in any way involved in, or connected to the motor vehicle accident which gave rise to this action. Defendants contend that defendants have no knowledge of the circumstances surrounding the alleged nonappearances of the claimants, and that if they are deposed, they could not provide any evidence to support plaintiff's allegations because they have no knowledge of the facts.

DISCUSSION

Plaintiff alleges in its complaint that the alleged injuries of all of the claimants, the allegations of the claimants, and any invoices for subsequent no-fault treatment submitted by the medical provider defendants were not casually related to the claimants' accident. *See Cent. Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 (1997) (holding that an insurer may assert a defense based upon the "fact or founded belief that the alleged injury does not arise out of an insured incident."). Plaintiff contends that defendants have spent hours with the claimants, have billed an excess of $50,000 for treatment, and have outstanding unpaid bills for the treatment. Plaintiff further maintains that defendants can testify regarding the services which they provided for claimants, their knowledge of the loss, what information they may know regarding the accident, and the type of injuries which the claimants are alleging.

Defendants overlook their noncompliance with the preliminary conference order, their

noncompliance with the directives to conduct defendants depositions, and their failure to provide discovery. The depositions of defendants were agreed to by the parties, and scheduled at two court conferences, however they failed to take place. Pursuant to paragraph 7 of the preliminary conference order, "[b]efore making any motions, as soon as a disclosure problem arises and before the end date for discovery, the affected party must call the part and arrange a telephone conference (646-386-3852). Failure to comply by discovery deadline waives all pending and future discovery absent good cause." Boucher Affirmation, ex. F. There is no indication by defendants that they complied with this provision, or contacted Part 2 to arrange a conference before this motion was filed or before they declined to produce defendants for a deposition. Furthermore, as argued by plaintiff, the claimants Marie Pierre and Clifford Gourdet's failure to appear for the requested EUO's, was a breach of Title 11, Part 65-1.1 of the New York Code, Rules, and Regulations.

Pursuant to CPLR 3126, the court may impose discovery sanctions, including the striking of a pleading, if it is demonstrated that a party wilfully fails to disclose information which the court finds ought to have been disclosed. As there is a repeated pattern of noncompliance with the directives of this court directing defendants to appear at depositions, and a failure to produce discovery, such noncompliance, without a reasonable excuse for same, "gives rise to an inference of willful and contumacious conduct." *Figiel v Met Food*, 48 AD3d 330, 330 (1st Dept 2008), *citing Siegman v Rosen*, 270 AD2d 14 (1st Dept 2000). Therefore, because plaintiff has met its burden and demonstrates noncompliance of the discovery order and directives of this court, defendants' answer is hereby stricken. *See Elias v City of New York*, 87 AD3d 513, 517 (1st Dept 2011) ("the history of defendant's untimely, unresponsive and lax

approach to complying with the court's pervious orders warrants the striking of defendant's answer").

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendants Alleviation Medical Services, P.C., Charles Deng Acupuncture, P.C., Compas Medical, P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., New Way Medical Supply, Corp., and T & J Chiropractic, P.C.'s motion for a protective order is denied; and it is further

ORDERED that plaintiff Hertz Vehicles, LLC's, cross-motion to strike defendants' answer due to outstanding discovery and failure to appear for scheduled EBT is granted and it is further

ORDERED that counsel for plaintiff is directed to file the note of issue on or before July 30, 2013, and upon that filing, the Clerk shall refer this matter to the Special Referee Clerk (Room 119 M), for placement at the earliest possible date upon the calendar of the Special Referee Part in order to assign this matter to an available Special Referee to schedule and conduct an inquest; and it is further

ORDERED that counsel for plaintiffs is directed to serve a copy of this order with notice of entry and notice of inquest upon the defendants, the County Clerk, and the Clerk of the Trial Support Office.

Dated: 7/1/14

FILED
JUL 16 2014
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.
LOUIS B. YORK
J.S.C.