SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

ACE AMERICAN INSURANCE COMPANY,

Plaintiff,

- v -

DR. WATSON CHIRPORACTIC, P.C. et al.,

Defendants.

INDEX NO. 150558/2017

MOTION DATE 1/19/18

MOTION SEQ. NO. 002

NYSCEF Doc Nos. 31–45 were read on this motion for an order granting leave to reargue motion seq. 001.

Motion brought by order to show cause by Plaintiff Ace American Insurance Company ("Ace") pursuant to CPLR 2221 (d) for an order granting Ace leave to reargue the Court's November 2, 2017 decision and order denying Plaintiff's motion seq. 001 pursuant to CPLR 3215 seeking an order directing the entry of a default judgment in favor of Ace and against medical provider defendants Dr. Watson Chiropractic, P.C. ("Chiropractic"), Good Care Pharmacy, Inc. ("Pharmacy"), Stand-Up MRI of Lynbrook, P.C. ("MRI"), Katzman Orthopedics, P.C. ("Orthopedics" and, together with Chiropractic, Pharmacy, and MRI, the "Provider-Defendants") and individual claimant-defendants Shakay Greaves ("Greaves") and Jonathan Williams ("Williams" and, together with Greaves, the "Claimant-Defendants") is granted and, upon reargument, the motion is denied.

BACKGROUND

This is an action in which Ace alleges that the Provider-Defendants are not entitled to payment of approximately $20,000 in bills for treatment provided to the Claimant-Defendants relating to a motor vehicle accident which they were involved in on May 27, 2016 (the "Collision").

On November 2, 2017, this Court issued a decision and order, incorporated herein by reference, denying Ace's motion seq. 001. (Boucher affirmation, exhibit B [November 2, 2017 Decision and Order].) The Court found that Ace had not met its prima facie burden of establishing that it requested examinations under oath ("EUOs") of the Claimant-Defendants in accordance with the procedures and time frames set forth in the no-fault implementing regulations. The Court found further that Ace had failed to show prima facie either that the Collision was staged or that there exists a valid foundation upon which to form a belief either that the claims or the billing were not causally related to the Collision. The Court found further that Ace had failed to submit proof of the facts constituting its claims as to Chiropractic and Orthopedics except for a single overbroad reference to those providers in the affidavit of merit.

Ace now moves in motion seq. 002 brought by order to show cause pursuant to CPLR 2221 (d) for an order granting Ace leave to reargue the Court's November 2, 2017 decision. Ace argues that pursuant to the Appellate Division, First Department's decision in *Mapfre Ins. Co. of NY v Manoo* (140 AD3d 468 [1st Dept 2016]), "an EUO request is timely if the EUO is requested prior to receipt of a claims document" and "if [Ace] shows that a claims document was received after an EUO was requested, [] the EUO timeliness requirements do not even apply." (Affirmation of Boucher ¶ 3.)

Ace further argues that it has satisfied the necessary burden of showing it maintains a founded belief that the alleged injuries did not arise from an insured incident for the purposes of a motion for an order directing the entry of a default judgment. (*Id.* ¶¶ 6–9.) Ace further argues that "the burden of proof on the insurer is not tantamount to proving 'fraud.' Rather, for an insurer to establish a lack of coverage defense, it must set forth admissible evidence of the fact or a founded belief that the alleged injury does not arise out of an insured incident." (*Id.* ¶ 10.) Ace further argues that Claimant-Defendants' alleged failure to subscribe their respective EUO transcripts was a breach of a condition precedent to coverage that should vitiate the policy.

On November 29, 2017, and December 18, 2017, Ace appeared for oral argument on the instant motion. Ace did not make arguments as to Chiropractic and Orthopedics. Ace argued, in sum and substance, that the instant case is controlled by Plaintiff's interpretation of *Mapfre*, that Ace had sufficiently satisfied its "founded belief" burden, and that pursuant to 11 NYCRR § 65-1.1 failure to subscribe an EUO transcript is a breach of a condition precedent to coverage that should vitiate the policy.

DISCUSSION

CPLR 2221 (d) provides, in relevant part that "[a] motion for leave to reargue[] . . . (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

The EUOs and Mapfre

In the underlying motion seq. 001, contrary to Ace's assertions in its moving papers and at oral argument, the Court did consider *Mapfre*. Although the Court did not cite to *Mapfre* directly, the Court instead cited to *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.* (147 AD3d 437 [1st Dept 2017]), a more recent case than *Mapfre* from the Appellate Division, First Department. The Court's November 2, 2017 decision and order quoted from a sentence in *Kemper* that cited to *Mapfre*. (November 2, 2017 Decision and Order, at 8.) The full sentence, which the Court quoted in part and cited from in its prior order, reads:

> "Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage, plaintiff failed to supply sufficient evidence to enable the court to

> determine whether the notices it had served on the injury claimants for EUOs were subject to the timeliness requirements of 11 NYCRR 65–3.5 (b) and 11 NYCRR 65–3.6 (b) (*see Mapfre Ins. Co. of N.Y. v. Manoo*, 140 A.D.3d 468, 470, 33 N.Y.S.3d 54 [1st Dept.2016]) and, if so, whether the notices had been served in conformity with those requirements)."

(*Kemper*, 147 AD3d at 438 [internal citations omitted].)

To meet its prima facie burden on motion seq. 001, Ace had to establish that it requested the EUOs in accordance with the procedures and time frames set forth in the no-fault implementing regulations to the extent they applied. (*See Am. Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015]; *see also Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011].) "[The Appellate Division, First Department's] holding in *Unitrin* applies to EUOs." (*Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014].)

With respect to an insurer's verification needs and requests, 11 NYCRR § 65-3.5 (b) states that:

> "[s]ubsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms. Any requests by an insurer for additional verification need not be made on any prescribed or particular form. If a claim is received by an insurer at an address other than the proper claims processing office, the 15[-]business day period for requesting additional verification shall commence on the date the claim is received at the proper claims processing office. In such event, the date deemed to constitute receipt of claim at the proper claim processing office shall not exceed 10 business days after receipt at the incorrect office."

11 NYCRR § 65-3.6 (b) states:

> "Verification requests. At a minimum, if any requested verifications ha[ve] not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested."

"[A provider's] failure to attend . . . EUOs is a violation of a condition precedent to coverage that vitiates the policy" (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411, 411 [1st Dept 2015]) as to the provider if "the EUOs were timely and properly requested" (*Am. Tr. Ins. Co. v Jaga Med. Svcs., P.C.*, 128 AD3d 441, 441 [1st Dept 2015]). An insurer must

ordinarily establish that it has requested an EUO within the verification time frame set forth in the no-fault regulations to obtain a judgment declaring that failing to attend the EUO violated a condition precedent to coverage. (*See Nat. Lia. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015].)

Where an insurer requests an EUO "prior to its receipt of any claim form" from a given provider (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 7 Misc3d 18, 22 [App Term, 2d Dept, 2d and 11th Jud Dists 2004]), the request is treated as "pre-claim" as to that provider and is not subject to the timing requirements in the no-fault regulations. (*See* 11 NYCRR § 65-3.5 (b); *Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468 [1st Dept 2016]; *Stephen Fogel Psychological P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721 [2d Dept 2006] [holding that independent medical examinations ["IMEs"] were pre-claim where the insurer demanded the IME before the provider "submitted the statutory claim forms"]; *Fogel, 7 Misc3d: New York Cent. Mut. Fire Ins. Co. v Bronx Chiropractic Svcs., P.C.*, 2014 NY Slip Op 33210 (U) [Sup Ct, NY County 2014] [holding that IME request was pre-claim where the insurer mailed its scheduling letter prior to the date of service and prior to the receipt of the claim forms of a provider]; *see also Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017].)

An EUO requested of a given provider after the insurance company receives the first prescribed verification form from that provider is treated as "post-claim" and "must be made within required time constraints set forth in 11 NYCRR 65-3.5 . . . [b] . . . and 11 NYCRR 65-3.6 (b)." (*Allstate Ins. Co. v Health East Ambulatory Surgical Center*, 55 Misc3d 1213 (A) [Sup Ct, NY County 2017] [relating to IMEs]; *see also Mapfre*, 140 AD3d at 469–470.)

In 2016, the Appellate Division, First Department articulated its reasoning as to why certain EUO requests may not be "subject to the timeliness requirements of 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b)." (*Kemper*, 147 AD3d at 438, citing *Mapfre*, 140 AD3d at 470.) In *Mapfre*, the plaintiff was an insurance company named "Mapfre." Mapfre sued an individual claimant named "Manoo" and several medical providers including one "Active Care." Mapfre sought a judgment declaring that individual claimant-defendant Manoo had breached a condition precedent to coverage by his failing to appear for an EUO. In *Mapfre*, it was the claimant who allegedly failed to appear for duly demanded EUOs. In the instant case, Plaintiff alleges that providers, not claimants, failed to attend EUOs.

Mapfre initially flagged Manoo's claim, alleging injuries arising out of a November 14, 2011 incident, and referred it to its Special Investigation Unit because Manoo was treating with a provider who was under "investigation" by the carrier. Manoo had presumably filed his form NF-2, Application for Motor Vehicle No-Fault Benefits, which was dated November 14, 2011, but there was no indication in the *Mapfre* record of when Mapfre received the NF-2.

According to the case file, Mapfre's Special Investigator allegedly attempted to obtain a recorded statement from Manoo over the phone, but Manoo was allegedly uncooperative. The Special Investigator then allegedly contacted Manoo's counsel and scheduled Manoo to provide him with a recorded statement on January 23, 2012. The Special Investigator allegedly attempted

to confirm the scheduled recorded statement date but did not receive any confirmation and Manoo did not give a recorded statement. Due to Manoo's having failed to provide the recorded statement, Mapfre sent a letter to Manoo dated February 3, 2012, requesting that Manoo appear for an EUO.

Looking back in the *Mapfre* record, on January 10, 2012, Manoo received his first treatment from provider Active Care and signed an assignment of benefits document assigning his rights to Active Care. Thereafter, Active Care prepared an NF-3 claim verification form regarding this treatment and dated the form February 7, 2012. The record does not indicate when Mapfre received that NF-3 form.

The Appellate Division, First Department held that Mapfre's request of an EUO of Manoo was not subject to the timing provisions of the no-fault regulations because the first EUO request letter was dated February 3, 2012, four days prior to the date written on the first Active Care NF-3, February 7, 2012. The court stated that "[a]lthough Active Care's NF-3 form is dated February 7, 2012, plaintiff was entitled to request the EUO prior to its receipt thereof." (*Mapfre* 140 AD3d at 469, citing *Steven Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 7 Misc3d 18, 20–21 [App Term, 2d Dept 2004], *affd* 35 AD3d 720 [2d Dept 2006]; *Life Tree Acupuncture P.C. v Republic W. Ins.* Co., 50 Misc3d 132[A]; 2016 NY Slip Op 50023[U] [App Term, 1st Dept 2016]; *Alfa Med. Supplies, Inc. v Praetorian Ins.* Co., 50 Misc3d 126[A]), 2015 NY Slip Op 51847[U] [App Term, 1st Dept 2015].)

Contrary to the relief requested by Plaintiff in the instant case, the three cases cited in the previous *Mapfre* quotation—*Fogel* (the Appellate Term decision, not the Appellate Division, Second Department's decision affirming it), *Life Tree*, and *Alfa Med.*—do not stand for the black-letter rule that an insurer's receipt of any claim form after an EUO has been requested renders 11 NYCRR §§ 65-3.5 (b) and 65-3.6 (b) inapplicable.

The question for the Appellate Term, Second Department in *Fogel* was "whether an insurer has a right to an IME following an oral or written notice of claim and prior to the insurer's receipt of the statutory claim forms [e.g., form NF-2] . . . which . . . triggers the verification process." (7 Misc3d at 20.) The court looked to the Mandatory Personal Injury Protection Endorsement, which it cited as stating "[t]he eligible person shall submit to [a] medical examination . . . *when, and as often as, the Company may reasonably require*." (*Id.*) The court found that "there appears to be no reason to preclude an insurer from requesting an IME prior to its receipt of the statutory claim *form*." (*Id.* [emphasis added].)

This Court notes that the singular here refers to form NF-2 or its equivalent. Because, in *Fogel*, the IME was "reasonably and properly requested prior to [the insurer's] receipt of *any claim form*," the request was not a verification request and fell outside of the timing requirements of the no-fault regulations. (*Id.* at 22 [emphasis added].)

The Appellate Division, Second Department, in its *Fogel* decision affirming the Appellate Term, nevertheless "disagree[d]" with the Appellate Term, holding that "[t]here is no basis for" "a distinction between the contractual remedies depending on whether the failure to

appear for IMEs occurs before submission of the claim form or after its submission. . . . The appearance of the insured for IMEs at any time is a condition precedent to the insurer's liability on the policy." (*Fogel*, 35 AD3d at 722.) *Fogel* is a 2006 decision from the Appellate Division, Second Department that predates all of the Appellate Division, First Department precedent cited above—most notably *Nat. Lia. & Fire Ins. Co.* (2015) and *Kemper* (2017)—enshrining that an insurer must show prima facie that it complied with the procedures and timeframes of the no-fault regulations if an EUO was requested "post-claim."

As such, when the court in *Mapfre* (140 AD3d at 470–471) cites *Fogel* (35 AD3d at 722) for its explanation that "[t]he appearance of the insured for IMEs at any time is a condition precedent to the insurer's liability on the policy" and that "[t]his conclusion accords with the language of the mandatory endorsement and the interpretation given it by the State Insurance Department, which promulgated the regulations" (internal citations omitted), it is only in support of the rule that "an insurer can[] request an EUO *prior to its receipt of a claim form* pursuant to 11 NYCRR 65-1.1" and the terms of the policy's Mandatory Personal Injury Protection Endorsement (*Mapfre*, 140 AD3d at 470).

In *Mapfre*, there was no evidence in the record that Mapfre had received Manoo's NF-2 form. If Mapfre had only received informal notice of Manoo's claim—a call or letter from Manoo's attorney—before it requested that Manoo appear for an EUO, then *Mapfre* would be like *Fogel*. But in *Mapfre*, the court based its holding on that the EUO had been requested before receipt of any claim form from Active Care. The court found this holding acceptable because Active Care's NF-3 was dated four days after the date of the first EUO request letter sent to Active Care. Presumably, the date on the NF-3 was either the same as, or prior to, to the date on which Mapfre received the NF-3.

Ordinarily, the receipt of the claim form from Active Care would have "trigger[ed] the verification process" and rendered any subsequent EUO request post-claim as to Active Care and as to the claimant with respect to Active Care. For example, if Mapfre receives Active Care's NF-3 form on February 7, 2012, receives no other NF-3 forms from Active Care or any other provider as of February 7, 2012, and requests an EUO of Manoo by a letter dated April 1, 2012 (not February 3, 2012, as in *Mapfre*), then, under the court's reasoning in *Mapfre*, that EUO request is subject to the timing requirements of the no-fault regulations, is untimely, and cannot be used to form the basis of an insurer's no-coverage argument. If Mapfre requests an EUO of Active Care also on April 1, 2012, that EUO request would also have been subject to those same timing requirements and would have been untimely under the same reasoning.

Continuing with this example, if Mapfre then receives a second NF-3 form from Active Care on April 5, 2012, the April 1, 2012 EUO request of Active Care remains post-claim under the *Fogel* reasoning because Mapfre has already received *a claim form* from Active Care. 11 NYCRR § 65-3.5 (b) begins, "[s]ubsequent to the receipt of *one or more* of the completed verification forms." (Emphasis added.) The regulation contemplates the receipt of multiple NF forms (or their equivalents), but is silent as to "from whom" those forms are received. Further, *Mapfre* (140 AD3d at 469) holds that "[t]he notification requirements for verification requests

under 11 NYCRR 65-3.5 and 65-3.6 do not apply to EUOs that are scheduled *prior to the insurance company's receipt of a claim form*" (emphasis added).

In the above example, the April 1, 2012 EUO request of Active Care was not sent prior to Mapfre's *receipt of a claim form* from Active Care, which was the NF-3 form received on February 7, 2012, but was sent nearly two months after receipt of the first claim form from Active Care. As such, the quoted holding in *Mapfre* would not apply, and the receipt of an additional claim after the date of the EUO request does not change this logic and suddenly render the EUO request pre-claim. Accordingly, this Court finds that subsequent claim forms from the same provider do not render the prior EUO request "pre-claim." Only the first form received from a given claimant or provider may be used as a measuring point to determine whether a request was "pre-claim." This accords with the language in *Fogel* referring to "any" form and the language of 11 NYCRR § 65-3.5 (b) referring to "one or more" forms.

None of this is to say that an insurance company is not entitled to an EUO. It only means that the insurance company is required to follow pre-claim or post-claim procedures and, as the case may be, make a timely EUO request.

There is no case this Court could find that stands for the proposition that Plaintiff is making that a post-NF-3 EUO request of a provider can be treated as pre-claim and not subject to the procedures and time frames of the no-fault regulations where an insurer receives an additional NF-3 from that same provider, or any other provider, after the request.

To hold as such would be to say that an insurance company could receive a subsequent claim form from that same provider anytime—days, months, even years—after it requested an untimely, post-claim EUO of that provider which had been subject to the procedures and timing requirements of the no-fault regulations, dub the EUO "pre-claim" under *Mapfre* because the request was technically received "prior to the insurance company's receipt of *a* claim form"—that being the subsequent verification form—and support a no-coverage argument. That is not what "pre-claim" means nor is it what *Mapfre* stands for either on its facts or on the holdings in the cases to which it cites and premises its own holding upon, and the ensuing result would be in derogation of the procedures and timing requirements of the no-fault regulations.

This accords with the facts in *Mapfre*, where Manoo's NF-2 had undoubtedly been received prior to the EUO request—even if the exact date was never established on the record—and a subsequent form, which was the first claim form submitted by provider Active Care, effectively made an untimely EUO request fall outside the procedures and timeframes of the no-fault regulations.

The Appellate Term, First Department's decision in *Alfa Med* followed *Fogel* and similarly pertained to the failure of a claimant, not a provider, to appear for an IME requested by the insurer "prior to its receipt of plaintiff's claim forms." (50 Misc3d at 126(A).) *Life Tree* is a nearly verbatim decision from the same court (50 Misc3d at 132(A).) As such, there is nothing in the cases *Mapfre* cited to regarding a plaintiff insurer's entitlement to request an EUO to suggest a rule as broad as that sought by Plaintiff in the instant case.

Upon review of the papers and the relevant law and facts it is the opinion of this Court that *Mapfre* stands for the black-letter rule that the notification requirements for verification requests under 11 NYCRR §§ 65-3.5 and 65-3.6 do not apply to EUOs that are requested: (1) before the insurer's receipt of any claim form (as in *Fogel*, where the insurer had received no claim forms at all before it scheduled the IME); or (2) before the insurer's receipt of a provider's first claim form, if the EUO is sought either of an individual claimant who has assigned his or her rights to that provider or of that provider. These would be "Pre-Claim" requests.

The notification requirements for verification requests under 11 NYCRR §§ 65-3.5 and 65-3.6 do apply to EUOs that are requested: (1) after the insurer's receipt of a claimant's first prescribed verification form or the equivalent, if the EUO is sought of the submitting claimant and if the insurer has received no other claim forms; or (2) after the insurer's receipt of a given provider's first submitted NF-3 form or its equivalent, if the EUO is sought either of that provider or of an individual claimant who has assigned his or her rights to that provider and the insurer does not subsequently receive any other related provider-assignee's first submitted NF-3 form or its equivalent. These would be "Post-Claim" requests.

In the instant case, the claimants have attended their EUOs and it is the providers who have allegedly breached a condition precedent by failing to appear for EUOs. The only specific claims mentioned in the papers and allegedly submitted by Provider-Defendants are:

(1) $878.67 by MRI, for date of service August 15, 2016, which was received on August 29, 2016
(2) $2,205.44 by Pharmacy, for date of service September 23, 2016, which was received on October 11, 2016; and

At the November 29, 2017 oral argument, the Court asked counsel for Plaintiff, "[h]ad there been any other bills from [Pharmacy]?" Counsel replied, "[r]espectfully, Your Honor, that is not a relevant point." The Court replied, "[w]ell, we may disagree with you. But were there other bills from [Pharmacy] that came previous[ly]?" Counsel replied, "[y]es, there likely were." (Tr at 5, lines 10–16.)

On or around August 4, 2016, Plaintiff allegedly sent MRI a notice by mail requesting that MRI appear for an EUO on or before August 18, 2016. On or around August 24, 2016, after MRI allegedly did not appear for the August 18, 2016 EUO, Plaintiff allegedly sent MRI a follow-up letter affording MRI one final opportunity to appear for its EUO on September 9, 2016. MRI allegedly did not appear for the September 9, 2016 EUO.

On or around August 11, 2016, Plaintiff allegedly sent Pharmacy a notice by mail requesting that Pharmacy appear for an EUO on August 26, 2016. On or around September 2, 2016, after Pharmacy allegedly did not appear for the August 26, 2016 EUO, Plaintiff allegedly sent Pharmacy a follow-up letter affording Pharmacy one final opportunity to appear for its EUO on September 19, 2016. Pharmacy allegedly did not appear for the September 19, 2016 EUO.

The Court finds that Ace has made no argument as to Chiropractic and Orthopedics. With respect to MRI and Pharmacy, the Court finds that Ace has failed to show that it requested their EUOs prior to its receipt of either of their first claim forms. Based upon the above analysis, without such a showing, the Court cannot determine whether Ace's EUO requests of MRI and Pharmacy were Pre-Claim or Post-Claim. Consequently, the Court cannot determine on the proof submitted whether the timeliness requirements apply. (*See Kemper*, 147 AD3d at 438.) As such, the Court cannot determine on the proof submitted in this case whether MRI and Pharmacy's failure to attend EUOs was a breach of a condition precedent that vitiated the policy ab initio.

Ace's "Founded Belief"

Ace alleges in its first and fourth causes of action, respectively, that Ace "maintains a founded belief that the alleged injuries of the Claimant[-Defendants] and any subsequent No-Fault treatment submitted by the [Provider-Defendants] were not causally related to an insured incident" (Complaint ¶ 30) and "that the collision was an intentional and staged event in furtherance of a scheme to defraud A[ce] (*id.* ¶ 41.) This Court properly analyzed these causes of action in its prior order and found that Ace "failed to show prima facie either that the Collision was staged or that there exists a valid foundation upon which to form a belief that either the claims or the billing were not causally related to the Collision." (November 2, 2017 Decision and Order, at 8–9.)

Contrary to Ace's assertions in the instant motion, the Court did not deploy a heightened "fraud" standard in making this determination, and there is nothing in its prior decision to suggest this was the case. Rather, the Court carefully considered the EUO testimony of the Claimant-Defendants and found that taken together with the affidavit of Maureen Stromberg the admissible evidence does not establish Ace's entitlement to a default judgment on either the first or the fourth causes of action.

Claimant-Defendants' Alleged Failure to Subscribe their Respective EUO Transcripts

Williams allegedly submitted to Plaintiff an application for motor vehicle no-fault benefits ("NF-2") dated June 16, 2016. The document as annexed to the moving papers is stamped in the header with "06/16/2016 THU 12:37 FAX." Greaves allegedly submitted an NF-2 dated June 24, 2016. Each page is stamped on the bottom-left corner with "RECD 6 29 16 NY CLMS." Plaintiff does not indicate in its motion submission when it received Claimant-Defendants' NF-2s. On or around July 15, 2016, Plaintiff allegedly sent Claimant-Defendants each a notice by regular mail which stated that Plaintiff required they each appear for an EUO on July 29, 2016. Both Claimant-Defendants appeared for their EUOs on July 29, 2016.

Ace has not shown that it requested Williams' EUO in accordance with the procedures and time frames set forth in the no-fault implementing regulations to the extent applicable. (*See* 11 NYCRR § 65-3.5 [b].) Over 15 business days had passed before Plaintiff allegedly sent him an EUO scheduling letter. As such, there is no showing by Ace pursuant to 11 NYCRR § 65-1.1 that Williams was "required to submit to examinations under oath by any person named by [Ace] and subscribe the same."

As to Greaves, it does appear upon further review of Greaves' NF-2 as annexed to the original motion papers that a stamp indicates its receipt by a claims department. Further, even though Ace does not indicate in its motion submission when it received the NF-2s, based upon the date of Greaves' NF-2 typed in at the top of the form and written in on the signature line, June 24, 2016, only 14 business days could have passed before Plaintiff allegedly sent Greaves an EUO scheduling letter.

As to both Claimant-Defendants, Ace has not cited to any authority or made any arguments in its December 1, 2017 affirmation in support of the instant motion regarding the transcription issue. Further, the lone citation in the November 13, 2017 affirmation in support of this Court's signing the order to show cause is *DTG Operations, Inc. v Park Radiology, P.C.* (2011 NY Slip Op 32467[U] [Sup Ct, NY County, Sept. 6, 2011, Gische, J.]). In *DTG*, the motion court did state that claimants "failed to sign and notarize transcripts of their EUO's [sic], as required" and that such was "required under their insurance contract." But, also in *DTG*, the motion court had held that the same claimants had "appeared for the EUOs[] but provided suspect and conflicting testimony relating to the circumstances surrounding the accident."

First, there is no statement from the motion court that a showing of a claimant's failure to subscribe an EUO transcript, standing alone, suffices for a court to find a breach of a condition precedent to coverage that violates the policy ab initio. Second, movant has failed to cite any appellate court authority that stands for this proposition. Third, this Court can find no such authority.

The closest authority found by this Court and in its November 2, 2017 order was *Pogo Holding Corp. v NY Prop. Ins. Underwriting Assn.* (73 AD2d 605 [2d Dept 1979].) The *Pogo* Court cited the fire insurance policy, which stated that

> "the insured shall, 'as often as reasonably required . . . submit to examinations under oath by any person named by this Company, and subscribed the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other voucher[s] . . . at such reasonable time and place as may be designated by this Company or its representative.'"

(*Id.* at 605.) But in *Pogo*, while the plaintiff did not subscribe an EUO transcript in an action involving fire insurance, the same plaintiff failed to produce the plaintiff's president and 50% stockholder for an examination under oath. The *Pogo* Court held that "[t]he plaintiff did not comply with either request. The failure to comply with the quoted provision of the policies is a material breach." (*Id.* at 606.) The *Pogo* Court further held that "[n]evertheless, in the perspective of this case, we are reluctant to exact the *extreme penalty* of the dismissal of the action, without affording the plaintiff the last opportunity to perform in accordance with the policies' provisions." (*Id.* [emphasis added].)

In the instant action, Claimant-Defendants cooperated fully with Ace in that both attended their respective EUOs on the first date set down by the insurance company and gave sworn testimony. Further, there is no indication that Claimant-Defendants' alleged failure to

subscribe their EUO transcripts was willful. There is no appellate authority found by this Court indicating that failure to subscribe an EUO transcript, standing alone, is a breach of a condition precedent to coverage that violates the policy ab initio. At worst, a claimant's failure to subscribe the transcript of sworn EUO testimony is an irregularity that could be corrected later. As such, the Court finds that the "extreme penalty" of a default judgment against otherwise cooperating Claimant-Defendants predicated solely upon a failure to subscribe transcripts of sworn EUO testimony is not a breach of a condition precedent to coverage that violates the policy ab initio.

CONCLUSION

Accordingly, it is

ORDERED that Motion brought by order to show cause by Plaintiff Ace American Insurance Company pursuant to CPLR 2221 (d) for an order granting Ace leave to reargue the Court's November 2, 2017 decision and order denying Plaintiff's motion seq. 001 pursuant to CPLR 3215 seeking an order directing the entry of a default judgment in favor of Ace and against medical provider defendants Dr. Watson Chiropractic, P.C., Good Care Pharmacy, Inc., Stand-Up MRI of Lynbrook, P.C., Katzman Orthopedics, P.C. and individual claimant-defendants Shakay Greaves and Jonathan Williams is granted and, upon reargument, the motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 9, 2018
New York, New York

HON. ROBERT D. KALISH, J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE