SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 154394/2017

UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

AUTO RX, CITIMEDICAL I, PLLC, ECO-LIFE ACUPUNCTURE, PC, ELITE MEDICAL SUPPLY, PHARMACENA, LLC, PSYCHOLOGY HELP, PC, ROB ATTANASIO, DC, SOLOMON HALIOUA, MD, SOUND CHIROPRACTIC & PHYSICAL THERAPY, PLLC, STAND-UP MRI OF QUEENS, LATRICE DASH, and FIONA JOHNSON,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 45, 47

were read on this motion to/for DEFAULT JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this action seeking a declaratory judgment, plaintiff Unitrin Advantage Insurance Company moves, pursuant to CPLR 3215, for a default judgment against defendants Auto Rx; Citimedical I, PLLC; Eco-Life Acupuncture, PC; Elite Medical Supply; Pharmacena, LLC;[1] Psychology Help, PC; Rob Attanasio, DC; Solomon Halioua, MD; Sound Chiropractic & Physical Therapy, PLLC; Stand-Up MRI of Queens (hereinafter collectively "the medical provider defendants"); Latrice Dash; and Fiona Johnson[2] (hereinafter collectively "defendants") on its first, second and third causes of action. After a review of plaintiff's motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is **granted**.

[1] After this motion was filed, plaintiff discontinued this action as against Elite Medical Supply (Docs. 39 and 40), Pharmacena, LLC (Doc. 41), and Citimedical I (Docs. 45 and 46).

[2] Certain exhibits refer to this defendant as "Fionia."

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a motor vehicle collision ("the collision") which occurred on January 30, 2016, in which defendants Fiona Johnson and Latrice Dash (collectively "claimants") were allegedly injured. Doc. 27, Winant Aff., at par. 4. The vehicle in which Johnson was driver and Dash was a passenger was registered to Johnson and insured by plaintiff under policy number WY821756 ("the policy"). Id., at par. 5.[3] The police report reflected that neither of the vehicles involved in the collision was towed and that claimants both refused medical attention at the scene. Doc. 29.

Despite the foregoing, claimants sought medical treatment by the medical provider defendants for the injuries they allegedly sustained in the collision. Claimants assigned their rights to collect no-fault benefits to the medical provider defendants, who in turn submitted claims to plaintiff seeking to recover no-fault benefits[4] as assignees of the claimants. Doc. 27, Winant Aff., at par. 8; Doc. 32. Plaintiff assigned claim number C007942NY16 to the no-fault claims arising from the collision. Id., at pars. 4-5.

Claimants did not report the collision promptly and plaintiff learned of the same from a medical provider. Id., at par. 10. Additionally, the policy was cancelled on February 2, 2016, just

[3] The "New York Mandatory Personal Injury Protection Endorsement" of the policy provides no-fault benefits pursuant to certain terms and conditions. The "conditions" provision of the endorsement required full compliance with the terms of the coverage. This included that, "[u]pon request by [plaintiff], the eligible injured person or that person's assignee or representative shall . . . "as may reasonably be required submit to examinations under oath by any person named by [plaintiff]" and also "provide any other pertinent information that may assist [plaintiff] in determining the amount due and payable." Doc. 27, Winant Aff., at par. 6.

[4] As of the time this motion was filed, the medical provider defendants sought to collect in excess of $184,000. Doc. 27, Winant Aff., at par. 7.

three days after the collision. Id., at par. 10. Further, claimants underwent similar treatment by the same medical providers. Id., at par. 10.

Given the foregoing factors, as well as the fact that claimants refused medical treatment at the scene of the collision, plaintiff demanded that Johnson appear for an examination under oath ("EUO") and that Dash appear for an independent medical examination ("IME") by Dr. Jeffrey Ritholtz, a chiropractor. Id., at pars. 12-14. However, claimants failed to respond to plaintiff's notices for these examinations. Id., at pars. 13-14.

On March 11, 2016, plaintiff, through Alternative Consulting Examinations ("ACE"), requested that Dash appear for a chiropractic IME by Dr. Ritholtz on March 30, 2016. Doc. 27, Wolkow Aff., at par. 14; Doc. 31. When Dash failed to appear, the examination was rescheduled by notice dated March 31, 2016, which directed Dash to appear on April 13, 2016. Doc. 27, Wolkow Aff., at par. 14; Doc. 27, Chambers Aff., at par. 6; Doc. 31. However, Dash failed to appear for the IME on April 13, 2016. Doc. 27, Wolkow Aff., at par. 14; Doc. 27, Distler Aff., at par. 6.[5]

On April 18, 2016, plaintiff requested that Johnson appear for an EUO on May 3, 2016. Doc. 27, Wolkow Aff., at par. 12; Doc. 30. Johnson failed to appear on May 3 and, on May 6, 2016, plaintiff requested that Johnson appear for an EUO on May 23, 2016. Doc. 27, Wolkow Aff., at par. 12; Doc. 30. Johnson failed to appear once again on May 23, 2016. Doc. 27, Winant Aff., at par. 13; Doc. 27, Wolkow Aff., at pars. 11-12; Doc. 47.

[5] In an affidavit in support of the motion, Dr. Ritholtz states that, although Dash appeared at his office on April 13, 2016, she arrived one hour early and, when advised that she would have to wait, she left the office and did not return.

On May 11, 2017, plaintiff commenced the captioned declaratory judgment action by filing a summons and complaint. Doc. 28. As a first cause of action, plaintiff alleged that none of the defendants were entitled to collect no-fault benefits under the policy because it had a "founded belief" that claimants' injuries and the treatment rendered by the medical provider defendants was "not causally related to an insured incident." Doc. 28, at pars. 29-30.

In its second cause of action, asserted against all defendants except Johnson, plaintiff alleged that Dash breached a condition precedent under the no-fault regulations by twice failing to appear for an IME and, thus, she and her assignees, the medical provider defendants, were not entitled to collect no-fault benefits in connection with the collision. Doc. 28, at pars. 32-34.

As a third cause of action against all defendants except Dash, plaintiff alleged that Johnson breached a condition precedent under the no-fault regulations by twice failing to appear for an EUO and, thus, she and her assignees, the medical provider defendants, were not entitled to collect no-fault benefits in connection with the collision. Doc. 28, at pars. 36-38.

Plaintiff's fourth cause of action alleged that defendants Citimedical I, PLLC, Eco-Life Acupuncture, PC, Psychology Help, PC, Sound Chiropractic & Physical Therapy, PLLC, and Stand-Up MRI of Queens had no standing to recover no-fault benefits in connection with the collision. Doc. 28, at pars. 40-41. As a fifth cause of action against all defendants, plaintiff sought a permanent stay of all arbitrations, lawsuits, and/or claims by defendants relating to defendants' claims arising from the collision. Doc. 28, at pars. 43-44.

After filing the summons and complaint, plaintiff served defendants with process. Docs. 2-11, 13-24, 33. However, none of the defendants have answered or otherwise appeared in this matter. Doc. 27, Wolkow Aff., at par. 17.[6]

On February 22, 2018, plaintiff filed the instant motion seeking a default against defendants pursuant to CPLR 3215 on its first three causes of action. Docs. 26-39, 45, 47. In support of the motion, plaintiff submits, inter alia, the summons and complaint, affidavits of service, the police report, medical claim forms, documentation regarding requests for Johnson's EUO and Dash's IME and their respective failures to appear for the same, proof of additional mailing of the summons and complaint, and proof that the individually named defendants are not in the military. The motion has not been opposed.

LEGAL CONCLUSIONS:

Pursuant to CPLR 3215 (f), a plaintiff moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear. *See 154 E. 62 LLC v 156 E 62nd St. LLC*, 159 AD3d 498 (1st Dept 2018); *Bank of Am. N.A. v Agarwal*, 150 AD3d 651, 652 (2d Dept 2017). Proof of the facts constituting the claim may be provided by plaintiff's affidavit or a verified complaint. *See* CPLR 3215(f). A default in answering the complaint is deemed to be an admission

[6] Although defendant Citimedical PLLC filed an answer on March 13, 2018, after this motion was filed, the claims against that defendant have, as noted above, been discontinued. Docs. 42, 45-46.

of all factual statements contained in the complaint as well as all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, the affidavits of service submitted by plaintiff establish that defendants were properly served with the summons and complaint. The affirmation of plaintiff's attorney in support of the motion establishes that the defendants remaining in this action have failed to answer or otherwise appear in this matter. Thus, the only remaining question is whether plaintiff established the facts constituting the claim. For the reasons set forth below, this Court answers that question in the affirmative.

Founded Belief

An insurer may disclaim coverage based upon "the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Grp. of Ins. Co.*, 90 NY2d 195, 199 (1997). In meeting this burden, a no-fault insurer is "not required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence." *V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 25 Misc. 3d 39, 41 (App Term, 2d Dept 2009) (internal citation omitted). Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief. Circumstantial evidence may be used to prove such facts if a party's conduct "may be 'reasonably inferred' based upon 'logical inferences to be drawn from the evidence.'" *Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 (2d Dept 2005) (citation omitted).

In support of the motion, plaintiff submits, inter alia, the affidavit of Denise Winant of Merastar Insurance Company, which handles claims for plaintiff. Doc. 27, Winant Aff., at par. 1. Winant states in her affidavit that, according to the police report, Johnson and Dash did not report any injuries at the scene of the collision; claimants did not promptly report the collision and that plaintiff learned of the same from a medical provider; that the policy was cancelled on February 2, 2016, just three days after the collision; and that Dash and Johnson underwent essentially the same treatment by the same medical providers. Doc. 27, Winant Aff., at par. 10. Winant states that "[t]hese factors raised a strong probability" that injuries claimed by Johnson and Dash were "not related to the collision" on January 30, 2016. Doc. 27, Winant Aff., at par. 11.

Winant's affidavit, as well as the police report and medical claim forms submitted by plaintiff, is sufficient to create a founded belief that the claims were fraudulent, and that, as such, Johnson and Dash are not entitled to no-fault benefits.[7] As assignees of the allegedly fraudulent claims, the defaulting medical provider defendants are likewise not entitled to receive any payments for services allegedly provided as the result of the collision. *See generally, Long Is. Radiology v Allstate Ins. Co.*, 36 AD3d 763, 765 (2d Dept 2007). Accordingly, plaintiff is entitled to a default based on the first cause of action seeking a judgment declaring that it is not obligated to provide coverage under the policy.

[7] This Court further notes that a "Denial of Claim Form", dated May 26, 2016 and issued to Johnson by Winant states, inter alia, that "[t]he claimed loss is not proven. This has been referred to the NYS Insurance Fraud Bureau, Log #2016-L-008512, and the National Insurance Crime Bureau, NICB Referral #R1613300201." Doc. 32.

Failure to Appear for EUO and IMEs

Plaintiff is also entitled to a declaration that it is not obligated to provide coverage based on the failures by Johnson and Dash to appear for an EUO and IME, respectively.

An insurer typically has 15 business days from its receipt of a medical bill to request an EUO. 11 NYCRR 65-3.5(b). Here, plaintiff received its first bill in connection with Johnson's treatment on May 2, 2016. Doc. 32. However, it first requested that Johnson appear for an EUO by correspondence dated April 18, 2016, prior to receiving the first bill. Doc. 30. "The 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." *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 469 (1st Dept 2016) (citations omitted). However, once Johnson failed to appear for her EUO on May 3, 2016, by which time plaintiff had received a bill, plaintiff "was required to comply with the follow-up provisions of 11 NYCRR 65-3.6(b)." *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d at 470. Plaintiff fulfilled this obligation by rescheduling Johnson's EUO by correspondence dated May 6, 2016 (Doc. 30), within 10 days of her failure to appear. *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d at 470.

Similarly, plaintiff first requested that Dash appear for an IME by notice dated March 11, 2016. Doc. 30. When Dash failed to appear on March 30, 2016, she was sent a notice, dated March 31, 2016, rescheduling the IME for April 13, 2016. Since the notices scheduling the IMEs were sent to Dash before May 2, 2016, when plaintiff first received a bill relating to her treatment (Doc. 32), plaintiff was not obligated to comply with any of the requirements set forth in 11 NYCRR 65-3.5 or 11 NYCRR 65-3.6. *See Hereford Ins. Co. v Lida's Med. Supply, Inc.*, 161 AD3d 442, 443 (1st Dept 2018).

Plaintiff is thus entitled to a declaratory judgment based on its second and third causes of action as well.

Therefore, in light of the foregoing, it is hereby:

ORDERED the motion by plaintiff Unitrin Advantage Insurance Company seeking a default judgment against defendants Auto Rx, Eco-Life Acupuncture, PC, Psychology Help, PC, Rob Attanasio, DC, Solomon Halioua, MD, Sound Chiropractic & Physical Therapy, PLLC, Stand-Up MRI of Queens, Latrice Dash, and Fiona Johnson on its first, second, and third causes of action is granted; and it is further,

ORDERED, DECLARED AND ADJUDGED that plaintiff Unitrin Advantage Insurance Company is not obligated to provide No-Fault coverage to defendants Auto Rx, Eco-Life Acupuncture, PC, Psychology Help, PC, Rob Attanasio, DC, Solomon Halioua, MD, Sound Chiropractic & Physical Therapy, PLLC, Stand-Up MRI of Queens, Latrice Dash, and Fiona Johnson for the No-Fault claims submitted to Country-Wide Insurance Company pursuant to policy number WY821756 and claim number C007942NY16; and it is further,

ORDERED that plaintiff Unitrin Advantage Insurance Company is to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision, order, and judgment of this Court.

9/17/2018
DATE

KATHRYN E. FREED, J.S.C.

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