SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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IMPERIUM INSURANCE COMPANY f/k/a DELOS INSURANCE COMPANY,

Plaintiff

- against -

Index No. 155090/2014

DECISION AND ORDER

JAIME G. GUTIERREZ, M.D., COMPAS MEDICAL, P.C., T&J CHIROPRACTIC, P.C. a/k/a T and J CHIROPRACTIC, P.C., CHARLES DENG ACUPUNCTURE, P.C., NEW WAY MEDICAL SUPPLY CORP., VLADIMIR SHUR, M.D., METROPOLITAN DIAGNOSTIC MEDICAL CARE, P.C., ALLEVIATION MEDICAL SERVICES, P.C., DELTA DIAGNOSTIC RADIOLOGY, P.C., and WADE JENKINS,

Defendants

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APPEARANCES:

For Plaintiff
Vitaly Vilenchik Esq.
Rubin, Fiorella & Friedman LLP
630 3rd Avenue, New York, NY 10017

For Defendants Compas Medical, P.C., Charles Deng Acupuncture, P.C., New Way Medical Supply Corp., Vladimir Shur, M.D., and Delta Diagnostic Radiology, P.C.
Richard Rozhik Esq. and Oleg Rybak Esq.
Rybak Firm, PLLC
1810 Voorhies Avenue, Brooklyn, NY 11235

LUCY BILLINGS, J.S.C.:

I. THE PARTIES' POSITIONS

Plaintiff seeks a declaratory judgment, C.P.L.R. § 3001, that plaintiff owes no duty to compensate defendants pursuant to New York Insurance Law § 5103 for medical expenses incurred from a motor vehicle collision March 22, 2011, in which defendant

Jenkins was injured and which involved a motor vehicle insured by plaintiff. Plaintiff moves for a default judgment against defendants Compas Medical, P.C., Charles Deng Acupuncture, P.C., New Way Medical Supply Corp., Vladimir Shur, M.D., and Delta Diagnostic Radiology, P.C. (defaulting defendants), C.P.L.R. § 3215, based on the order dated April 18, 2018 (Mendez, J.), striking the defaulting defendants' answer. For the reasons explained below, the court denies plaintiff's motion.

Plaintiff contends that the medical treatments for which the defaulting defendants billed were not caused by the collision or were unnecessary. To verify whether or not the treatments were caused by the collision and necessary, plaintiff requested defendant Jenkins to appear for an Examination Under Oath (EUO). Plaintiff maintains that he failed to appear after two requests and thus breached a condition of plaintiff's insurance coverage, eliminating coverage for any expenses claimed from the collision March 22, 2011. The defaulting defendants maintain that plaintiff fails to demonstrate its entitlement to declaratory relief eliminating that coverage because its follow-up request for an EUO of Jenkins, more than 10 days after his nonappearance for the EUO when first requested, was untimely. 11 N.Y.C.R.R. § 65-3.6(b). See Hertz Vehs. LLC v. Significant Care, PT, P.C., 157 A.D.3d 600, 601 (1st Dep't 2018); Mapfre Ins. Co. of N.Y. v. Manoo, 140 A.D.3d 468, 470 (1st Dep't 2016); Encompass Ins. Co. v. Rockaway Family Med. Care, P.C., 137 A.D.3d 582, 582 (1st Dep't 2016).

II. APPLICABLE STANDARDS

To obtain a default judgment, plaintiff must present admissible evidence of the facts constituting plaintiff's claim. C.P.L.R. § 3215(f); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 202 (2013); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517, 517 (1st Dep't 2010); Beltre v. Babu, 32 A.D.3d 722, 723 (1st Dep't 2006). See Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007). The facts necessary to plaintiff's claim include a showing that the EUO requests were timely. Hertz Vehicles, LLC v. Best Touch PT, P.C., 162 A.D.3d 617, 618 (1st Dep't 2018). See Kemper Independence Ins. Co. v. Adelaida Physical Therapy, P.C., 147 A.D.3d 437, 438 (1st Dep't 2017); National Liab. & Fire Ins. Co. v. Tam Med. Supply Corp., 131 A.D.3d 851, 851 (1st Dep't 2015).

The defaulting defendants urge that, since the 10 days for follow-up EUO requests do not run from when defendants submitted their claims, this time limit applies regardless when the claim was submitted, even if it was after the EUO requests. None of the time limits in 11 N.Y.C.R.R. §§ 65-3.5(b) and 65-3.6(b) applies, however, when the requests for verification, such as an EUO, preceded the insurer's receipt of medical treatment providers' claims. Hereford Ins. Co. v. Lida's Med. Supply, Inc., 161 A.D.3d 442, 443 (1st Dep't 2018); Mapfre Ins. Co. of

N.Y. v. Manoo, 140 A.D.3d at 469. Moreover, the purpose of the regulations is to deny claims promptly, see Aetna Health Plans v. Hanover Ins. Co., 27 N.Y.3d 577, 582 (2016); Raffellini v. State Farm Mut. Auto. Ins. Co., 9 N.Y.3d 196, 201 (2007), a purpose that is inapplicable if no claim was pending.

III. PLAINTIFF'S FAILURE TO MEET ITS BURDEN

Regarding Jenkins's nonappearance at the scheduled EUOs, the affirmation by Harlan Schreiber, plaintiff's attorney, offered to establish timely notice July 12, 2011, to Jenkins of the first scheduled EUO and his nonappearance for that EUO, is not signed as required. C.P.L.R. § 2106(a). Plaintiff's failure to present admissible evidence of this element of its claim against the defaulting defendants is grounds alone to deny its motion for a default judgment against them. C.P.L.R. § 3215(f); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d at 203; Giordano v. Berisha, 45 A.D.3d 416, 417 (1st Dep't 2007); Feffer v. Malpeso, 210 A.D.2d 60, 61 (1st Dep't 1994). Were the court to disregard the omission of attorney Schreiber's signature or permit this omission to be corrected, however, C.P.L.R. § 2001, the absence of admissible evidence permitting a determination of the timeliness of plaintiff's EUO requests in relation to the defaulting defendants' claims requires denial of its motion for a default judgment in any event. 11 N.Y.C.R.R. § 65-3.5(b); Hertz Vehicles, LLC v. Best Touch PT, P.C., 162 A.D.3d at 618. See Kemper Independence Ins. Co. v. Adelaida Physical Therapy, P.C., 147 A.D.3d at 438; National Liab. & Fire Ins. Co. v. Tam Med.

Supply Corp., 131 A.D.3d at 851.

In sum, plaintiff fails to show that its requests for an EUO preceded its receipt of the defaulting defendants' claims. Plaintiff presents no evidence of their actual claims, but only plaintiff's denial dated June 5, 2012, of defendant New Way Medical Supply's claim. Plaintiff's witness, its claims examiner Shayla Cohen, nowhere lays a foundation even for the denial's admissibility, as a business record or otherwise. E.g., C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); Oldham v. City of New York, 155 A.D.3d 477, 478 (1st Dep't 2017); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); O'Connor v. Restani Constr. Corp., 137 A.D.3d 672, 673 (1st Dep't 2016).

Cohen does attest that plaintiff received New Way Medical Supply's claim June 5, 2012, but admits that this date of receipt is based on her review of plaintiff's computer system and review of the denial, both of which she claims record the receipt date as June 5, 2012. The denial bears but one date, June 5, 2012, denominated the "Process Date." No witness explains whether "Process Date" refers to the date when plaintiff received the claim or the date when plaintiff denied the claim, but, even if plaintiff did both on the same day, or the reference is to the denial in any event, this date is inadmissible hearsay from a computer record of the claim's receipt or from the claim itself. No witness offers any explanation for the failure to present either of these documents, Schozer v. William Penn Life Ins. Co.

of N.Y., 84 N.Y.2d 639, 643-44 (1994); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014), or at least a copy. C.P.L.R. § 4539(a); Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 122 A.D.3d 481, 482 (1st Dep't 2014). Cohen's recitation of their contents is not an acceptable substitute for the computer record or the claim itself, People v. Joseph, 86 N.Y.2d 565, 570 (1995); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d at 438, and, as inadmissible hearsay, may not support a default judgment. See BP A.C. Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014); Ainetchi v. 500 W. End LLC, 51 A.D.3d 513, 515 (1st Dep't 2008).

Aside from the inadmissible evidence regarding New Way Medical Supply's claim discussed above, plaintiff's claims examiner attests merely that plaintiff received claims after the collision, without further specification that they were after the EUO requests. Plaintiff presents no evidence of the other defaulting defendants' claims or plaintiff's denials of their claims. Plaintiff thus fails to show that the time limits do not apply to any of the defaulting defendants' claims. Hertz Vehicles, LLC v. Best Touch PT, P.C., 162 A.D.3d at 618.

IV. DISPOSITION

Consequently, the court denies plaintiff's motion for a default judgment. C.P.L.R. §§ 3001, 3215; 11 N.Y.C.R.R. § 65-3.6(b). The court also denies plaintiff's request for a stay of arbitrations and other court actions relating to that collision,

since the denial of the declaratory judgment sought removes plaintiff's basis for the stay. Even had the court granted the declaratory judgment, plaintiff fails to show that it timely requested a stay of any arbitration, C.P.L.R. § 7503(c), or any basis to stay another court action. OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co., 96 A.D.3d 541, 541 (1st Dep't 2012); Asher v. Abbott Labs., 307 A.D.2d 211, 212 (1st Dep't 2003). See Rodriguez v. Dormitory Auth. of the State of N.Y., 104 A.D.3d 529, 530-31 (1st Dep't 2013); Ruiz v. RHQ Assoc., LLC, 92 A.D.3d 410, 410 (1st Dep't 2012); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609, 609 (1st Dep't 2011); Cardenas v. One State St., LLC, 68 A.D.3d 436, 438 (1st Dep't 2009).

DATED: October 4, 2018

LUCY BILLINGS, J.S.C.

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J.S.C.