SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON **PART** IAS MOTION 42EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

MYA VAZQUEZ, SUCCESS REHAB PT P.C.,METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, WESTCHESTER RADIOLOGY & IMAGING, P.C.,GARA MEDICAL CARE, P.C.,MANHATTAN BEACH PHARMACY, INC, HAMZA PHYSICAL THERAPY PLLC,LIDA'S MEDICAL SUPPLY INC.,DOWNSTATE CHIROPRACTIC, P.C.,URGENT CHIROPRACTIC CARE, P.C.,THE GREENWELL ACUPUNCTURE, P.C.,PARKSIDE CHIROPRACTIC, P.C.

Defendant.

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INDEX NO. 651117/2018

MOTION DATE 08/18/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

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

In this action, the plaintiff moves pursuant to CPLR 3212 against answering defendants Success Rehab PT, P.C., Downstate Chiropractic P.C., Urgent Chiropractic Care, P.C. and Parkside Chiropractic, P.C. (the health-care defendants) seeking a declaration that it is not obligated to pay no-fault benefits to the health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on January 13, 2017 on the grounds that eligible injury party defendant failed to appear for duly scheduled Examinations Under Oath (EUOs), and for the dismissal of all counter-claims made against it. The plaintiff's motion for summary judgment is granted in part.

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that she was injured in a motor vehicle accident on January 13, 2017, and that she thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment under claim number 000323786-002,

as assignees of the individual defendant, for no-fault benefits under insurance policy number RT7101088-16. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff started to receive claims for the individual defendant's care on or about March 15, 2017 and continued to receive claims through April 12, 2017. The plaintiff mailed its first notice for an EUO to be held on May 1, 2017 to the individual defendant on April 12, 2017. The individual defendant did not attend either the first or second rescheduled EUO and denied the claims on May 24, 2017. The plaintiff now seeks summary judgment stating that it is not required to pay the no-fault benefits as the individual defendant's coverage is vitiated.

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

The plaintiff, in support of its motion, submits, *inter alia*, the affidavit of Jessica Mena-Sibrian, the no-fault litigation and arbitration supervisor for the plaintiff, detailing the plaintiff's request for EUO based upon discrepancies between the minor property damage to the vehicles associated with the accident and the medical treatment being provided, the applicable NF-3 forms submitted by the health-care defendants, the first and second letters scheduling the EUOs and the statements on the record made after each EUO non-appearance, and the denial of claims forms. The submissions establish that the initial notice for the EUO was timely mailed to the individual defendant within business 15 days of the plaintiff's receipt of the NF-3 forms received on or after March 22, 2017, as required by 11 NYCRR 65-3.5(b). As such, of the fourteen claims disputed by the plaintiff, seven are beyond the 15-day timeframe.

An insurer has a 30 calendar day period in which it may deny a claim (see NY Ins. Law 5106; 11 NYCRR 65-3.8[j]), failure to pay benefits within the 30-day requirement or seek to extend the time by requesting verification in the prescribed forms, precludes the insurance

company's ability to deny the claim. See Presbyterian Hosp. in City of New York v Maryland Cas. Co., 226 AD2d 260 (1st Dept. 1996). Moreover, any failure by an insurer to abide by the 15-day requirement of 11 NYCRR 65-3.5(b) shall have its 30-day window reduced to the extent of the deviation (see 11 NYCRR 65-3.8[i]; Nyack Hospital v General Motors Acceptance Corp., 8 NY3d 294 [2007]). Upon the proper and timely request for an EUO, the 30-day period is extended while verification is provided. Presbyterian Hosp. in City of New York v Maryland Cas. Co., 226 AD2d 260 (1st Dept. 1996). As the first EUO request was sent on April 12, 2017, the 30-day calendar period bars any claims prior to March 13, 2017. As the 15-day requirement under 11 NYCRR 65-3.5(b) was not met for the seven of the claims, the amount of time that the plaintiff had to deny them is reduced accordingly, and of the seven claims, the reduction in the 30-day calendar limit bars recovery for all of the claims received before March 20, 2017. Therefore, while the plaintiff has not met its burden establishing an absence of a triable issue of fact as to all of the disputed claims, the plaintiff has established its prima facie burden demonstrating that there is no issue of triable fact with regard to its denial and nonpayment of any claims received on or after March 20, 2017.

In response, the defendants argue that the plaintiff fails to demonstrate that the EUOs were timely scheduled, as, although the letters were dated April 12, 2017, there is no evidence supporting that they were actually sent that day. Moreover, the defendants argue that the transcripts supporting Vazquez' failure to appear for the two EUOs are insufficient, as they are unsworn. However, defendants fail to raise a triable issue of fact.

Where proof of an office practice and procedure followed by insurers in the regular course of their business shows that mailings are duly address and mailed, a presumption arises that the insureds receive the notice. See Nassau Ins. Co. v Murray, 46 NY2d 828 (1978). To rebut such a presumption, there must be a showing that the routine office practice was not followed or was so careless that it would be unreasonable to assume that a notice is mailed. Id. Here, the affidavit of Annie Persaud, the EUO clerk for the plaintiff, establishes an office practice and procedure followed by the plaintiff, showing that the EUO requests are addressed by her and verified by the plaintiff's computer records, then collected by another employee who delivers the request to the company mail processing center on the same day the EUO request is generated, and thereafter delivered to the United States Post Office by a company employee. The defendants do not make any showing that the routine office practice was not followed in this

instance, nor do the defendants raise an issue of triable fact as to whether the plaintiff's practice is so careless that it would be unreasonable to assume that the notice was mailed.

The defendants also fail to raise a triable issue of fact as to whether the transcripts supporting Vazquez' failure to appear are proper. Although the defendant contends that the transcripts are unsworn, each transcript is notarized and accompanied by a certification the notary public and shorthand reporter, Christina Cochran, that the transcript is a true, complete, and correct transcript of the proceedings.

Inasmuch as the plaintiff moved to have all counterclaims against it dismissed, the plaintiff fails to address the issue in its moving papers. As such, that branch of the plaintiff's motion is deemed withdrawn.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3212 against defendants Success Rehab PT P.C., Downstate Chiropractic P.C., Urgent Chiropractic Care, P.C., and Parkside Chiropractic, P.C., seeking a declaration that it is not obligated to pay no-fault benefits to the health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on January 13, 2017 is granted in part; and it is further,

ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendants Success Rehab PT P.C., Downstate Chiropractic P.C., Urgent Chiropractic Care, P.C., and Parkside Chiropractic, P.C., for any claims received on or after March 20, 2017, to reimburse them for treatment or medical equipment that they provided to Mya Vazquez for injuries that she sustained in a motor vehicle accident that occurred on January 13, 2017; and it is further,

ORDERED that the branch of the plaintiff's motion for summary judgment seeking dismissal of all counterclaims as against it is deemed withdrawn.

This constitutes the Decision, Order, and Judgment of the court.

1/10/2020
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

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