SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 159583/2019

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

AMSC, LLC, HAPPY APPLE MEDICAL SERVICES, P.C., MODERN SERVICES PAIN MANAGEMENT, P.C., QUICK SCRIPTS, INC., JAYNEE GARCIA, SHAWANA GARCIA, and QUINSHAY VINCENT,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT – DEFAULT.

In this declaratory judgment action, plaintiff State Farm Mutual Automobile Insurance Company moves, pursuant to CPLR 3215, for a default judgment against defendants AMSC, LLC, Happy Apple Medical Services, P.C., Modern Services Pain Management, P.C., Quick Scripts, Inc. (collectively "the medical provider defendants") and Jaynee Garcia, along with such other relief as this Court deems just and proper. After a review of plaintiff's arguments, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from the collision of two motor vehicles ("the incident" or "the collision") which allegedly occurred in Brooklyn on January 16, 2016. At the time of the incident, defendants Jaynee Garcia, Shawana Garcia, and Quinshay Vincent (collectively "claimants") were occupants of one of the vehicles ("the insured vehicle"), which was covered under a no-fault policy issued by plaintiff to nonparty Stacy Blue ("the insured"), who was not in the vehicle at the time. According to the police accident report, the insured vehicle was being driven by nonparty Rebecca Marshall ("Marshall") at the time of the collision. The police report also reflects that neither the claimants nor Marshall required medical attention at the scene or were taken to the hospital.

Following the collision, claimants underwent treatment by the medical provider defendants, which sought to recover no-fault benefits from plaintiff as the alleged assignees of claimants.

On October 2, 2019, plaintiff commenced the captioned action against the medical care provider defendants and the claimants. In the complaint, plaintiff alleged that it was entitled to a declaration that it was not required to provide no-fault benefits to the claimants or the medical care provider defendants due, inter alia, to the fact that it had a founded belief that the claimants' injuries did not arise from an insured incident. After the filing of the summons and complaint, all

defendants except Shawana Garcia and Quinshay Vincent were served with process.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against the medical provider defendants and Jaynee Garcia. In support of the motion, plaintiff argues that it has a founded belief that the injuries alleged by the claimants are not causally related to the collision and/or did not arise from an insured event. Specifically, plaintiff argues that, since the collision was minor (i.e., the airbags of the insured vehicle did not deploy and plaintiffs did not seek medical treatment until two weeks thereafter), the treatment rendered by the medical provider defendants was excessive, unnecessary and/or unrelated to the incident. Additionally, plaintiff asserts that the testimony given by the claimants at their examinations under oath ("EUO") was contradictory and that their testimony also conflicted with that given by the insured.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." It is well settled that a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in

answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 31 N.Y.S.3d 864 (1st Dept 2016). Here, plaintiff has established service of process on Jaynee Garcia and on the medical provider defendants and plaintiff's counsel represents in his affirmation in support of the motion that none of those defendants has answered or otherwise appeared in this action. Thus, this Court must address whether plaintiff has set forth facts constituting the claim.

Where, as here, a no-fault insurer seeks a declaration that it is not required to provide coverage on the ground that an accident was staged, it must establish as a "fact or founded belief that the alleged injury does not arise out of an insured incident." *Central Gen. Hosp. v Chubb Grp. of Ins. Cos.*, 90 NY2d 195, 199 (1997). Here, plaintiff attempts to fulfill this burden by submitting the affidavit of Linda Toole, the claim specialist assigned to this matter. However, Toole's affidavit is insufficient for this purpose insofar as the account of the incident as set forth therein is based, in principal part, on inadmissible evidence, including the police report and the EUOs. *See American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, 2020 N.Y. Misc. LEXIS 1874, *1-5, 2020 NY Slip Op 50532(U), 1-2 (Sup Ct New York County [Lebovits, J.] 2020).

"A police accident report is admissible as a business record if, when prepared, it was based on the preparing officer's personal observations at the scene, or if the information in the report came from an eyewitness with a business duty to

report to the officer. *See Pena v. Slater*, 100 AD3d 488, 489 (1st Dept 2012); *State Farm Mut. Auto Ins. Co. v Langan*, 18 AD3d 860, 862 (2d Dept 2005)." *American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, *supra*. Here, however, the police report does not reflect that the officer who prepared it witnessed the alleged collision. Nor does the police report reflect that the claimants or Marshall (the occupants of the insured vehicle and, thus, the presumptive sources of the information in the report) were under a business duty to report to the investigating officer. Thus, the police report is "inadmissible for the hearsay purpose for which [plaintiff] seeks to use it: establishing as fact the circumstances under which the alleged collision occurred. *See Jupa v Zaidi*, 309 AD2d 606, 607 (1st Dept 2003); *accord Langan*, 18 AD3d at 862." *American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, *supra*. Further, this Court notes that the copy of the police report scanned into NYSCEF is of such poor quality that it is virtually illegible.

Toole also relies heavily on the EUO transcripts of the claimants and the insured, which are neither signed nor notarized, and there is no indication that the EUO transcripts were mailed to the witnesses in accordance with CPLR 3116(a). Thus, the said transcripts are inadmissible hearsay and cannot be considered herein. *see American Tr. Ins. Co. v 21st Century Pharmacy Inc.*, *supra* citing *Martinez v Reiner*, 104 AD3d 477, 478 (1st Dept 2013); *Ramirez v Willow Ridge Country Club*, 84 AD3d 452, 453 (1st Dept 2011); *Santos v. Intown Assocs.*, 17

AD3d 564, 565 (2d Dept 2005); *Zelnik v Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 (1st Dept 1997).

Given the above, this Court is constrained to deny the motion. However, given that plaintiff may be able to cure the deficiencies noted above, the motion is denied with leave to renew upon proper papers.

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

ORDERED that the motion by plaintiff State Farm Mutual Automobile Insurance Company seeking a default judgment against defendants AMSC, LLC, Happy Apple Medical Services, P.C., Modern Services Pain Management, P.C., Quick Scripts, Inc., and Jaynee Garcia is denied, with leave to renew within 30 days after this order is uploaded to NYSCEF, upon penalty of dismissal; and it is further

ORDERED that this constitutes the decision and order of the court.

7/23/2020
DATE

KATHRYN E. FREED, J.S.C.

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