SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

- v -

AUTORX, LLC, CHC CHIROPRACTIC, P.C., OCEAN SPINE AND JOINT MEDICAL CARE, P.C., also known as COMPREHENSIVE CHIROPRACTIC CENTER, KANWARPAUL GREWAL, D.O., JCB ACUPUNCTURE, P.C., NEW YORK CITY FIRE DEPARTMENT EMS., OCEAN VALLEY PHYSICAL MEDICINE, P.C., STAND-UP MRI OF LYNBROOK, and MIKHEAL BOGLE

Defendants.

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INDEX NO. 154158/2020

MOTION DATE 08/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

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

In this declaratory judgment action, the plaintiff insurer, State Farm Mutual Automobile Insurance Company (State Farm), moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Mikheal Bogle, as well as the defendants Autorx, LLC, CHC Chiropractic, P.C., Ocean Spine and Joint Medical Care, P.C., also known as Comprehensive Chiropractic Center, Kanwarpaul Grewal, D.O., JCB Acupuncture, P.C., New York City Fire Department EMS, Ocean Valley Physical Medicine, P.C., and Stand-Up MRI of Lynbrook (collectively the medical defendants) declaring that it is not obligated to pay no-fault benefits to Bogle in connection with injuries that he sustained in a motor vehicle accident, or to reimburse the medical defendants for treatment they rendered or equipment and supplies they provided to him for those injuries. No opposition is submitted. The motion is granted to the extent that the

court shall enter a default judgment against all of the defendants other than New York City Fire Department EMS (FDNY EMS), and the motion is denied as to that defendant.

Bogle claimed that he was injured in a motor vehicle accident on April 28, 2019, and that he thereafter obtained medical treatment or medical supplies from the medical defendants, among others. The medical defendants sought payment, as Bogle's assignees, for no-fault benefits under insurance policy number 284815452, as issued by State Farm to Bogle under claim number 52-8617-T49 (*see* Insurance Law 5106[a]; 11 NYCRR 65-1.1). Bogle timely appeared for and submitted to an examination under oath (EUO). State Farm timely denied the numerous claims for benefits (*see* 11 NYCRR 65-3.8[a][1]), concluding that, based on Bogle's testimony at the EUO and its own investigation, Bogle made material misrepresentations in his initial application for the issuance of the subject insurance policy with respect to where the insured vehicle was usually garaged and maintained in order to lower the cost of obtaining the policy, and that coverage was thus vitiated.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the defendant's default, and proof of the facts constituting the claim (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp*., 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc*. 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

The affidavits of service filed by the plaintiff establish that Bogle and all of the medical defendants, save FDNY EMS, were properly served with process, as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]). With respect to service upon FDNY EMS, that entity, formally known as the New York City Fire Department Bureau of Emergency Medical Services, is a division of the New

York City Fire Department (FDNY). The FDNY, in turn, is an agency of the City of New York (*see* New York City Charter § 481; *Sams v New York City Hous. Auth.*, 2012 NY Slip Op 30387[U], *4, 2012 NY Misc LEXIS 722, *3 [Sup Ct, N.Y. County, Feb. 21, 2012 [NY City Charter § 396 requires all actions seeking money damages from the City to name only the City as a defendant, regardless of the agency alleged to be responsible for the damages; FDNY, as a city agency, is not an entity amenable to suit for money damages]). Pursuant to CPLR 311(a)(2), proper service upon a New York City agency in a declaratory judgment action or CPLR article 78 proceeding requires personal service of the notice of the summons and complaint upon "the corporation counsel or [ ] any person designated to receive process in a writing filed in the office of the clerk of New York County" (*see Matter of Exxon Mobil Corp. v New York City Dept. of Envtl. Protection*, 178 AD3d 696, 698-699 [2d Dept 2019]). The plaintiff served the summons and complaint upon a person at the offices of Medical Receivables Billing Group in Uniondale, New York, a private billing and insurance claim processing firm that apparently processes claims for ambulance services rendered by FDNY. This is insufficient to establish that FDNY EMS was properly served and, hence, State Farm is not entitled to the entry of a default judgment against that defendant.

The affirmation of State Farm's attorney established that neither Bogle, nor the medical defendants who were properly served, either answered the complaint, timely moved with respect to the complaint, or appeared in the action.

With respect to the proof of the facts constituting the claim,

> "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts"

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way,

while the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered" (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (*see id*.; *Silberstein v Presbyterian Hosp*., 95 AD2d 773 [2d Dept 1983]).

"Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Green v Dolphy Constr. Co*., 187 AD2d 635, 636 [2d Dept 1992]; *see Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must "state a viable cause of action" (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating whether the plaintiff has fulfilled this obligation, the defendant, as the defaulting party, is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (*see Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]).

Proof that the plaintiff has submitted "enough facts to enable [the] court to determine that a viable" cause of action exists (*Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *see Gray v Doyle*, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability (*see* CPLR 105[u]; *Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc*., 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; *see also Michael v Atlas Restoration Corp*., 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc*., 20 AD3d 521, 522 [2d Dept 2005]; *see generally Mitrani Plasterers Co., Inc. v SCG Contr. Corp*., 97 AD3d 552, 553 [2d Dept 2012]).

Where an insured makes material misrepresentations on his or her application for insurance as to where he or she regularly garages a vehicle sought to be insured, coverage is defeated (*see Remedial Med. Care, P.C. v Infinity Prop. & Cas. Co.*, 2017 NY Slip Op 50391[U], 55 Misc 3d 130[A] [App Term, 2d, 11th & 13th Jud Dists, Mar. 31, 2017]; *Jamaica Dedicated Med. Care, P.C. v Praetorian Ins. Co.*, 2015 NY Slip Op 50756[U], 47 Misc 3d 147[A] [App Term, 2d, 11th & 13th Jud Dists, May 6, 2015]; *see also Liberty Mut. Ins. Co. v Mendez*, 2021 NY Slip Op 30071[U], *4, 2021 NY Misc LEXIS 85, *6-7 [Sup Ct, N.Y. County, Jan. 7, 2021]; *see generally State Farm Fire & Cas. Co. v Jewsbury*, 169 AD3d 949, 950 [2d Dept 2019]). State Farm's proof establishes, prima facie, the facts underpinning its contentions, namely, that when Bogle first applied for insurance coverage on February 2, 2019, he represented that he resided at 93 Hollowbrook Road, Apartment 2, Lake Peekskill, New York 10537, and garaged the insured vehicle there, but actually lived at 244-07 136th Avenue, Rosedale, New York 11422, an address located in Queens County, and kept the vehicle garaged there, where premium rates are substantially higher than those for vehicles garaged in Lake Peekskill.

As set forth in the affidavit of State Farm's claims specialist Tim Dacey, who investigated the claim, the subject collision occurred in Queens County, Bogle's Queens County address is listed on all no-fault benefit forms submitted by Bogle and the medical defendants, Bogle treated and received therapy in Queens County, Bogle is registered to vote at the Rosedale address in Queens County, and a video search revealed that all sightings of the insured vehicle were in Queens County and western Nassau County, with no sightings at or near Lake Peekskill. In addition, Dacey averred that a State Farm representative visited Bogle's Rosedale address, and confirmed with an occupant of those premises, a neighbor, and a postal delivery employee that Bogle resided there, while another representative visited the Peekskill Lake address, and was informed by a long-time resident at a neighboring address that he had never seen Bogle at the Peekskill Lake address identified on Bogle's application. Dacey further explained that the

garaging the vehicle at the Queens County address costs $4,483.82 more, for each six-month period of coverage, than garaging the vehicle at Peekskill Lake.

In fact, although Bogle procured the policy on February 2, 2019, he testified at his EUO on July 26, 2019 that he had resided solely at the Rosedale address since 2013, and that although he had lived in Peekskill Lake in 2007, he hadn't lived there since for 12 years. He averred that he receives all of his mail in Rosedale, has all of his credit cards issued to that address, and maintains of his personal property there. Bogle admitted that he had never garaged the insured vehicle in Peekskill Lake, but used that address on his application because of his poor driving record and his understanding that he would not be able to procure insurance had he used his actual residence address.

The denial-of-claim statements show that the relevant denials of coverage were expressly based on the ground that Bogle made material misrepresentations in connection with his application for insurance with respect to the where the vehicle was regularly garaged in order to reduce her insurance premium rates.

Hence, State Farm is entitled to a declaratory judgment against the defendants that were properly served with process.

CPLR 3215(a) requires that where, as here, a default judgment is taken against fewer than all of the defendants, the action is severed as against the remaining defendants (*see Holt v Holt*, 262 AD2d 530, 530 [2d Dept 1999]; *see also Woodson v Mendon Leasing Corp.*, 259 AD2d 304, 305 [1st Dept 1999]; *Frolish v Ryder Truck Rental*, 63 AD2d 799, 799 [3d Dept. 1978]).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants is granted to the extent that the judgment sought by the plaintiff shall be entered against the defendants Autorx, LLC, CHC Chiropractic, P.C., Ocean Spine and Joint Medical Care, P.C., also known as Comprehensive Chiropractic Center, Kanwarpaul Grewal, D.O., JCB

Acupuncture, P.C., Ocean Valley Physical Medicine, P.C., Stand-Up MRI of Lynbrook, and Mikheal Bogle, and the motion is otherwise denied; and it is further,

ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendant Mikheal Bogle in connection with injuries that he sustained in a motor vehicle accident on April 28, 2019, or to reimburse the defendants Autorx, LLC, CHC Chiropractic, P.C., Ocean Spine and Joint Medical Care, P.C., also known as Comprehensive Chiropractic Center, Kanwarpaul Grewal, D.O., JCB Acupuncture, P.C., Ocean Valley Physical Medicine, P.C., or Stand-Up MRI of Lynbrook for treatment that they rendered or equipment and supplies that they provided to him for those injuries; and it is further,

ORDERED that the action against the defendant New York City Fire Department EMS is severed, and shall proceed under Index No. 154158/2020.

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

11/10/2021
DATE

JOHN J. KELLEY, J.S.C.

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**