SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ERIE INSURANCE COMPANY OF NEW YORK,

Plaintiff,

- v -

ANTHONY BROWNING, GORDON C. DAVIS MEDICAL, P.C.,LONGEVITY MEDICAL SUPPLY, INC.,METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, METROPOLITAN MEDICAL & SURGICAL P.C.,NEW MILLENIUM MEDICAL, PLLC,NEW YORK PHYSICAL THERAPY CARE P.C.,PINE CONE ACUPUNCTURE P.C.,STARLIGHT P.T. P.C.,TIME TO CARE PHARMACY INC.,NEW MILLENIUM MEDICAL, P.C.,

Defendants.

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INDEX NO. 152114/2021

MOTION DATE 09/23/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32

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

Upon the foregoing documents, it is hereby ordered that the plaintiff's motion for entry of a default judgement pursuant to CPLR 3215 against defendants Anthony Browning, Gordon C. Davis Medical, P.C., Metropolitan Medical & Surgical P.C., New York Physical Therapy Care P.C., Pine Cone Acupuncture P.C., Starlight P.T. P.C., Time to Care Pharmacy Inc., and New Millennium Medical, P.C. (the "defaulting defendants"), is granted in part based upon the following memorandum decision.

Background

In this action for a declaratory judgment regarding no-fault insurance coverage, plaintiff Erie Insurance Company of New York ("plaintiff") seeks entry of a default judgment declaring, *inter alia*, that it has no duty to provide coverage under its insurance policy held by defendant Anthony Browning ("Browning") related to a motor vehicle accident that occurred on November

24, 2019. Defendants Longevity Medical Supply, Inc. and Metro Pain Specialists Professional Corporation have appeared and answered the complaint, and plaintiff does not seek a default judgment against them.

Browning obtained the underlying policy from plaintiff on November 21, 2019 (NYSCEF Doc. No. 20, ¶ 8). Three days later, Browning was involved in a motor vehicle accident, and claimed he was injured (*id.*, ¶¶ 4-5). Thereafter, plaintiff received claims from the medical provider defendants for services allegedly rendered as a result of the accident (*id.*, ¶¶ 6-7). Plaintiff believed that the claimed treatment was unrelated to the accident, and that Browning may have made misrepresentations to obtain the policy and scheduled him for an Examination Under Oath ("EUO"). Browning appeared for his EUO on January 7, 2020 (*id.*, ¶ 10). Following the EUO, plaintiff sent several verification requests to Browning and his then counsel Nwele & Associates, LLC, which plaintiff states went unanswered (*id.*, ¶¶ 11-12). As a result, plaintiff denied coverage on May 19, 2020 pursuant to 11 NYCRR 65-3.5[o], which requires that an insured respond to verification requests within 120 days (*id.*, ¶ 13; NYSCEF Doc. No. 24; 11 NYCRR 65-3.5[o]).

Plaintiff commenced this action by filing a summons and complaint on March 2, 2021 (NYSCEF Doc. No. 1). Affidavits of service filed with the motion attest to service on Browning by in-hand delivery to a person of suitable age and discretion at his residence on March 20, 2021, with a follow-up mailing pursuant to CPLR 308(2), and service on all other defaulting defendants via the Secretary of State pursuant to Business Corporation Law § 306 on March 12, 2021 (NYSCEF Doc. No. 17). Plaintiff filed a supplemental summons on May 18, 2021 (NYSCEF Doc. No. 9), and affidavits of service filed with the motion attest to service of same on Browning by in-hand delivery to a person of suitable age and discretion at his residence on

June 17, 2021, with a follow-up mailing pursuant to CPLR 308(2), and service on all other defaulting defendants via the Secretary of State pursuant to Business Corporation Law § 306 on June 11, 2021 (NYSCEF Doc. No. 17). Affidavits of additional service filed with the motion attest to service by mail on Browning n August 3, 2021, and the other defaulting defendants on August 5, 2021 at their last known addresses pursuant to CPLR 3215(g) (NYSCEF Doc. No. 26). To date, none of the defaulting defendants has answered the complaint or otherwise appeared in the action. There is no opposition to the motion.

Discussion

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are 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]). Nevertheless, "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" (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff has failed to meet its burden on the motion with respect to Browning. Plaintiff served Browning by delivery to a person of suitable age of discretion with follow-up mailing pursuant to CPLR 308(2). The statute provides that "such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of

the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing" (CPLR 308[2]). Browning's time to answer only expires thirty days after service under CPLR 308(2) is complete (CPLR 3012[c]). Plaintiff did not file proof of service within 20 days of mailing as required, and accordingly Browning's time to answer has not yet expired. Thus, the motion with respect to Browning must be denied (*Khan v Hernandez*, 122 AD3d 802, 804 [2d Dept 2014]).

Plaintiff has, however, met its burden on the motion with respect to the other defaulting defendants by submission of the affidavits of service demonstrating service of the summons, supplemental summons, and verified complaint on the other defaulting defendants (NYSCEF Doc. No. 17), the verified complaint (NYSCEF Doc. No. 1), the affirmation of its counsel, Desirée Ortiz, Esq., attesting to the default (NYSCEF Doc. No. 15, ¶¶ 15-16), and the affidavit of Elsie Vazquez, plaintiff's medical management claims specialist, which attests to the facts constituting plaintiff's claims (NYSCEF Doc. No. 20). In her affidavit, Vazquez reaffirms the allegations of the verified complaint. As set forth in the verified complaint and confirmed in Vazquez's affidavit, following plaintiff's EUO, which was scheduled as part of plaintiff's investigation into the motor vehicle accident on November 24, 2019, plaintiff sent repeated requests for verification beginning on January 7, 2020 following the EUO (NYSCEF Doc. No. 1, ¶¶ 26-29; NYSCEF Doc. No. 20, ¶¶ 10-12). Neither plaintiff nor his then-counsel responded to the requests for verification (*id.*). Accordingly, plaintiff denied coverage (NYSCEF Doc. No. 24).

The no-fault insurance regulations provide that "[t]he insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested" (11 NYCRR 65-3.5[c]). "The insurer shall advise the applicant in the verification

request that the insurer may deny the claim if the applicant does not provide within 120 calendar days from the date of the initial request either all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply" (11 NYCRR 65-3.5[o]). A claimant's failure to timely provide the requested verification is grounds to deny coverage (11 NYCRR 65-3.8[b][3]; *Chapa Products Corp. v MVAIC*, 66 Misc 3d 16, 18 [App Term 2019]). Thus, plaintiff, by its factual showing set forth above, has established its entitlement to an entry of a default judgment against all the defaulting defendants other than Browning.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent set forth herein; and it is further

ADJUDGED and DECLARED that plaintiff herein owes no duty to pay No-Fault claims with respect to the November 24, 2019 accident, assigned claim number A00002300510, as referenced in the complaint, to defendants Gordon C. Davis Medical, P.C., Metropolitan Medical & Surgical P.C., New York Physical Therapy Care P.C., Pine Cone Acupuncture P.C., Starlight P.T. P.C., Time to Care Pharmacy Inc., and New Millennium Medical, P.C.; and it is further

ADJUDGED and DECLARED that all No-Fault lawsuits and arbitrations brought by defendants Gordon C. Davis Medical, P.C., Metropolitan Medical & Surgical P.C., New York Physical Therapy Care P.C., Pine Cone Acupuncture P.C., Starlight P.T. P.C., Time to Care Pharmacy Inc., and New Millennium Medical, P.C. relating to the November 24, 2019 accident, assigned claim number A00002300510, as referenced in the complaint, are permanently stayed; and it is further

ADJUDGED and DECLARED that defendants Gordon C. Davis Medical, P.C., Metropolitan Medical & Surgical P.C., New York Physical Therapy Care P.C., Pine Cone

Acupuncture P.C., Starlight P.T. P.C., Time to Care Pharmacy Inc., and New Millennium Medical, P.C. have no right to collect No-Fault benefits as assignees of defendant Anthony Browning with respect to the November 24, 2019 accident, assigned claim number A00002300510, as referenced in the complaint; and it is further

ORDERED that the balance of this action is severed and continued.

This constitutes the Decision and Order of the Court.

2/18/2022
DATE

LOUIS L. NOCK, 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