

State Farm Fire & Cas. Co. v 3 Star Acupuncture

2022 NY Slip Op 33082(U)

September 13, 2022

Supreme Court, New York County

Docket Number: Index No. 154162-2021

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

State Farm Fire and Casualty Company

INDEX NO. 154162-2021

MOT. DATE

- v -

MOT. SEQ. NO. 002

3 Star Acupuncture, et al.

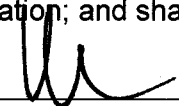
The following papers were read on this motion to/for renew

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

In this action, plaintiff-insurer, State Farm Fire and Casualty Company (“State Farm”) seeks to re-new its default judgment motion against defendants Adagio Chiropractic, P.C., Advanced Rx Pharmacy, Inc., Allied Care, P.T., P.C., Atlantic Diagnostic, LLC, Better Medical Health, P.C., Boulevard 9229 LLC, Eclipse Medical Imaging, P.C., Equinox Physical Therapy, P.C., Fast Recovery CPM and Equipment Corp., Gara Medical Care, P.C., GM Medical Supplies, P.C., Gordon C. Davis Medical, P.C., Graham Wellness Medical, P.C., Herschel Kotkes, M.D., P.C., IZM P.T., P.C., Metropolitan Medical and Surgical, P.C., Morning Star Physical Therapy, P.C., MZY Acupuncture, P.C., New York Physical Therapy Care, P.C., Rehab Time, P.T., P.C., Sacrum Chiropractic, P.C., St. Sebastian Medical, P.C., Streamline Rx, Time to Care Pharmacy, Inc., Jiang Xiao Yan, Shop-N-Save Pharmacy, Inc., Professional Billing Collec-tions, LLC, Colin Clarke, M.D., and Tyler Strachan (collectively the “motion defendants”) and its motion to extend time to serve the complaint upon 5 Star Chiropractic, P.C., Damien Bend, Andrew Petty and Jean Marc Richardson (collectively the “unserved defendants”). Upon renewal, State Farm seeks a de-fault judgment pursuant to CPLR § 3215 against the motion defendants and a declaration that State Farm has no obligation to pay no-fault benefits in connection with a motor vehicle accident. State Farm also seeks an extension of time to serve the complaint upon the unserved defendants pursuant to CPLR § 306-b. This action is predicated on an accident that occurred on March 18, 2020 at the intersection of Avenue Z and East 6th Street in Brooklyn, New York. Plaintiff alleges that the no-fault claims that have been filed as a result of the accident are fraudulent, that the claimants breached a condition precedent to coverage, that the injuries asserted by the claimants are not a result of the March 18, 2020 accident, that the policy holder made material misrepresentations in his policy application, and that it will suffer irreparable harm if there is not a declaration granting a permanent stay of arbitrations, lawsuits and/or claims by the claimants.

A motion for leave to renew shall be identified specifically as such, shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain

Dated: 9-17-22



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFERENCE

reasonable justification for the failure to present such facts on the prior motion (CPLR R §2221[e]). Courts have discretion to relax the statute's requirements and to grant such a motion in the interest of justice (*Mejia v. Nanni*, 307 AD2d 870 [1st Dept. 2003]). In the prior order, dated May 26, 2022, this court permitted a renewal of the motion for default judgement within ninety days and stated that the plaintiff should submit an affidavit of facts made by one with personal knowledge of the facts surrounding the claim.

Plaintiff filed this motion on June 27, 2022 and has successfully submitted an affidavit of merit from Timothy Dacey, a Claims Specialist at State Farm. Therefore, the motion was renewed within the ninety days provided by the court.

The court first turns to the branch of the motion seeking an extension of time to serve the complaint upon the unserved defendants. In order to be granted an extension of time to serve a complaint, a party must demonstrate that there was good cause for the failure to serve and that granting such an extension is in the interest of justice (*Henneberry v. Borstein*, 91 AD3d 493 [1st Dept. 2012]). Good cause requires a threshold showing that the plaintiff was diligent in attempting to effect service (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]). Whether the extension is in the interest of justice is a discretionary consideration which includes consideration of: 1. Expiration of the statute of limitation; 2. Meritorious nature of the cause of action; 3. Length of delay in service; 4. Promptness of the request for the extension of time; and 5. Prejudice to the opposing party (*Id.*).

Here, State Farm has submitted affidavits demonstrating that service was attempted on 5 Star Chiropractic, P.C. at 3626 Bailey Ave., Bronx, New York 10463, but the receptionist at MacIntosh Medical located in the same building informed the process server that 5 Star Chiropractic, P.C. moved out about a year ago. Service was attempted on Damien Bend at his reported residential address of 1709 East 51st Street, Brooklyn, New York, but the house was burned down, vacant and boarded up. Service was attempted on Andrew Petty at his reported residential address of 1170 East 101st Street, Brooklyn, New York, but an occupant informed the process server that Andrew Petty was unknown and did not live there. Finally, service was attempted on Jean Marc Richardson at his reported residential address of 1709 East 51st Street, Brooklyn, New York, but the house was burned down, vacant and boarded up. Therefore, State Farm has demonstrated that it was diligent in attempting to effect service and there is good cause for an extension of time to serve the complaint.

Regarding the interest of justice analysis, the statute of limitations for a no-fault benefits case is three years (CPLR § 214(2); see *Contact Chiropractic, P.C. v. New York City Tr. Auth.*, 31 NY3d 187 [2018]). The accident that is the subject of this action took place on March 18, 2020. Therefore, State Farm is still within the statute of limitations. Additionally, the new defendants would not be prejudiced since discovery is in its early stages as demonstrated by the Preliminary Conference order dated July 11, 2022. The motion for an extension of time to serve the complaint was not as prompt as it should have been; the original motion was filed on March 2, 2022, ten months after the filing of the complaint and nine months after service was attempted on the unserved defendants. However, while the lack of promptness in filing the request for the extension of time is not helpful to the plaintiff's interest of justice analysis, that factor, standing alone, is outweighed by the other factors of an interest of justice analysis. The plaintiff has demonstrated that there was good cause for its failure to serve the unserved defendants and that granting such an extension is in the interest of justice. Therefore, the branch of the motion requesting an extension of time to serve the complaint is granted.

The court now turns to the branch of the motion seeking a default judgment. The plaintiff has demonstrated proof of service of the motion on all the motion defendants via regular mail except for Gordon C. Davis Medical, P.C., Graham Wellness Medical, P.C., MZY Acupuncture, P.C., and Sacrum Chiropractic, P.C. Therefore, the motion must be denied as to these four defendants for failure to demonstrate proper service of the motion upon them.

Plaintiff has provided proof that the summons and complaint were served on each of the remaining motion defendants (collectively the "defaulting defendants"). The summons and complaint were served upon defendants Adagio Chiropractic, P.C., Allied Care, P.T., P.C., Better Medical Health, P.C., Eclipse

Medical Imaging, P.C., Equinox Physical Therapy, P.C., Fast Recovery CPM and Equipment Corp., Gara Medical Care, P.C., Herschel Kotkes, M.D., P.C., IZM P.T., P.C., Metropolitan Medical and Surgical, P.C., Morning Star Physical Therapy, P.C., New York Physical Therapy Care, P.C., Rehab Time, P.T., P.C., St. Sebastian Medical, P.C., Time to Care Pharmacy, Inc., Shop-N-Save Pharmacy, Inc. via personal service on Ms. Sue Zouky, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306(b)(1). The summons and complaint were served upon defendants Boulevard 9229 LLC, and Professional Billing Collections, LLC, via personal service on Ms. Sue Zouky, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with LLC Law § 303. The summons and complaint were served upon defendant Colin Clarke, M.D. by delivering a true copy of the summons and complaint to Eunice L, a person of suitable age and discretion at the defendant's residence, 16410 Crocheron Ave., Flushing, New York 11358 and by mailing a copy of the summons and complaint to the same address (CPLR § 308[2]). The summons and complaint were served upon defendant Tyler Strachan by delivering a true copy of the summons and complaint to a John Doe, a person of suitable age and discretion at the defendant's residence, 1303 East 46th St., Brooklyn, New York 11234 and by mailing a copy of the summons and complaint to the same address (CPLR § 308[2]). The summons and complaint were served upon defendant Jiang Xiao Yan by delivering a true copy of the summons and complaint to Niki G., a person of suitable age and discretion at the defendant's residence, 5830 Main Street, Flushing, New York 11355 and by mailing a copy of the summons and complaint to the same address (CPLR § 308[2]). The summons and complaint were served upon defendant Advanced Rx Pharmacy Inc. by delivering a true copy of the summons and complaint to Essy K., a person of suitable age and discretion who represented that they were authorized to accept service at the address of the defendant, 5315 Avon Park Drive, Suite 120, Tampa, Florida 33607 (BCL § 306[a]). The summons and complaint were served upon defendant GM Medical Supplies, P.C. by delivering a true copy of the summons and complaint to Athur F., a person of suitable age and discretion who represented that they were authorized to accept service at the address of the defendant, 1674 East 22nd Street, suite 2, Brooklyn, New York 11229 (BCL § 306[a]). The summons and complaint were served upon defendant Streamline Rx by delivering a true copy of the summons and complaint to Pavan Mantrapagada, a person of suitable age and discretion who represented that they were the owner of the corporation at the address of the defendant, 2861 Executive Drive, Suite 210, Clearwater, Florida 33762 (BCL § 306[a]). Finally, the summons and complaint were served upon defendant Atlantic Diagnostic, LLC by delivering a true copy of the summons and complaint to Arlenis Barbon, a person of suitable age and discretion who represented that they were the a person authorized to accept service on behalf of the LLC at the address of the defendant, 9017 Jamaica Ave., Woodhaven, New York 11421 (CPLR §311-a).

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

In support of the motion, plaintiff submits the police report from the accident. According to the police report, the collision occurred on East 6th Street and Avenue Z in Brooklyn, New York. The report contains conflicting accounts of how the collision occurred. Strachan claims that the adverse vehicle made a U-turn and struck the insured vehicle. The adverse driver claims that he was driving straight on Avenue Z when the vehicle drive by Strachan collided with him. The report indicates that the collision was minor, that it resulted in minimal damage, that the air bags did not deploy and that both vehicles were able to drive away from the scene. It also states that Strachan, Petty, Richardson and the adverse driver failed to report any injuries at the scene and refused medical attention.

The motion is also supported by the sworn affidavit of Timothy Dacey, plaintiff's Claim Specialist. Dacey states based upon personal knowledge the following. States Farm issued a personal auto insurance policy to the policy holder, Bend, on March 9, 2020. The policy covered a 2008 Chevrolet Malibu (the "insured vehicle") which included coverage for any occupants of the insured vehicle for any medically necessary and causally related medical expenses incurred while riding in the insured vehicle as the result of a collision. The policy stated that the insured vehicle would be primarily garaged at 139 Conhocton Street, Apt. F, Corning, New York 14830 (the "Corning address"). On March 18, 2022, Tyler Strachan ("Strachan") was operating the insured vehicle when he was allegedly involved in a motor vehicle collision. Strachan was driving with two passengers, Petty and Richardson. Bend was not in the car. Dacey states that after the collision, claimants reported to have sustained serious bodily injuries as a result of the collision, despite making no such claims at the scene of the accident.

Dacey states that upon investigation, State Farm questioned whether the policy application was accurate in declaring that the insured vehicle would be primarily housed at the Corning address because: 1) the collision occurred in Brooklyn, New York; 2) Accurint links Bend to the address 1709 51st Street in Brooklyn, New York and no database links Bend to the Corning address; and 3) State Farm spoke to the leasing company in Corning and the leasing company that runs the property where the Corning address is located and they stated that they have no record of Bend living at the Corning address and that there is no apartment F in that building. State Farm also questioned the legitimacy of the claims because: 1) Bend reported the collision on March 19, 2020 and stated that Strachan was driving at the time and had permission to use the vehicle, but could not produce a contact number for Strachan; 2) the claim documents submitted on behalf of Petty contain conflicting social security numbers and dates of birth and State Farm has been unable to ascertain Petty's actual social security number; 3) State Farm's investigation revealed that the vehicle currently insured under Strachan's name was previously insured under Bend's name; 4) Strachan had a significant history of prior losses including four prior motor vehicle accidents within one year that occurred on March 13, 2020, January 30, 2020, December 31, 2019, and July 4, 2019; 5) Petty was involved in a prior collision on March 13, 2020. The phone number that Petty provided for that loss matches the number for a Dwayne McGregor who happened to be an adverse occupant in the March 13, 2020 collision involving Strachan; 6) Richardson was involved in a prior collision on December 2, 2019. The address that Richardson provided for that loss is the Brooklyn address attached to Bend; 7) Medical providers have submitted billing for treatment that took place on Sundays, holidays and other days that such facilities would not normally be open; and 8) There was a subsequent collision under Bend's policy on May 4, 2020 which involved three different occupants and in which Bend was also absent from the vehicle.

Dacey states that State Farm sought examinations under oath ("EUO") of the claimants and Bend to confirm the facts on the policy application, the legitimacy of the loss and the necessity of the alleged treatments but that Bend and all claimants failed to appear for their EUOs on two occasions each. Based upon the conflict in the police report, the discrepancies in the legitimacy of the true primary housing location of the insured vehicle and the legitimacy of the claim, and the failure to show up for EUOs, Dacey states that State Farm determined that the collision was intentionally caused and that the alleged injuries of the Claimants did not arise from a covered event.

In its complaint, plaintiff asserts seven causes of action. The first, third, fourth, and sixth causes of action are based on a theory of fraud wherein plaintiff states that the claimant's alleged injuries and subsequent no-fault treatment submitted by the medical provider defendants were not caused by the February 16, 2019 collision and did not arise from an insured event. The second cause of action is based on a theory of breach of the condition precedent to coverage, wherein plaintiff states that by failing to appear for EUOs, the claimants breached a condition precedent to coverage. The sixth cause of action is based in a theory of material misrepresentation whereby plaintiff asserts that Bend made material misrepresentations in procuring the insurance policy for financial gain and thus that it has no duty to provide any coverage. The seventh cause of action is based on a theory of irreparable harm wherein the plaintiff asserts that it will suffer irreparable harm if a stay of all arbitrations, lawsuits, and/or claims by the defendants is not issued

The general standard for a fraud defense to a no-fault claim is an assertion by the insurer that the defense is based on the founded belief that the alleged injury did not arise out of an insured incident, but rather, that it was a deliberate event staged in an effort to defraud the insurer (*Central General Hospital v. Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]). The evidence of this fraud cannot be based on suspicion; the insurer must come forward with admissible proof to establish the foundation for its belief that the incident was staged (*Inwood Hill Med. V. Allstate Ins. Co.*, 787 NYS2d 678 [Civ Ct NY County 2004]). An affidavit of the investigator who has personal knowledge of the alleged fraud investigation and police reports of the incident may be used to establish a founded belief of fraud. (See *Mount Sinai Hospital v. Triboro Coach Inc.*, 263 AD2d 11 [2d Dept 1999]).

Based on the foregoing, plaintiff has established a *prima facie* case based on a theory of fraud. The third cause of action based on a theory of material misrepresentation, the second cause of action based on a theory of breach of the condition precedent to coverage, and the seventh cause of action based on a theory of irreparable harm are therefore moot.

In light of this result, the motion is granted as follows.

In accordance herewith, it is hereby

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the branch of the motion seeking an extension in time to serve the complaint is granted; and it is further

ORDERED that State Farm Fire and Casualty Company has 90 days from the date of this order to serve 5 Star Chiropractic, P.C., Damien Bend, Andrew Petty and Jean Marc Richardson with the complaint; and it is further

ORDERED that the motion for default judgment against defendants Gordon C. Davis Medical, P.C., Graham Wellness Medical, P.C., MZY Acupuncture, P.C., and Sacrum Chiropractic, P.C. is denied; and it is further

ORDERED that plaintiff's motion for a default judgment against defendants Adagio Chiropractic, P.C., Advanced Rx Pharmacy, Inc., Allied Care, P.T., P.C., Atlantic Diagnostic, LLC, Better Medical Health, P.C., Boulevard 9229 LLC, Eclipse Medical Imaging, P.C., Equinox Physical Therapy, P.C., Fast Recovery CPM and Equipment Corp., Gara Medical Care, P.C., GM Medical Supplies, P.C., Herschel Kotkes, M.D., P.C., IZM P.T., P.C., Metropolitan Medical and Surgical, P.C., Morning Star Physical Therapy, P.C., New York Physical Therapy Care, P.C., Rehab Time, P.T., P.C., St. Sebastian Medical, P.C., Streamline Rx, Time to Care Pharmacy, Inc., Jiang Xiao Yan, Shop-N-Save Pharmacy, Inc., Professional Billing Collections, LLC, Colin Clarke, M.D., and Tyler Strachan is granted on default; and it is further

ORDERED and DECLARED that plaintiff has no duty to pay any no-fault, bodily injury/liability coverage, or uninsured motorists benefits, in the form of sums, monies, damage, awards, or benefits to Adagio Chiropractic, P.C., Advanced Rx Pharmacy, Inc., Allied Care, P.T., P.C., Atlantic Diagnostic, LLC, Better Medical Health, P.C., Boulevard 9229 LLC, Eclipse Medical Imaging, P.C., Equinox Physical Therapy, P.C., Fast Recovery CPM and Equipment Corp., Gara Medical Care, P.C., GM Medical Supplies, P.C., Herschel Kotkes, M.D., P.C., IZM P.T., P.C., Metropolitan Medical and Surgical, P.C., Morning Star Physical Therapy, P.C., New York Physical Therapy Care, P.C., Rehab Time, P.T., P.C., St. Sebastian Medical, P.C., Streamline Rx, Time to Care Pharmacy, Inc., Jiang Xiao Yan, Shop-N-Save Pharmacy, Inc., Professional Billing Collections, LLC, Colin Clarke, M.D., and Tyler Strachan their agents, employees, assignees, or heirs arising out of any current or future proceeding, including without

limitation, arbitrations and lawsuits seeking to recover no-fault, bodily injury/liability coverage, or uninsured motorists benefits for the March 18, 2020 collision referenced in the complaint.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

9-13-22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.