

**State Farm Mut. Auto. Ins. Co. v Burke Physical
Therapy, P.C.**

2022 NY Slip Op 30580(U)

February 25, 2022

Supreme Court, Nassau County

Docket Number: Index No. 607480/19

Judge: Erica L. Prager

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

PRESENT: ERICA L. PRAGER, J.S.C.

-----X
**STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY and STATE FARM FIRE AND CASUALTY
COMPANY,**

Plaintiff,

-against-

BURKE PHYSICAL THERAPY, P.C.,

Defendant.

IAS/TRIAL PART 20

Motion Seq.: 005

Submission Date: 02/01/22

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DECISION AND ORDER

-----X
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PRELIMINARY STATEMENT

Upon the foregoing papers, the plaintiff moves for an Order: (i) pursuant to CPLR §§ 3025(b) and (c) granting plaintiffs' application to amend the complaint to reflect the amount in dispute as \$154,877.05 to conform to the evidence, and to deem the amended complaint served *nunc pro tunc* upon defendant; and (ii) pursuant to CPLR 3212 granting plaintiffs summary judgment based upon defendant's failure to provide requested additional documentary verification to plaintiffs within 120 days pursuant 11 NYCRR 65-3.5(o).

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BACKGROUND

This is an action for a declaratory judgment, in which plaintiffs STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY (together "STATE FARM") seek a declaration that they are not obligated to reimburse defendant BURKE PHYSICAL THERAPY, P.C., ("BURKE") for healthcare services purportedly rendered to STATE FARM's insureds and billed to STATE FARM pursuant to the No-Fault law and implementing regulations.

STATE FARM commenced this action on June 3, 2019 with the electronic filing of the Summons and Verified Complaint (the "Complaint"). In its Complaint, STATE FARM alleges that from April through September of 2018, BURKE submitted a total of 468 bills to STATE FARM in the total amount of \$155,921.78 for healthcare services that were allegedly rendered to 168 separate and distinct patient/assignors. Prior to seeking verification of the claims, STATE FARM states, it conducted an investigation into BURKE's billing and treatment practices. STATE FARM alleges that it had a basis to request verification, in order to determine whether or not BURKE was eligible to collect No-Fault Benefits pursuant to 11 N.Y.C.R.R. §65-3.16 and Insurance Law §5102(a)(1).

STATE FARM alleges further that after conducting an Examination Under Oath (EUO) of BURKE, STATE FARM made formal requests for written verification from BURKE in accordance with the applicable insurance policies and No-Fault Laws and regulations. Each request advised BURKE of its obligations under 11 N.Y.C.R.R. § 65-3.5(o). BURKE allegedly failed and/or refused to provide the additional written verification requested by STATE FARM, or to submit written proof providing reasonable justification for the failure to do so. STATE FARM alleges that with respect to each claim, STATE FARM issued a timely denial on the prescribed NF-10 form stating the reasons therefor.

The Complaint's sole cause of action seeks a declaration that, based upon BURKE's failure to comply with its obligations under 11 N.Y.C.R.R. § 65-3.5(o), BURKE is not entitled to reimbursement for any of the claims listed therein.

Issue was joined with the filing of BURKE's Answer on August 9, 2019. STATE FARM now moves to amend the Complaint, and to obtain summary judgment in its favor on its cause of action for declaratory relief.

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DISCUSSION

Amend the Complaint.

STATE FARM seeks to amend the Complaint to reflect the removal of certain duplicate or resolved bills from the claims in dispute, leaving \$154,877.05 as the total amount at issue. BURKE stated no opposition to this portion of STATE FARM's motion. On the record presented, the Court finds that STATE FARM has demonstrated entitlement to the relief sought. See CPLR §§ 3025(b) & (c).

Summary Judgment.

In support of its motion for summary judgment, STATE FARM submits, among other things:

(i) the Affidavit of Timothy Dacey, STATE FARM's Claims Specialist (NYSCEF Doc. 54), attesting to STATE FARM's standard practices and procedures for handling No-Fault claims, and detailing the handling of each particular bill that is the subject of this action from the time of its receipt to its denial, including the subject bills and the date received, and the dates of STATE FARM's issuance of the related EUO notices, requests for additional verification, and denial of claim forms.

(ii) The Affidavits of Josh Mai, STATE FARM's Claims Support Supervisor (NYSCEF Docs. 56 & 57), attesting to the standard practices and procedures used by STATE FARM with respect to the generating and mailing of the requests for additional verification and denial of claim forms.

(iii) The Affidavit of Doug Babin, an investigator in STATE FARM's Special Investigative Unit (NYSCEF Doc. 55), attesting to the facts and circumstances prompting the investigation into BURKE's business practices, as well as the basis for STATE FARM's seeking an EUO and additional documentary verification of the claims submitted by BURKE. Mr. Babin averred that BURKE failed to provide STATE FARM with any of the requested documentation.

(iv) the Affirmation of Joseph Schwarzenberg, Esq., STATE FARM's attorney (NYSCEF Doc. 53), attesting to his issuance of the documentary verification requests to BURKE on September 18, 2018 and October 19, 2018, and confirming the failure of BURKE to provide the documentary verification as requested.

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In addition, STATE FARM provides copies of the verification requests (*NYSCEF Doc. 59*), the EUO Transcript of John Nasrinpay, P.T. (*NYSCEF Doc. 60*), and the specific documentation (including verification requests, denial of claim forms, and certificates of mailing) pertaining to each of the bills that are the subject of this action (*NYSCEF Docs. 66-233*).

Based upon the foregoing, STATE FARM asserts that it has demonstrated BURKE's noncompliance with its obligations under 11 N.Y.C.R.R. § 65-3.5(o), and has thereby established STATE FARM's right to declaratory relief as a matter of law.

BURKE opposes the motion, based upon its contention that STATE FARM engaged in "red-tape" dilatory tactics, harassment, and bad faith in processing BURKE's claims. In BURKE's view, despite BURKE's good faith efforts to cooperate with STATE FARM, STATE FARM denied BURKE's claims without any basis in law or fact.

BURKE argues that STATE FARM cannot sustain its *prima facie* burden on a motion for summary judgment because it failed to establish that STATE FARM complied with the No-Fault regulations when it denied BURKE's claims. In particular, BURKE contends that: (i) STATE FARM's additional verification requests for claims subject to the EUO were untimely; (ii) STATE FARM's documentary verification requests, whether or not the claims were subject to the EUO, constituted "post-EUO verification requests," which effectively extend the EUO, and which are not recognized by the No-Fault regulations; (iii) STATE FARM's documentary verification requests were improper; (iv) BURKE's actions in response to STATE FARM's documentary verification requests comported with 11 NYCRR 65-3.5(o).

It is well settled that, under the No-Fault statutory/regulatory scheme, a no-fault insurance carrier may require an eligible injured person or that person's assignee, among other things, to execute a written proof of claim under oath, to submit to examinations under oath, and to provide any other pertinent information that may assist the carrier in determining the amount due and payable. 11 NYCRR §65-1.1.

The procedures and time-frames applicable to the verification of No-Fault claims are set forth in 11 NYCRR §65-3.5. Subsection (a) provides that "[w]ithin 10 business days after receipt of the completed application for motor vehicle no-fault benefits (NYS form NF-2) or other substantially equivalent written notice, the insurer shall forward, to the parties required to complete them, those prescribed verification forms it will require prior to payment of the initial claim." 11 NYCRR §65-3.5(a). Subsequent to the receipt of one or more of the completed verification forms, any additional

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verification required by the insurer to establish proof of claim must be requested within 15 business days of receipt of the prescribed verification forms. 11 NYCRR 65-3.5(b). The 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).

With respect to documentary verification sought by an insurer, 11 NYCRR 65-3.5(o) provides:

(o) An applicant from whom verification is requested shall, within 120 calendar days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply. 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. This subdivision shall not apply to a prescribed form (NF-Form) as set forth in Appendix 13 of this Title, medical examination request, or examination under oath request.

An insurer may deny the claim if, after 120 days from the initial request for verification, the applicant has not submitted all of the requested verification in the applicant's control or possession, or written proof providing reasonable justification for the failure to comply. 11 NYCRR § 65-3.8 (b)(3).

At bar, STATE FARM has demonstrated, without contradiction, that it issued requests for additional verification commencing within 15 days of BURKE's EUO, and that BURKE did not provide the requested documents within 120 days of the initial request for same. At issue is: (i) whether STATE FARM's requests for additional verification were, as a procedural matter, timely and properly issued in accordance with the No-Fault statutory/regulatory scheme, insofar as they were not issued within 15 days of receipt of "the prescribed verification forms" in accordance with 11 NYCRR §65-3.5(b), but rather, were issued in response to the information adduced at the EUO; (ii) whether STATE FARM's requests for additional verification were substantively proper; that is, whether STATE FARM was entitled to request the information sought regarding BURKE's corporate structure and finances in the context of verifying the claims; and (iii) whether BURKE satisfied its obligations under 11 NYCRR §65-3.5(o), by providing a reasonable justification for the failure to comply with STATE FARM's requests for documents.

In the view of this Court, the last issue is dispositive of the instant motion. Accordingly, the Court focuses its discussion on the question of whether BURKE can be said to have provided a

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reasonable justification for its failure to provide the documents sought. The issues are somewhat intertwined. That is, the reasonableness of BURKE's response depends, at least in part, on the propriety of the requests for additional verification. The analysis thus requires an examination of the substance of STATE FARM's document requests and BURKE's responses thereto.

STATE FARM's initial post-EUO verification request, dated September 18, 2018 (*NYSCEF Doc. 59*), asked BURKE to produce all documents in BURKE's possession or control that fall within the following categories:

1. Burke's federal and state tax returns for 2017 to the present, including any schedule K-1s, W-2s, 1099s, and quarterly payroll tax returns.
2. Burke's bank records for the period December 1, 2017 to the present, including any statements, deposits slips and cancelled checks.
3. Burke's general ledgers for the period December 1, 2017 to the present, or such other documents as reflect its financial condition, payments made and payments received.
4. Any documents relating to or reflecting any agreement, contract, lease, deal, arrangement or understanding with any person or entity providing management, billing, collection, consulting, or administrative services to Burke during the period December 1, 2017 to the present, including Expert Billing Solutions and Streamline Services.
5. Any documents relating to or reflecting any payment to or received from any person or entity providing management, billing, collection, consulting, or administrative services to Burke during the period December 1, 2017 to the present, including Expert Billing Solutions and Streamline Services.
6. All contracts, leases, subleases and agreements concerning Burke's operations at 941 Burke Avenue, Bronx, New York, including the written agreement with Seo Han Medical, P.C.
7. All contracts, leases, subleases and agreements concerning Burke's operations at 764 Elmont Road, Elmont, New York, including the written agreement with Starimed Group, Inc.
8. All contracts, leases, subleases and agreements concerning Burke's operations at 2625 Atlantic Avenue, Brooklyn, New York, including the written agreement with 2625 Group, Inc.
9. All contracts, leases, subleases and agreements concerning Burke's operations at 152-80 Rockaway Boulevard, Jamaica, New York.
10. All contracts, leases, subleases and agreements concerning Burke's operations at 80-12 Jamaica Avenue, Woodhaven, New York, including the written agreement with Healthwise Medical Services, P.C.
11. All contracts, leases, subleases and agreements concerning Burke's operations at 424 East 147th Street, Bronx, New York, including the written agreement with 19413 Northern Boulevard, Inc.
12. All contracts, leases, subleases and agreements concerning Burke's operations at 5037 Broadway, New York, New York, including the written agreement with 19413 Northern Boulevard, Inc.
13. All contracts, leases, subleases and agreements concerning Burke's operations at 2510 Westchester Avenue, Bronx, New York, including the written agreement with 19413 Northern Boulevard, Inc.
14. All contracts, leases, subleases and agreements concerning Burke's operations at 90-04 Merrick Road, Merrick, New York, including any written agreement with Life Health Care Medical, P.C.
15. All contracts, leases, subleases and agreements concerning Burke's operations at 2025 Davidson Avenue, Bronx, New York, including any written agreement with Seasoned Chiropractic, P.C.
16. All contracts, leases, subleases and agreements concerning Burke's operations at 550 Remsen Avenue, Brooklyn, New York.

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17. All contracts, leases, subleases and agreements concerning Burke's operations at 1122A Coney Island Avenue, Brooklyn, New York, including the written agreement with Marina Gadaborshev/MG Chiropractic, P.C.

BURKE responded to STATE FARM's request for additional verification by letter dated October 16, 2018 (*NYSCEF Doc. 277*). Therein, BURKE objected to the post-EUO request as improper and defective as a matter of law. The letter states (in relevant part):

While an EUO has been treated by courts as a condition precedent to coverage, the No Fault Regulations treat the EUO as a form of verification. Thus, where a carrier properly demands an examination under oath, "the verification is deemed to have been received by the insurer on the day the examination was performed." *See* 11 NYCRR 65-3.8(a)(1). The insurer has 30 days from the day the EUO is conducted to pay or deny the claim(s). *Id.* *See Hospital for Joint Disease v. New York Central Mutual Fire Ins. Co.*, 44 A.D. 3d 903 (2 Dept 2007); 11 NYCRR 65-3.5(c); and 11 NYCRR 65-3.8(a)(1).

Further, please be advised that pursuant to *Dynamic Med. Imaging, P.C. v. State Farm Mut. Auto. Ins. Co.*, 29 Misc.3d 278 (Dist. Ct., Nassau County, 2010) (Hirsh, J.), "the regulations do not give the insurer the right to ask an assignee to produce documents relating to the corporate structure or finances of a medical provider." *Dynamic* defines an EUO as a formal interrogation of a witness by an Attorney, specifically stating that a party may appear and give oral testimony, but a document request in connection with the requested EUO, or any other type of production is not proper.

Furthermore, State Farm's request for documentation is "essentially a demand for pre-action discovery regarding a *Mallela* defense. CPLR 3102(c) permits pre-action discovery only by court order and only to aid in bringing an action. Some of the documentation requested in the EUO letters [State Farm] may not be able to obtain even if it had been requested in a duly [sic] served notice for discovery and inspection."

As such, we deem State Farm's unduly burdensome post EUO request for additional verification in connection with the EUO that has already been submitted to the carrier a nullity. The insurer had 30 days from the day the EUO was conducted to pay or deny the claim(s), and we would hope that State Farm was guided accordingly.

(Emphasis in original.)

STATE FARM responded to BURKE's objections in its letter dated October 19, 2018. Therein, STATE FARM challenged the validity of BURKE's objections, and reasserted its position that it is entitled to the documents sought. In their subsequent correspondence, the parties essentially reiterate the arguments articulated in their initial correspondence. In its final response, BURKE adds:

We incorporate all our prior responses pertaining to this matter (dated October 16, 2018, October 26, 2018, November 29, 2018, December 7, 2018, December 28, 2018, February 26, 2019, and April 16, 2019), and reiterate all our previously articulated objections accordingly.

For the reasons stated in those responses, it goes without saying that Burke Physical has complied with STATE FARM's verifications requests insofar as said requests complied with the

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No-Fault Regulations. Burke Physical, of course, is under no legal obligation to respond to requests from STATE FARM that flaunt the No-Fault Regulations.

STATE FARM is wrong as to the burdens set forth in the No-Fault Regulations and which party must still meet them. Upon completing its EUO on September 14, 2018, Burke Physical fulfilled its burden to timely respond to STATE FARM's verification requests that were permitted by the No-Fault Regulations. The burden then shifted to STATE FARM to pay or deny Burke Physical's claims within 30 days of the EUO -- a burden STATE FARM failed to meet. As the Court of Appeals acknowledged on this point, "[t]o string out belated and extra bites at the apple is, on the present state of the law, inherently contradictory and unfounded under the statutes, regulations and policies that pertain to and govern this dispute, and we should not countenance such practices on the state of this record and these regulations and statutes." *Presbyterian Hosp. v. Md. Cas. Co.*, 90 N.Y.2d 274, 286 (1997). Allowing an insurer to make verification requests beyond the ones permitted by the Regulations would thus be unfounded and will not be sanctioned, as it unmistakably constitutes belated and extra bites at the apple by STATE FARM.

In the instant motion, STATE FARM asserts that its request for verification was justified and proper. The basis for requesting such documentation is set forth in the Affidavit of Doug Babin, STATE FARM's investigator (*NYSCEF Doc. 55*). As explained in detail therein, the inquiry into BURKE's business practices raised questions regarding BURKE's right to be compensated for health care services rendered to STATE FARM insureds. The EUO of BURKE was sought: (i) to verify that the billed services were medically necessary; (ii) to confirm the appropriateness of the billing codes and corresponding charges submitted by Burke; and (iii) to verify that BURKE's services were provided pursuant to arrangements with others that comply with New York State licensing laws. Mr. Babin states that the EUO of John Nasrinpay, P.T. (BURKE's owner) did not resolve STATE FARM's questions, but rather raised further questions. Accordingly, Mr. Babin states, the documentary verification was requested from BURKE to confirm that BURKE had standing to receive payment of assigned No-Fault benefits, and that BURKE operated in compliance with New York State licensing requirements.

STATE FARM's counsel explains that a professional corporation must comply with New York State or local licensing requirements in order to have standing to collect No-Fault benefits. 11 NYCRR §65-3.16(a)(12). In the case of *State Farm Mut. Auto. Ins. Co. v Mallela*, 4 N.Y.3d 313 (2005), the Court of Appeals held that an insurer may withhold payment for medical services provided by a professional corporation when there is willful and material failure to abide by licensing and incorporation statutes. *Id.*, at 321. Under New York law, a medical corporation must be solely owned and controlled by physicians. See Business Corporation Law §§ 1503, 1507, 1508, and Education Law § 6507. Thus, a corporate provider that is not solely owned and controlled by physicians is not eligible for No-Fault insurance reimbursements. *Id.* See also *Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d 389 (2019). Insofar as STATE FARM's investigation

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raised questions in this regard, STATE FARM asserts that it was entitled to further inquiry into BURKE's corporate documents and finances.

In opposition, BURKE's counsel asserts that STATE FARM's requests for verification improperly sought financial and corporate documents from BURKE, including tax returns, bank statements, and leases, that were unrelated to the verification of any of the claims. Relying upon the decision in *Dynamic Med. Imaging, P.C. v. State Farm Mut. Auto. Ins. Co.*, 29 Misc.3d 278 (Dist. Ct., Nassau County, 2010), BURKE contends that the request for such documents is not authorized in the context of the No-Fault regulatory scheme, which was designed to promote the expeditious resolution of claims. Rather, BURKE asserts, the production of such documents is appropriately sought, if at all, in the context of pre-trial discovery, either in a provider's action for reimbursement, or in a declaratory judgment action brought by the insurer. Moreover, BURKE asserts that, as a factual matter, STATE FARM has not established a sufficient basis for its purported *Malella* defense to justify the broad and extensive discovery sought.

The Court has reviewed the extensive case law cited by the parties in support of their respective positions. Most of the decisions cited are from Courts of first impression, and articulate general principles or present factual contexts not applicable here. The parties have presented, and the Court has found, no controlling authority that provides a definitive answer to the precise question at issue in this case – that is, the extent to which an insurer that believes it has a sound basis for a *Malella* defense may seek documents supporting that defense at the verification stage of a claim. Cases reviewed by the Court vary in their outcome and rationale, or avoid the question altogether.

Notably, these two parties, STATE FARM and BURKE, have engaged in essentially the same dispute in other fora. That is, in other cases, with respect to other claims, STATE FARM has sought summary judgment based upon the “outstanding verification defense” – that BURKE failed to provide the documents sought pursuant to a request for verification of the claims at issue therein. In those cases, STATE FARM's requests for documentary verification, and BURKE's responses thereto, appear to mirror the ones at issue here, and were supported by the same arguments as were articulated here. The cases went both ways. See *Burke Physical Therapy, PC v State Farm Mut. Auto. Ins. Co.*, 2021 NY Slip Op 50624(U); *Burke 2 Physical Therapy, P.C., a/a/o Echevarria-Rosa v State Farm Mut. Auto. Ins. Co. PIP/BI Claims*, Index No.: CV-743482-19 (NYSCEF Doc. 292); *Burke 2 Physical Therapy, P.C., a/a/o Simmons v State Farm Mut. Auto. Ins. Co.* Index No. CV-730313-19/KI (NYSCEF Doc. 292). The extent to which the outcome and rationale were based upon the particular facts or procedural posture of the case is not clear.

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In this Court's view, only one conclusion can be drawn – that on the precise question at issue here, the law is unsettled. To the extent that the Court finds one position more persuasive than the other, the Court is of the opinion that for purposes of the determination herein, it is of no import. What matters is the reasonableness of BURKE's justification for refusing to provide the documents sought. In the absence of a clear answer as to whether or not STATE FARM was entitled to obtain the numerous documents sought at the verification stage of the claims, the Court cannot find, as a matter of law, that BURKE's justification was unreasonable. Accordingly, the Court cannot find, as a matter of law, that BURKE failed to satisfy its obligation under 11 NYCRR 65-3.5(o) to offer, within 120 days, "written proof providing reasonable justification for the failure to comply." The Court thus finds that, on the record presented, STATE FARM has failed to meet its burden to establish a right to disclaim coverage. See *TAM Medical Supply Corp. v Tri State Consumers Ins. Co.*, 57 Misc 3d 133(A) (App Term, 2d Dept., 2d, 11th & 13th Jud. Dists. 2017).

It appears that STATE FARM may have proceeded to seek declaratory relief on the basis of an outstanding verification defense, rather than on its potential *Malella* defense, in order to expedite judgment, and because summary judgment might be unavailable on the *Malella* defense, particularly without the documentation sought. The Court is not inclined to short-circuit the process of determining entitlement to declaratory relief, particularly in view of the potentially broad and far-reaching impact of such a determination. To the extent that STATE FARM believes that it has a viable *Malella* defense, nothing in this decision precludes STATE FARM from seeking discovery in the context of this declaratory judgment action, or proceeding to litigate the central issue underlying this case; that is, whether STATE FARM is entitled to disclaim coverage on the basis that BURKE was not in compliance with the applicable licensing and incorporation statutes.

CONCLUSION

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

Based upon the foregoing, it is

ORDERED, that the portion of STATE FARM's motion that seeks to amend the Complaint pursuant to CPLR §§ 3025(b) and (c) to reflect the amount in dispute as \$154,877.05 to conform to the evidence is *granted*, and the Amended Complaint, in the form attached to the motion as Exhibit H (*NYSCEF Doc. 65*), is deemed served *nunc pro tunc* upon BURKE; and it is further

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ORDERED, that the portion of STATE FARM's motion that seeks an Order pursuant to CPLR § 3212 granting STATE FARM summary judgment based upon BURKE's failure to provide the requested additional documentary verification to STATE FARM within 120 days pursuant 11 NYCRR 65-3.5(o) is *denied*.

Any requests for relief not specifically addressed herein are *denied*.

This constitutes the Decision and Order of this Court.

Dated: February 25, 2022
Mineola, NY, 11501

ENTER:



HON. ERICA L. PRAGER, J.S.C.

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