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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

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INTERBORO INSURANCE COMPANY,

Plaintiff,

-against-

NATHANIEL BENNET, PETER MINOTT, GLOBAL HEALTH CARE CHIROPRACTIC, P.C., SOONER PHYSICAL THERAPY SERVICES, P.T., FLATBUSH MULTI SERVICES MEDICAL, P.C., OSH MODERN ART ACUPUNCTURE, P.C., MERIDIAN PSYCHOLOGICAL, P.C., LIFE TREE ACUPUNCTURE, P.C., FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER SOCIAL WORK SERVICES, P.L.L.C., RIMOUN GEORGE HANNA, P.T. D/B/A COUNTRYWIDE PHYSICAL THERAPY, COUNTRYWIDE PHYSICAL THERAPY, P.C., V&T MEDICAL P.C., SEACOAST MEDICAL, P.C., ADVANCED CHIROPRACTIC OF NEW YORK, P.C., MDJ MEDICAL, P.C., GRS CHIROPRACTIC, P.C., QUEST SUPPLY INC.,

Defendants.

Motion Sequence #1, #2
Submitted August 10, 2011

INDEX NO: 2252/11

The following papers were read on this motion to dismiss:

Notice of Motion and Affs.....1-4
Notice of Cross-Motion and Affs.....5-7
Affs in Reply.....8-10
Affs in Sur-Reply.....11&12

Upon the foregoing, it is ordered that this motion by the plaintiff, Interboro Insurance Company, for an order pursuant to CPLR 3215 granting a default judgment in its favor against the non-answering defendants: to wit, Nathaniel Bennet, Peter Minott, Global Health Care Chiropractic, P.C., Sooner Physical Therapy Services, P.T., Flatbush Multi Services Medical, P.C., Osh Modern Art Acupuncture, P.C., Meridian Psychological, P.C., Life Tree Acupuncture, P.C., Rimoun George Hanna, P.T. d/b/a Countrywide Physical Therapy, Countrywide Physical Therapy, P.C., V&T Medical P.C., Seacoast Medical, P.C., Advanced Chiropractic of New York, P.C., MDJ Medical, P.C., GRS Chiropractic, P.C., Quest Supply Inc. (collectively referred to herein as the "non-answering defendants"), and for an order, pursuant to CPLR 3212, granting summary judgment in its favor declaring that no defendant is entitled to no-fault coverage for the underlying motor vehicle accident on June 1, 2010 is disposed of as follows:

This cross-motion by defendant, Five Boro Psychological and Licensed Master Social Work Services, P.L.L.C. (herein referred to as "Five Boro"), for an order pursuant to CPLR 603 and 1002, granting it severance of the action as asserted against it and for an order pursuant to CPLR 3124 compelling the plaintiff to comply with it's discovery demands is also disposed of as follows:

This action emanates from a motor vehicle accident that took place on June 1, 2010. Plaintiff, Interboro, provided a policy of insurance to its insured, Michael Simpson. The policy included a no-fault endorsement which provided coverage to an insured or an eligible injured person in the amount of at least $50,000 for all necessary expenses resulting from a motor vehicle accident. The policy was in effect on June 1, 2010.

Defendants Nathaniel Bennet, Peter Minott and non-party Joann Berry, were alledgely involved in the subject motor vehicle accident with Michael Simpson and made claims, as purported eligible injured persons under the policy issued by Interboro. As best as can be determined from the papers submitted herein, defendants Nathaniel Bennet, Peter Minott and non-party Joann Berry, all sought no-fault benefits from defendant Five Boro as well as from all non-answering defendants (except obviously from Bennet and Minott).

Specifically, only defendant Peter Minott sought no-fault benefits from defendant Five Boro. Five Boro is the only defendant that has appeared in this action.

Plaintiff, Interboro, commenced this action asserting three causes of action. Each cause of action seeks a declaratory judgment: the first cause of action is against Nathaniel Bennett and all of his provider defendants; the second cause of action is against Peter Minott and all of his provider defendants; and, the third cause of action is against all of Joanne Berry's provider defendants. In bringing this suit, plaintiff claims that there is no coverage as to these defendants, including the provider defendants who seek no-fault reimbursement benefits from Interboro, because no defendant attended it's properly scheduled Examinations Under Oath ("EUO"). Plaintiff maintains that it gave Nathaniel Bennett, Peter Minott, and Joanne Berry two opportunities each to attend said EUOs but that the defendants, Bennett and Minott, failed to attend either EUO. Non-party Joanne Berry attended her duly scheduled EUO. Plaintiff claims that since Bennett and Minott missed the scheduled EUOs and violated a condition precedent to coverage, it, as a result, is allowed to deny coverage for the accident, retroactive to the date of the accident. Accordingly, plaintiff claims that it is entitled to a

declaration that there is no coverage for any and all first party benefits claimed by Nathaniel Bennett and his assignee provider defendants, Peter Minott and his assignee provider defendants and all of Joanne Berry's provider defendants, none of which appeared for their EUOs.

Upon the instant application, plaintiff seeks summary judgment. It argues that the failure to attend examinations under oath absolves the plaintiff from having to prove coverage to each defendant.

The purpose of the no-fault statute is to insure prompt payment of medical claims regardless of fault (*Hospital for Joint Diseases v Travelers Property Casualty Ins. Co.*, 9 NY3d 312). In order to meet this purpose, an insurer must pay or deny a claim within 30 days of receipt (11 NYCRR 65–3.8[a]). An insurer may toll or extend its time to pay a claim by timely demanding an IME, an Examination Under Oath or verification (*Hospital for Joint Diseases v New York Cent. Mut. Fire Ins. Co.*, 44 AD3d 903; 11 NYCRR 65–3.5[c]; 11 NYCRR 65–3.8[a][1]). The no-fault insurance carrier may request an eligible injured person or that person's assignee to submit to an examination under oath as may reasonably be required (11 NYCRR 65-1.1). The rules state that the examination under oath shall be conducted at a time and place reasonably convenient for the applicant (11 NYCRR 65-3.5[e]). A request for an examination under oath "... must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination" (*Id*). Appearance at a properly demanded EUO is a condition precedent to an insurance carrier's liability to pay no-fault benefits (*Five Boro Psychological Services, P.C. v Progressive*

Northeastern Ins. Co., 27 Misc.3d 141[A] [App. Term 2nd, 11th and 13th Jud. Dists. 2010]).

In this case, plaintiff has satisfied its *prima facie* burden on summary judgment of establishing that it requested EUOs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that defendants and their assignors did not appear. Specifically, plaintiff has established both that the notices which scheduled the EUOs were properly mailed by the law firm retained by the plaintiff to schedule and conduct said EUOs (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 and that the defendants and their assignors failed to appear (*Crotona Hgts. Med., P.C. v Farm Family Cas. Ins. Co.*, 27 Misc.3d 134[A] [App. Term 2nd, 11th and 13th Jud. Dists 2010]; see also *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720).

The only party to oppose this plaintiff's motion is defendant Five Boro. Prior to addressing the merits of Five Boro's opposition however, this Court first notes that inasmuch as plaintiff seeks, *inter alia*, a default judgment against all non-answering defendants, said application is granted (CPLR 3215[a]). Specifically, having established proof of service of the summons and complaint as well as a *prima facie* showing of a cause of action against the defaulting parties (CPLR 3215[f]), plaintiff's motion for a default judgment against the non-answering defendants is granted (*Joosten v Gale*, 129 AD2d 531).

Consequently, having awarded default judgment against the non-answering defendants, plaintiff's application for summary judgment against said defaulting defendants is denied as moot.

As to the answering defendant, Five Boro, however, the burden shifts to Five Boro to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Defendant Five Boro has failed to sustain said burden.

Five Boro's contention that the plaintiff did not establish that the EUO notices were timely and properly mailed to Peter Minott is unfounded and meritless. By submitting the affirmation of Jason Tenenbaum, the owner of the law firm that mailed the EUO scheduling letters, the plaintiff has presented proof in admissible form establishing the plaintiff's standard office practices or procedures that were designed to ensure that items were properly addressed and mailed (*Residential Holding Corp. v Scottsdale Ins. Co.*, *supra*; see also *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547; *Hospital for Joint Diseases v Nationwide Mut. Ins. Co.*, 284 AD2d 374). Moreover, by submitting a copy of Peter Minott's signed certified mail return receipt, acknowledging receipt of the first letter scheduling the EUO, defendant's argument that plaintiff mailed the letter to the wrong address is likewise unfounded.

Furthermore, and inasmuch as there is ample evidence that the claim was denied within 30 days of the final EUO default, plaintiff Interboro's EUO no-show defense is preserved (*Westchester Med. Ctr. v Lincoln Gen. Ins. Co.*, 60 AD3d 1045).

In light of the foregoing, plaintiff's motion for an order granting it summary judgment decreeing that defendant Five Boro, i.e., the only answering defendant, is not entitled to no-fault coverage for the underlying motor vehicle accident on June 1, 2010, is granted.

Having awarded summary judgment on its second cause of action against Peter Minott's provider, Five Boro, defendant Five Boro's cross motion pursuant to CPLR 603 and 1002 for an Order granting it severance of the action as asserted against it is denied as moot. Similarly, Five Boro's application for an Order, pursuant to CPLR 3124 compelling the plaintiff to comply with it's discovery demands is also denied as moot.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

All applications not specifically addressed herein are denied.

Dated: OCT 07 2011

UTE WOLFF LALLY, J.S.C.

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