SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

INTERBORO INSURANCE COMPANY,

Plaintiff,

-against-

MOTION DATE: 10/19/11

MOTION SEQ. NO.: 001
INDEX NO.: 6908/11

ROSETTA DAWKINS
MERIT ACUPUNCTURE, P.C.
AVENUE C MEDICAL, P.C.
HARMONY CHIROPRACTIC, P.C.
PROFESSIONAL HEALTH IMAGING, P.C.
TOTAL MOBILITY, P.C.

Defendants.

The following papers read on this motion (numbered 1):
Notice of Motion For Leave To Enter A Default Judgment.....1

Plaintiff INTERBORO INSURANCE COMPANY moves pursuant to **CPLR §3215** for a default judgment against defendants MERIT ACUPUNCTURE, P.C. ("MERIT"), AVENUE C MEDICAL, P.C. ("AVENUE C"), PROFESSIONAL HEALTH IMAGING, P.C. ("PHI") and TOTAL MOBILITY, P.C. ("TOTAL MOBILITY") (collectively, the "Provider Defendants"). Plaintiff purports to have discontinued the action as against its insured, defendant ROSETTA DAWKINS ("DAWKINS"), and defendant HARMONY CHIROPRACTIC, P.C. ("HARMONY"). The Court has received no opposition to this motion.

Pursuant to this Part's Rules, namely Rule I(B), the Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This is a declaratory judgment action in which plaintiff seeks a determination that it is not obligated to provide No Fault benefits to DAWKINS or to her assignees or health care providers, particularly the Provider Defendants, in connection with a motor vehicle accident that allegedly occurred on December 8, 2010 (the "Accident"). Plaintiff admits that DAWKINS was insured on the date of the Accident, but claims that coverage was

vitiated by the failure of DAWKINS to appear for an Examination Under Oath ("EUO"), which is a prerequisite to coverage under the applicable policy of automobile insurance and insurance regulations.

Plaintiff's counsel claims to have sent three letters by Certified Mail, Return Receipt Requested, and by regular mail, to DAWKINS at the address provided in her claim for No Fault benefits, requesting her appearance at an EUO on 2/10/11, 2/25/11 and 3/11/11, respectively. According to plaintiff's counsel, DAWKINS failed to appear on all of the scheduled dates. Counsel states that on March 21, 2011, plaintiff denied DAWKINS' claim for No Fault benefits and all of the Provider Defendants' bills. Counsel claims that all bills received thereafter were denied within 30 days of receipt.

Plaintiff now moves for a default judgment based upon the failure of all of the Provider Defendants to answer or otherwise appear in this action. In support of its motion, plaintiff submits: (i) the Affirmation in Support by its attorney, dated August 4, 2011 (the "Attorney Affirmation"); (ii) a copy of the Summons and so-called Verified Complaint (with no copy of the verification); (iii) Affidavits of Service, attesting to service of the Summons and Complaint upon AVENUE C, HARMONY, PHI and TOTAL MOBILITY by delivery to the New York Secretary of State pursuant to **Business Corporation Law §306**; (iv) Copies of letters dated January 26, 2011, February 14, 2011, and February 24, 2011, which were purportedly sent to DAWKINS for purpose of notifying her of the scheduled EUOs; (v) Affirmation of plaintiff's attorney, which is not dated (the "Undated Affirmation"); and (vi) Affidavit of plaintiff's Claim Representative, sworn to on August 4, 2011 (the "Party Affidavit").

At the outset, the Court notes an irregularity in this application that raises the Court's concern. Every document submitted to the Court (including the Attorney's Affirmation), which purports to bear, or is required to bear, the signature of plaintiff's counsel, Jason Tenenbaum, Esq., is either unsigned or contains an illegible and unformed marking that is not only non-uniform, but is clearly and largely different on each document. In view of the recent, well-publicized "robo-signing" scandal, the Court finds that this renders the attorney's signature questionable and the entire application suspect.

Apart from the foregoing, the Court finds that the proof is inadequate. First, plaintiff fails to provide proof of service of the Summons and Complaint upon MERIT. Accordingly, no default judgment may be granted against that defendant. The service upon the remaining Provider Defendants pursuant to **Business Corporation Law §306** is valid for purposes of jurisdiction, but plaintiff fails to show additional service pursuant to **CPLR §3215(g)(4)**. This alone is sufficient to defeat the application for a default judgment.

Second, plaintiff fails to show proof of service of the Notice of Motion upon DAWKINS or HARMONY, or to demonstrate that such service was not required. There is no proof that either of these defendants were in default. The RJI indicates that issue was not joined with respect to DAWKINS, but it is silent with respect to HARMONY. In either case, insofar as the RJI is unsigned, it is devoid of probative value. Further, plaintiff fails to provide proof of service of the Summons and Complaint upon DAWKINS. Without such proof, her default cannot be established. Presumably, DAWKINS and HARMONY were not served with this motion because plaintiff purports to have discontinued the action as against these defendants. Plaintiff fails to show, however, that the purported discontinuance has been effected in accordance with **CPLR §3217.** Absent proof of a proper and effective discontinuance, it is incumbent upon plaintiff to demonstrate service of this motion upon DAWKINS and HARMONY, or to show that such service was not required. Plaintiff has done neither.

Plaintiff's proof of the merits is perfunctory. Although unopposed, this motion may be granted only upon plaintiff's demonstration of a *prima facie* right to declaratory relief. *See* **Merchants Insurance Company of New Hampshire Inc. v. Long Island Pet Cemetery**, 206 AD2d 827; **Mount Vernon Fire Ins. Co. v. NIBA Construction Inc.,** 195 AD2d 425; **Joosten v. Gale,** 129 AD2d 531. *See also* **CPS Group, Inc. v. Gastro Enterprises, Corp.,** 54 AD3d 800. The standard of proof set forth in **Joosten** and progeny is not stringent. At minimum, however, some first-hand confirmation of the facts is required. **Joosten v. Gale**, 129 AD2d at 535.

Plaintiff fails to meet this burden. The Attorney's Affirmation is replete with boilerplate. For example, the affirmation recites: "On 1/26/11, The Law Office of Jason Tenenbaum, P.C. (on behalf of Plaintiff INTERBORO INSURANCE COMPANY) sent to Rosetta Dawkins (and his/her attorney if one was retained) at the address stated on the application for benefits a letter requesting that he/she attend an Examination Under Oath ('EUO') on 2/25/11, at a court reporting center." Attorney's Affirmation, ¶ 19. *See also* ¶¶ 14, 15, 17, 18, 21, 23, 26. This type of language, coupled with the dubious signature, at the very least raises questions regarding the personal knowledge of the purported affirmant.

The Party Affidavit and Undated Affirmation speak only to the general practices of plaintiff and plaintiff's counsel with respect to the mailing of EUO notices. The application is devoid of first-hand testimony or substantiating documentation regarding the attempt to secure DAWKINS' attendance at the EUO. There is no evidence that the mailing address on the EUO notice was the current and valid address of DAWKINS – plaintiff does not provide a copy of the application for benefits which allegedly contains

this address, or any other documentary proof. Further plaintiff does not provide a copy of the Certified Mail Return Receipt or any other evidence showing the result of the mailing – i.e., whether anyone signed for the letter or whether it was returned unclaimed. In the face of insufficient proof of notice, DAWKINS' inaction does not support an inference that she knowingly or deliberately breached her obligation to appear for an EUO.

Based upon the foregoing, and particularly in view of the specter of unreliability permeating this application, the Court finds that plaintiff is not entitled to the relief sought. Accordingly, it is

ORDERED, that plaintiff's motion for a default judgment pursuant to **CPLR §3215** is **denied.** Plaintiff shall serve a copy of this Order upon all defendants within ten (10) business days of entry, and shall file proof of such service with the Court, on or before any further application in this matter.

This constitutes the Order of the Court.

Dated: 1/17/12

Dana Winslow
J.S.C.

ENTERED
JAN 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE