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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

STATE FARM MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

VALENTINA ANIKEYEVA, ANDREWY ANIKEYEV a/k/a ANDRE ANIKEYEV a/k/a ANDREI ANIKEYEV, AVA ACUPUNCTURE, P.C., CROSSBAY ACUPUNCTURE, P.C., DITMAS ACUPUNCTURE, P.C., DOWNTOWN ACUPUNCTURE, P.C., EAST ACUPUNCTURE, P.C., EMPIRE ACUPUNCTURE P.C., FIRST HELP ACUPUNCTURE, P.C., GREAT WALL ACUPUNCTURE, P.C., LEXINGTON ACUPUNCTURE, P.C., MADISON ACUPUNCTURE, P.C., MIDBOROUGH ACUPUNCTURE, P.C., NEW ERA ACUPUNCTURE, P.C., N.Y. FIRST ACUPUNCTURE, P.C., NORTH ACUPUNCTURE, P.C. and V.A. ACUTHERAPY ACUPUNCTURE, P.C.,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 4399-10

MOTION SUBMISSION
DATE: 3-21-13

MOTION SEQUENCE
NOS. 7 and 008

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Reply Affirmation	X
Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition	X
Affirmation in Opposition	X

Order to Show Cause by defendants, for an Order: staying enforcement and compliance with the subpoenas; quashing these subpoenas pursuant to CPLR §2304; granting the providers a Protective Order pursuant to CPLR §3103; and imposing costs and sanctions pursuant to 22NCYRR §130-1.1 and that all court proceedings be stayed pending the hearing and determination of this motion, is denied.

Motion by plaintiff, State Farm Automobile Insurance Company, for a default judgment, pursuant to CPLR §3215, on plaintiff's first and second causes of action against all defendants : Valentina Anikeyeva ("Anikeyeva"), Andrey Anikeyev a/k/a Andre Anikeyev a/k/a Andrei Anikeyev ("Andrey"), Ava Acupuncture, P.C., Crossbay Acupuncture, P.C., Ditmas Acupuncture, P.C., Downtown Acupuncture, P.C., East Acupuncture, P.C., Empire Acupuncture, P.C., First Help Acupuncture, P.C., Great Wall Acupuncture, P.C., Lexington Acupuncture, P.C., Madison Acupuncture, P.C., Midborough Acupuncture, P.C., Midwood Acupuncture, P.C., New Era Acupuncture, P.C., N.Y. First Acupuncture, P.C., North Acupuncture, P.C., and VA Acutherapy Acupuncture, P.C. is granted.

PROCEDURE

The instant motions arise out of an underlying action for a declaratory judgment filed by plaintiff in this Court in March, 2010. The complaint alleges therein, that the defendant professional corporations (collectively, "P.C. defendants ") are not owned and controlled by licensed acupuncturists, as required by the statutes, rules and regulations of New York State. Further, the actual services were performed by independent contractors, also in violation of the state regulations.

The plaintiff's first cause of action alleges that the P.C. defendants are unlawfully incorporated and are not entitled to collect no-fault benefits for any charges they have submitted to State Farm, and plaintiff is therefore not obligated to pay the P.C. defendants or any patient for such health services. The second cause of action alleges that the P.C. defendants are not entitled to collect and State Farm is not obligated to pay, no-fault benefits for any charges that the P.C. defendants submitted to State Farm as the professional health services were provided by independent contractors or other non-employees of the P.C. defendants.

Specifically, plaintiff alleges that the defendants were engaged in a fraudulent scheme where Anikeyeva, a licensed acupuncturist, formed the professional corporations for Andrey, who was not licensed in New York State, to

operate, own and control the acupuncture businesses. Andrey hired independent contractors to perform acupuncture services at the P.C. defendants' offices. This conduct was alleged to be in violation of the Business Corporation Law ("BCL") and the New York Code of Rules and Regulations ("NYCRR").

The plaintiff seeks reimbursement of $57,200.00 and declaration that it is not obligated to pay any outstanding claims, that are presently in excess of $770,977.38.

The defendants responded to the complaint by serving a 981-page amended answer and counterclaims, and the parties also exchanged discovery demands. The defendants moved to dismiss plaintiff's complaint under CPLR §3211 (a)(7), which was denied by this Court in August; 2010. The plaintiff moved this Court to dismiss certain counterclaims, which the Court, in its Order dated August 10, 2011, granted as a motion to compel the defendants to serve a second amended answer and counterclaim in compliance with the statutory pleading requirements. In March, 2012, the Court, after receiving the second amended answer and counterclaims, granted plaintiff's motion.

On June 27, 2012, the parties entered into a preliminary conference stipulation, so-ordered by this Court, partially over the defendants' objections, that the defendants were to comply with outstanding discovery demands within 30 days of the date of its execution. As the defendants allegedly had not complied

with the terms of the stipulation, the plaintiff issued as a good faith attempt to resolve the issue a letter dated August 15, 2012. Plaintiffs issued a second letter to defendants' counsel, dated September 11, 2012, as a reminder that they have not complied with discovery, causing the deposition of defendant, Anikeyeva, to be rescheduled.

As the defendants remained non-complaint, the plaintiff moved this Court, in October, 2012, to compel discovery from the defendants. Shortly thereafter, the plaintiffs served subpoenas demanding certain documents that were requested in discovery, upon the following insurance companies: Geico, GMAC, Interboro, lancer, Liberty Mutual, Metlife New York, New York Central, Progressive, Tower, Travelers Indemnity, USAA General, Zurich North America, and upon individual, Alex Zolotisky, E.A. The non parties were requested to produce, inter alia, copies of IRS Form 1099's from 2004 -2011 documenting payments issued to the P.C. defendants. The defendants filed the instant motion for a protective order and to quash the subpoenas.[1]

On November 20, 2012, the parties executed a stipulation which provided in relevant part; "...[p]laintiff's motion to compel is granted...in its entirety [and] Defendants answer is *conditionally stricken* unless Defendants fully comply with

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[1]The defendants also requested consolidation of "the eighty-eight (88) cases annexed as Exhibit 1". However that particular exhibit is a copy of the verified complaint and there is no reference to 88 cases contained therein.

all of Plaintiff's/discovery/demands by [January 7, 2013]..." As the defendants continued to be non-complaint, the plaintiffs filed the instant motion, where the defendants responded with an affirmation citing meritorious defenses and reasonable excuses. The defendant further claimed that responses to discovery were served upon plaintiff in February, 2013[2].

Prior to the commencement of the underlying action, defendant, Midwood Acupuncture, P.C. and claimant/applicant, Nadia Geoadzhaeva, who treated at the facility, filed for arbitration against State Farm, seeking reimbursement for services rendered. The claim was denied as arbitrator determined that Midwood was "fraudulently incorporated" based on the evidence presented at the hearing, and therefore not entitled to receive reimbursement (see Plaintiff's Motion, Exhibit W). A related claim for arbitration against State Farm, was filed by defendant, Ava Acupuncture and claimant/applicant, Luis Domeneck, P.C., for reimbursement for services rendered. The arbitrator, based on the "clear and convincing evidence", similarly determined that Ava Acupuncture, P.C. was fraudulently incorporated and not entitled to receive reimbursement. Similar actions were commenced against the plaintiff in Queens County Civil Court, King County Civil Court, and Kings County Supreme Court.

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[2]The defendants state that their responses were voluminous, about 4,000 pages, and they only annexed the affirmation of service as an exhibit.

Further, in February 2012, defendant, Andrey, was indicted by a Grand Jury in the United States District Court of the Southern District of New York, Case:1:12-cr-00171(JPO) for charges of, inter alia, racketeering and money laundering. The facts and circumstances include the very allegations set forth in the underlying summons and complaint, specifically regarding defendant P.C.s, Ava Acupuncture, First Help Acupuncture, Great Wall, Lexington Acupuncture, Midborough Acupuncture, and New Era Acupuncture.

FACTS

The facts are not laid out in full in the instant motions as the parties have engaged in protracted litigation before this Court, Kings County Civil and Supreme Courts, and Queens County Civil Court. In sum, the plaintiff reimbursed the defendant P.C.'s for acupuncture services provided to patients regarding no-fault claims under Insurance Law §5101.

In 2004, the plaintiff uncovered that the defendant P.C.'s were not owned and controlled by an actual New York State licensed physician. Specifically, defendant, Anikeyeva, allowed defendant, Andrey, to borrow the use of her name and license, to create a stamp of her signature for purposes of forming a P.C. and to circumvent New York State licensing requirements. In other words, Anikeyeva was the "front" and Andrey owned and operated the business.

ARGUMENT

Plaintiff argues that if a health provider fails to comply with New York State or local licensing requirements, it is not entitled to receive no-fault payments. In addition, the defendants' failure to comply with a so ordered stipulation of this Court regarding compliance with outstanding discovery requests, warrants the cited consequence of striking defendants' answer, and its attempt of compliance by issuing a 4,000 page document with largely non-responsive answers, is woefully insufficient.

Plaintiffs' supporting evidence includes: copies of the pleadings; Orders of this Court; a release from the U.S. Attorney's Office announcing charges against individuals, including Andrey, for participation in a health care fraud scheme; letters to defendants' counsel regarding outstanding discovery and failure to comply with so-ordered stipulations of this Court; affidavit by non-party witness, Yebo Fu; and copies of arbitration decisions.

Because plaintiff had not deposed the defendants due to their non-compliance with discovery, it submits the following transcripts of depositions conducted in prior actions between plaintiff and certain P.C. defendants: Alla Anoshkina, Crossbay Acupuncture, P.C. and et al v. State Farm Insurance Company, #SSF-4179; Shu Juan Co, Great Wall Acupuncture and et al v. State

Farm Insurance Company, Kings County Supreme Court, Index No. 107904/04; Martha McAdams, Midborough Acupuncture, and et al v. State Farm Insurance Company, Kings County Civil Court, Index no. 098851/04; Anikeyeva, Downtown Acupuncture and et al v. State Farm Insurance Company, Kings County Supreme Court, Index No. 044326/04; Anikeyeva, N.Y. First Acupuncture and et al v. State Farm Insurance Company, Queens County Civil Ct., Index No. 1093/08; and Jian Wen Shu, North Acupuncture v. State Farm Insurance Company, Kings County Civil Court, Index No. 083579/04.

Defendant argues that its delay in responding to the terms of the November 20, 2012 Order of this Court, is due to the effects of Hurricane Sandy, and law office failure. Additionally, the plaintiff's claim lies in statutory violations under the BCL, and the statute of limitations of three years for such claims, bars plaintiff from any recovery, if due. As to the motion to quash the subpoenas, defendants argue that the information requested therein is overly broad and same has already been requested through discovery.

DISCUSSION

The Court will first address the merits of plaintiff's motion seeking a default judgment. Such relief is predicated on theory that the defendants were in contempt of an Order of this Court compelling them to comply with outstanding discovery

demands by January 7, 2013. The defendants admittedly served the responses on February 19, 2013.

CPLR §3126 authorizes courts to issue an order in response to a party's refusal to obey a disclosure order, including an order striking the pleadings. If the credibility of court orders and the integrity of the judicial system are to be maintained, a litigant cannot ignore court orders with impunity, and a court may make such orders that are just, including dismissal of an action. Further, compliance with a disclosure order requires both a timely response and one that evinces a *good-faith effort to address the requests meaningfully* (see *Kihl v. Pfeffer* 94 NY2d 118 [1999]). Here, the defendants failed to comply with a conditional order of preclusion dated November 20, 2012. As a result, the conditional order became absolute (see *Lopez v City of New York*, 2 AD3d 693 [2nd Dept 2003]).

In order to defeat enforcement of a conditional order, the defaulting party must demonstrate a reasonable excuse for its failure to produce the requested documents and a meritorious claim or defense through an affidavit. Where these two conditions cannot be met, the court may enforce its conditional order. The defendants attempt to proffer a reasonable excuse by its reference to Hurricane Sandy. It is of judicial notice that Hurricane Sandy struck the Long Island area on

October 29, 2012 and the so ordered stipulation was executed on November 20, 2012. The defendants, in their appearance in this part on that date, made no reference to being so impacted and they failed to set forth how they were impacted in their affidavit. The law office failure excuse is also unavailing.

This Court takes note of the defendants' general conduct throughout the litigation. First , they answer the complaint with a voluminous convoluted document that caused this Court to order the submission of a second amended answer. During the request for exchange of discovery, defendants did not seek relief from this Court regarding any issue with plaintiffs' discovery requests. They simply did not respond. Further, this Court so-ordered compliance within 30 days of a stipulated agreement between the parties in June, 2012, and defendants failed to comply. Taken together, defendants' overall pattern of noncompliance, both in response to plaintiff's repeated demands for the requested disclosure and following the issuance of the stipulated conditional order of striking their answer, gives rise to an inference that their conduct was willful and contumacious (see *Hesse Const., LLC v. Fisher,* 61 AD3d 1143 [3rd Dept 2009]).

As to defendants' argument that the plaintiff's cause of action sounds in a statutory violation which is subject to a three-year statute of limitations, CPLR §214 provides in relevant part:

> "...The following actions must be commenced within three years:...
>
> an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215...";

CPLR §213 provides in relevant part:

> "...The following actions must be commenced within six years:
> ...
>
> an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it...".

In light of the foregoing and in applying the very case cited by defendants, [*Gaidon v. Guardian Life Ins. Co. of America,* 96 NY2d 201 (2001)], this Court has determined that the six-year statute of limitations applies to the instant case. In *Gaidon*, the defendant argued that the plaintiff's cause of action set forth claims under the General Business Law, as the plaintiff sought to recover upon a liability created or imposed by statute under CPLR §214 (2) and were therefore governed by the three-year Statute of Limitations provided in that section. However, the Court of Appeals noted that such time limitation does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability "would not exist but for a statute". In other words, CPLR §214 (2) does not apply to liabilities existing at common law which have been recognized or implemented

by statute. In such a case, as in the case at bar, the statute of limitations for the statutory claim is that for the *common-law cause of action which the statute codified or implemented* (*Gaidon v. Guardian Life Ins. Co. of America, supra*) (emphasis added).

Also it is noted that in the August 31, 2010 Order of this Court by the Hon. Edward W. McCarthy III, this issue was raised in defendants' Motion to Dismiss, pursuant to CPLR §3211(a)(7). The Court did acknowledge that the plaintiff's complaint set forth causes of action sounding in unjust enrichment and for a declaratory judgment; however, the Court determined that the causes of action for declaratory judgment did indeed include claims of fraud, and such claims were adequately pled with sufficient particularity under CPLR §3016(b) (see Plaintiff's Notice of Motion, Exhibit G). As such, the defendants' statute of limitations defense is without merit.

Finally, it is noted that the defendants stipulated to the consequences of their conduct and proffered no adequate excuse for their noncompliance. Notably, they attempt to avoid the consequences of the conditional order by the service of 4,000 pages of responses, about a month after the court ordered date, which, according to plaintiff and undisputed by defendants, were evasive, unresponsive and consisting mostly of objections. For example, in response to plaintiff's

interrogatory as to the date the defendant P.C.s were formed, the names of its directors and shareholders, and Anikeyeva's ownership's interest, the defendants' responded ; "Upon information and [belief], Valentina Anikeyeva" (see Plaintiff's Reply Affirmation, Exhibit 5, Q.4). The defendants' discovery responses are rejected, and their answer is therefore stricken.

Regarding the branch of plaintiff's motion seeking a default judgment under CPLR §3215, when a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. The striking of the defendants' answer herein results in the non-appearance of a party entitling the plaintiff to a judgment of default.

A plaintiff's right to recover upon a defendant's default in answering is governed by CPLR §3215, which requires that the plaintiff state a viable cause of action. In evaluating whether plaintiff has fulfilled this obligation, defendant, as the defaulting party, is deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them. The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (see *Walley v. Leatherstocking Healthcare, LLC* 79 AD3d 1236 [3rd Dept 2010]).

The plaintiff's motion, in addition, to the exhibits already described herein, contains a verified complaint setting forth the factual allegations as well as an affidavit from Barbara Stolfe, a State Farm investigator. It is noted that the defendants' failure to comply with discovery has caused the plaintiff to reference and submit evidence from similar proceedings where it was a named party. The Court has determined, after a review of the record, that the plaintiff has established a prima facie entitlement to the relief sought.

The plaintiff's cause of action is based on the defendants' violations of certain sections of the BCL and NYCRR, which are set forth below in relevant part:

BCL § 1507:

> "A professional service corporation may issue shares *only to individuals who are authorized by law to practice in this state a profession which such corporation is authorized to practice* and who are or have been engaged in the practice of such profession in such corporation or a predecessor entity, or who will engage in the practice of such profession in such corporation within thirty days of the date such shares are issued.";

BCL § 1508:

> "*No individual may be a director or officer of a professional service corporation unless he is authorized by law to practice in this state a*

profession which such corporation is authorized to practice and is either a shareholder of such corporation or engaged in the practice of his profession in such corporation."

NYCRR §65-3.16:

"...(12) A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York or meet any applicable licensing requirement necessary to perform such service in any other state in which such service is performed...".

NYCRR§ 65–3.11(a):

"...An insurer shall pay benefits for any element of loss other than death benefits, directly to the applicant or, when appropriate, to the applicant's parent or legal guardian or to any person legally responsible for necessities, or, upon assignment by the applicant or any of the aforementioned persons, shall pay benefits directly to providers of health care services as covered under section 5102(a)(1) of the Insurance Law, a provider's entitlement to seek recovery of no-fault benefits directly from the insurer is contingent upon an assignment of such benefits, and the assignment must be made to the providers of services...."

In 2004, the plaintiff received no-fault claims from certain professional corporations allegedly owned by Anikeyeva, that were providing service to various "patients". A review of the public New York State Office of Professions revealed that Anikeyeva was the listed owned of the 20 named P.C. defendants.

The plaintiff investigated that matter and uncovered the fraudulent scheme. Incredibly, the defendants appeared to assist in such investigation by commencing actions against the plaintiff when it did not tender reimbursement payments, causing incriminating evidence to be revealed, and produced therein.

The plaintiff demonstrated, among other things, that Anikeyeva did not know who was employed at the defendant P.C. offices, had no knowledge of where the offices were located, and never treated patients at those facilities. The "employees", either in deposition, or by affidavit, contended that they either never saw Anikeyeva in the office, or only saw her in the office about three times within an extended time period (see Plaintiff's Notice of Motion, Exhibits Q, ¶ 16; R, p.6-7, 16, .28, .49; S, p. 51). Further, all witnesses believed that Andrey was their actual employer, and their paychecks were signed by Andrey. In addition, the witnesses reported that they were issued IRS 1099 forms, and not W-2's for the most part (see Plaintiff's Notice of Motion, Exhibits Q, ¶ 8; R, p. 8; S, p.15; X, p. 13). Some witnesses even testified that Andrey suggested that they form their own P.C.s, so he could operate under those entities. They even claimed that he made rubberized stamps of their signatures and used them without their authorization (see Plaintiff's Notice of Motion, Exhibits Q, ¶ 8; R, p. 34, 44-47; S, p.24; X, p. 10, 12) .

Moreover, in an arbitration decision dated October 31, 2007, the arbitrator determined that defendant P.C.s, Ava and Midwood, were fraudulently incorporated and therefore not entitled to seek reimbursement from plaintiff for acupuncture services rendered. The arbitrator noted, during Anikeyeva's testimony at the hearing, that she was unable to identify the location of the 45 acupuncture offices she "owned". She could not identity any of the 100 "employees" who worked at those various offices (see Plaintiff's Notice of Motion, Exhibits V, W). Anikeyeva's testimony in the Kings County Supreme Court and Queens Civil Court actions, also indicated that she knew little about the P.C.'s incorporated under her name (see Plaintiff's Notice of Motion, Exhibits T, p. 10, 12, 17, 18, 21, 15, 26, 29, 57, 70; U, p. 67, 69, 70, 79).

In sum, the overwhelming evidence indicates that the P.C. defendants were not owned and controlled by a licensed acupuncturist, therefore rendering them ineligible to receive reimbursement, and to collect payment on outstanding claims. Additionally, a billing provider which utilizes an independent contractor to provide the services in question, is not a "provider" of the services in question and is not entitled to recover direct payment of assigned no-fault benefits from the defendant insurer (see *A.M. Medical Services, P.C. v. Progressive Cas.*, 101 AD3d 53 [2nd Dept 2012]).

action against the defendants. The branch of defendants' motion seeking sanctions is denied as there is no evidence to support any conduct on the plaintiff's part warranting such penalty. This Court has considered the defendant's remaining arguments, and has determined that they are without merit.

Accordingly, the defendants' answer having been stricken, the plaintiff's motion for a default judgment as to the first and second causes of action is granted. Plaintiff shall submit Judgment on notice.

Further, the parties are directed to appear in this Part for the previously scheduled conference on May 29, 2013 at 9:30 a.m. as to the third cause of action, which is hereby severed and shall continue.

Dated: April 29, 2013

STEVEN M. JAEGER, A.J.S.C.