

**Kemper Independence Ins. Co. v Best Touch PT,
P.C.**

2018 NY Slip Op 31241(U)

June 19, 2018

Supreme Court, New York County

Docket Number: 154010/16

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 154010/16

BEST TOUCH PT, P.C., EVERGREEN ACUPUNCTURE, P.C., F-R
MOBILE PHYSICIAN, P.C., GARA MEDICAL CARE, P.C. GC
CHIROPRACTIC, P.C., LIDA'S MEDICAL SUPPLY, INC., MANHATTAN
BEACH PHARMACY, INC., METRO PAIN SPECIALISTS, P.C., STATE
CHIROPRACTIC, P.C., AHMED MEDICAL CARE, P.C., BLANO MEDICAL,
P.C., CLEAR WATER PSYCHOLOGICAL SERVICES, P.C., HOLYSTAR
ACUPUNCTURE, P.C., HORIZON PT CARE, P.C., KSENIA PAVLOVA,
DO, LEV TAYTS, MD, PRO EDGE CHIROPRACTIC, P.C., PROMPT
MEDICAL SUPPLY, INC., SKAPARS HEALTH PRODUCTS, INC., SR
WELLNESS PT, P.C., THERAPEUTIC CHIROPRACTIC SERVICES, P.C.,
KENSINGTON RADIOLOGY GROUP, P.C., ALLAY MEDICAL
SERVICES, P.C., AXIAL CHIROPRACTIC, P.C., ACCELERATED
SURGICAL CENTER OF NORTH JERSEY, LLC, TOP TAP
ACUPUNCTURE, P.C., MEDICSBURG, AMERICAN KINETICS, LAB,
INC., COLUMBUS IMAGING CENTER, LLC, DANIEL COHEN
PSYCHOLOGY, P.C., HAYEK CHIROPRACTIC, P.C., SAMUEL
WALTERS, MD, STONE ACUPUNCTURE, P.C., ULTIMED
HEALTHCARE, P.C., LANTSMAN ACUPUNCTURE, P.C., MED
EQUIPMENTS SERVICES, INC., QUEENS SURGI-CENTER, RANDALL
PHARMACY, INC., SENIORCARE EMERGENCY MEDICAL SERVICES,
P.C., ACTION CHIROPRACTIC, P.C., MOHAMED ATTYA, M.D., BARNERT
SURGICAL CENTER, LLC, FARSAM MEDICAL SERVICES, P.C., LUCKY
CHIROPRACTIC CARE, P.C., STRESSCARE BEHAVIORAL &
PSYCHOLOGICAL SERVICES, P.C., 21ST CENTURY PHARMACY,
ARDEN M. KAISMAN, M.D., P.C., BIO-REFERENCE LABORATORIES,
INC., BRADLEY WASSERMAN, MD, DAVID FLEISS, MD, EAST TREMONT
MEDICAL CENTER, a/k/a UPTON HEALTH CARE MANAGEMENT, INC.,
FOREST HILLS MEDICAL, P.C., JOSEPH FEDRICK, MD, RONALD HAYEK,
DC, SOVEREIGN TRANSPORTATION, INC., PANJSHIR LEASING, INC.,
PETERSON BELLEVUE, JOE MYERS, ALICE ALARCON, CINAMONNE
CHARLES, JOHN LENNON, GERSY LOUSSAINT, MICHELLE HAYNIE,
MARQUISA GRANT, SHANICE PICKETT, TARA TAYLOR, BAPTISTE
MARCLISH, MAHOGANY YULLES, KARA KEITA KISSI, SENY DIOP,
YURY CHERNIKAU, TRAVON SMITH, MAHMOUD TELEB, SHIRROD
BELLS-HALL, LATISHA GANNAWAY, DERRON SMITH, JOSEPH BENOIT,
and JAMES ESTIMOND

DECISION,
ORDER &
JUDGMENT

MOT SEQ. 002

Defendants.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff, Kemper Independence Insurance Company, seeks a judgment declaring that the defendant Peterson Bellevue is not entitled to defense and indemnification or uninsured motorists coverage in connection with four separate but allegedly related and staged motor vehicle accidents that occurred on May 26, 2015, July 14, 2015, October 6, 2015, and January 3, 2016 in Brooklyn. It also seeks a declaration that the defendants Joe Myers, Alice Alarcon, Cinamonne Charles, John Lennon, Gersy Loussaint, Michelle Haynie, Marquisia Grant, Shanise Pickett, Tara Taylor, Baptiste Marclish, Mahogany Yulles, Kara Keita Kissi, Seny Diop, Yury Chernikau, Travon Smith, Mahmoud Telab, Shirrod Bells Hall, Latisha Gannaway, Derron Smith, Joseph Benoit, and James Estimond (collectively the individual defendants) are not entitled to no-fault benefits, and the remaining defendants (collectively the provider defendants) are not entitled to reimbursement for medical services and equipment that they provided to the individual defendants in connection with those accidents.

The plaintiff alleges that it has determined that the four accidents were not covered occurrences under the insurance policy at issue, upon concluding that the one vehicle that they insured was involved in all four accidents over an eight-month period, and that the accidents were staged. The plaintiff alleges that it has also determined that the numerous persons who made no-fault claims in connection with those accidents, including the individuals involved in the accidents and the provider defendants, had submitted fraudulent claims.

The plaintiff now moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Best Touch PT, P.C., Evergreen Acupuncture, P.C., F-R Mobile

Physician, P.C., Gara Medical Care, P.C., GC Chiropractic P.C., Manhattan Beach Pharmacy, Inc., State Chiropractic, P.C., Blanco Medical, P.C., Clear Water Psychological Services P.C., Holy Star Acupuncture, P.C., Lev Tayts, MD, Pro Edge Chiropractic P.C., Prompt Medical Supply Inc. (Prompt Medical), Skapars Health Products Inc., SR Wellness PT P.C., Therapeutic Chiropractic Services P.C., Kensington Radiology Group, P.C., Axial Chiropractic P.C., Accelerated Surgical Center of North Jersey, LLC, Top Tap Acupuncture, P.C., Medicsburg, American Kinetics Lab Inc., Columbus Imaging Center, LLC, Daniel Cohen Psychological, P.C., Hayek Chiropractic P.C., Samuel Walters, MD, Stone Acupuncture, P.C., Ultimed Healthcare, P.C., Lantsman Acupuncture P.C., Med Equipments Services, Inc., Queens Surgi-Center, Randall Pharmacy Inc., Seniorcare Emergency Medical Services Inc., Total Chiropractic P.C., Wave Medical Services, P.C., Action Chiropractic P.C., Mohamed Attya, M.D., Barnert Surgical Center, LLC, Farsam Medical Services, P.C., Lucky ChiropracticCare P.C., Stresscare Behavioral & Psychological Services, P.C., 21st Century Pharmacy, Arden M. Kaisman, MD, P.C., Bio-Reference Laboratories, Inc., Bradley Wasserman, MD, David Fleiss, MD, East Tremont Medical Center a/k/a Uptown Health Care Management, Inc., Forest Hills Medical, P.C., Joseph Fredrick, MD, Ronald Hayek DC, Sovereign Transportation Inc., Panjshir Leasing Inc., Joe Myers, Alice Alarcon, Cinamonne Charles, Gersy Louissant, Marquisia Grant, Shanice Pickett, Tara Taylor, Baptiste Marclish, Kara Keita Kissi, Seny Diop, Yury Chernikau, Travon Smith, Mahmoud Telab, Shirrod Bells Hall, Latisha Gannaway, Derron Smith, Joseph Benoit, and James Estimond (collectively the defaulting defendants).

Prompt Medical opposes the motion, and cross-moves pursuant to CPLR 3012(d) to compel the plaintiff to accept a late answer. The defendants Columbus Imaging Center, LLC,

Pro Edge Chiropractic P.C., Blano Medical, P.C., Total Chiropractic, P.C., Wave Medical Services, P.C., and Mohamed Attya, M.D. (collectively the Columbus defendants), separately cross-move pursuant to CPLR 5015(a)(1) to vacate their default in answering and, upon vacatur, pursuant to CPLR 3012(d) to compel the plaintiff to accept a late answer. The defendant Yury Chernikau opposes the motion and, although he does not formally cross-move for relief, requests in his opposition papers that he be permitted to vacate his default and serve a late answer.

For the reasons set forth below, the plaintiff's motion is granted, and the cross motions and Chernikau's cross application are denied.

II. BACKGROUND

A. Pre-Litigation History

In support of its motion, the plaintiff submits the complaint, the affidavits of service referable to service upon all of the defendants except Haynie and Lennon, attorneys' affirmations describing the history of the dispute and the manner in which examinations under oath (EUOs) of certain defendants were requested and conducted, and affidavits its special investigator Deborah Scarchilli, its claims representative Deborah Schraven, private investigator Robert J. Sasso, and the defendant Bellevue himself. The plaintiff further submits the subject insurance policy, police reports referable to the four accidents, transcripts of EUOs of various defendants, correspondence, parking violations search reports, a policy cancellation notice, and a stipulation of settlement and release from the defendant Yulles. The submissions establish the following.

In February 2015, the plaintiff received an application for insurance in Bellevue's name that sought to insure a 2001 Ford van bearing license plate GVK6319 and VIN 1FBSS316HB54608 (the insured vehicle), which was allegedly garaged at 15 Taylor Street,

Johnson City, New York. The application also represented that Bellevue had been in no prior car accidents, and that he resided at the Johnson City address, which is located in Broome County, approximately 200 miles northwest of New York City.

Based upon these representations, the plaintiff issued policy RB 710684 to Bellevue, effective February 23, 2015, which provided, among other things, \$300,000 in bodily injury and uninsured motorist coverage per occurrence, and \$50,000 in no-fault coverage per claimant, per occurrence. The plaintiff later learned that Bellevue did not personally apply for or take out the policy of insurance, did not own the insured vehicle, and did not reside in Johnson City.

The insured vehicle was then allegedly involved in four collisions during the one-year term of the policy. The plaintiff contends that each of these collisions was suspect, as they all occurred in Brooklyn, and not in Johnson City. Moreover, in each case, the insured vehicle had entirely different operators and occupants, and collided with livery vehicles.

1. The May 26, 2015, Collision

The first collision allegedly occurred on May 26, 2015, on Bedford Avenue in Brooklyn. The police report indicated that this collision was a minor sideswipe with a taxicab. The insured vehicle was allegedly operated by the defendant Louissant, and the passengers were identified as the defendants Myers, Charles, Lennon, and Alarcon. Bellevue, although the named insured, was not in the vehicle. Despite the minor nature of the collision, the plaintiff received over \$250,000 in no-fault claims from the alleged assignees of Louissant, Charles, Lennon, and Alarcon, all of whom were purportedly treated at the same facilities, and received the same courses of treatment.

The plaintiff requested examinations under oath (EUOs) of Louissant, Charles, Lennon, and Alarcon to determine if the collision, the alleged injuries, and the treatment were legitimate.

Only Louissant and Charles appeared for EUOs. However, their testimony contained multiple inconsistencies about the facts of the accident, the relationships between the parties, the alleged injuries, and the referrals to medical providers. Louissant and Charles were forwarded their EUO transcripts for execution, and neither party returned the transcripts. The no-fault claims of Lennon and Alarcon were denied for their failure to appear for EUOs.

Based on these facts, the plaintiff then timely requested EUOs of several providers that allegedly provided treatment and equipment to Louissant and Charles, in order to assess whether their claims of were proper, and to determine if the referrals were legitimate. The provider defendants Blanco Medical, P.C., Clear Water Psychological Services P.C., Holy Star Acupuncture, P.C., Lev Tayts, MD, Pro Edge Chiropractic P.C., Prompt Medical, Skapars Health Products Inc., SR Wellness PT P.C., Therapeutic Chiropractic Services P.C., Kensington Radiology Group, P.C., Barnert Surgical Center, LLC, Accelerated Surgical Center of North Jersey, LLC, Top Tap Acupuncture, P.C., American Kinetics Lab Inc., Best Touch PT, P.C., Columbus Imaging Center, LLC, Daniel Cohen Psychological, P.C., GC Chiropractic, P.C., Hayek Chiropractic P.C., Medicsburg, Ronald Hayek, D.C. Samuel Walters, M.D., Stone Acupuncture, P.C., Ultimed Healthcare, P.C., and F-R Mobile Physician P.C., failed to appear for their EUOs. The plaintiff denied the claims of these defendants for their failure to appear.

The defaulting defendant Axial Chiropractic, P.C. (Axial), submitted to an EUO, but refused to answer whether it had a financial relationship with the other defendants. The plaintiff thereafter denied Axial's claims for this refusal to properly submit to an EUO.

The plaintiff contends that all of the claims submitted by Louissant's and Charles's providers were denied on the additional ground that the underlying collision was staged, or an

intentional act, and was therefore not a covered event under the policy. The plaintiff submits documentation showing that the insured vehicle had been assessed 19 parking tickets in 2015 in and around Brooklyn, indicating that the vehicle was what it characterized as a “crash car,” and not a vehicle responsibly maintained by a true owner.

The plaintiff submit the affidavit of the defendant Bellevue, who asserts therein that he never applied for or took out the subject insurance policy in the first instance, never owned the insured vehicle, never resided in Johnson City, and was unaware of the parking tickets assessed against that vehicle. Bellevue further states that his identification had been stolen at some point, and that he believed that unknown parties had impersonated him in order to run an insurance fraud scheme. In his affidavit, Bellevue specifically avers that he makes “no claims under this policy and release[s] any and all claims [he] might assert under this policy.”

The plaintiff thus concluded that the May 26, 2015, collision was intentional, and denied all insurance coverage on that additional basis.

2. The July 14, 2015, Collision

On July 14, 2015, the insured vehicle was allegedly involved in another collision, this time on Coney Island Avenue at its intersection with Ditmas Avenue in Brooklyn. Again, Bellevue was not in the vehicle. The driver, the defendant Marclish, who had no relationship with Bellevue, purportedly struck the rear end of a taxi. The plaintiff contends that it found that two of Marclish’s prior collisions had been deemed staged by the insurers who investigated them.

After investigation, plaintiff determined that this collision was intentional, and denied all coverage for this loss.

3. The October 6, 2015, Collision

On October 6, 2015, the insured vehicle was allegedly involved in another collision in which it sideswiped a livery vehicle. Bellevue was not in the vehicle, and the driver, the defendant Haynie, as well as the other occupants of the insured vehicle, the defendants Grant, Taylor, and Pickett, had no apparent relationship either with Bellevue or with the persons who operated or occupied the insured vehicle when it was allegedly involved in the two prior collisions.

Although the October 6, 2015, collision was minor, to date, the plaintiff received over \$111,000 in no-fault claims from the alleged assignees of Haynie, Grant, Taylor, and Pickett.

The plaintiff requested EUOs of Haynie, Grant, Taylor, and Pickett to verify how they obtained the insured vehicle, as well as whether the claimed loss and treatment were legitimate. Haynie, Grant, and Pickett all failed to appear for EUOS, and their no-fault claims were denied on this basis. Although Taylor submitted to an EUO, her testimony about the accident was inconsistent with the police report. In addition, she admitted that she was being treated at the same medical clinic as the other occupants of the vehicle, but denied receiving many of the medical treatments that were billed by her purported providers. After the EUO, the plaintiff requested that Taylor execute her transcript, but she failed to do so.

Based on these facts, the plaintiff then timely requested EUOs of medical providers Best Touch, P.T., P.C., Evergreen Acupuncture, P.C., F-R Mobile Physician, P.C., and State Chiropractic, P.C., which allegedly treated Taylor, to verify her alleged injuries and treatment. However, none of these providers appeared for EUOs, and their claims for reimbursement were denied on this basis.

Based on the above facts, the plaintiff concluded that this collision was an intentional act, and thereupon denied all no-fault and liability coverage on that ground as well.

4. The January 3, 2016 Collision

On November 25, 2015, the policy was cancelled prior to the end of its term because none of the premiums had been paid.

After the policy was cancelled, the insured vehicle was purportedly involved in another collision on January 3, 2016, on Atlantic Avenue in Brooklyn. The insured vehicle was operated by the defendant Yulles. The defendants Bells-Hall, Gannway, and Derron Smith were passengers in the insured vehicle, which allegedly sideswiped a vehicle operated by the defendant Teleb. At the collision scene, Yulles produced registration information for a 2000 Ford with a different license plate than the vehicle she operated, and which listed the owner as the defendant Estimond, rather than Bellevue.

The plaintiff informed all of the parties that the policy was not in effect at the time of the loss.

By stipulation of settlement dated June 3, 2016, Yulles admitted to plaintiff that the loss was staged, and the action was discontinued against her upon her withdrawal of all claims for coverage and benefits and her release of the plaintiff from liability for any such claims.

B. Litigation History

All of the individual defendants, save Haynie and Lennon, the latter of whom the plaintiff concluded was a fictitious name, have been served with the summons and complaint, and are in

default in answering. The plaintiff investigated and has verified that the individual defaulting defendants are not currently in the military. All of the defaulting provider defendants have been served with a notice of default.

Three actions seeking to recover for personal injuries have been commenced against the plaintiff's insured in connection with the four subject accidents, and over 45 actions or arbitration proceedings have been commenced against the plaintiff itself, seeking to collect no-fault benefits with respect to these collisions.

The defendants Lida's Medical Supply Inc., Metro Pain Specialists P.C., Ahmed Medical Care P.C., Horizon PT Care P.C., Ksenia Pavlova, DO, and Allay Medical Service, P.C., have appeared in this action. Those defendants moved to dismiss the complaint against them or, in the alternative, to sever the action against them. By order dated July 14, 2017, this court denied the motion.

To date, the plaintiff has not been able to locate Haynie or Lennon for service. Bellevue has been served, but has tendered a release of any claims.

III. DISCUSSION

A. Plaintiff's Motion for Leave to Enter a Default Judgment

The plaintiff seeks leave to enter a default judgment on its first, seventh, eighth, ninth, tenth, eleventh, fourteenth and fifteenth causes of action against the defaulting defendants, on the grounds that its investigation has determined that the insurance policy was fraudulently procured with the express purpose of staging collisions, and committing insurance fraud, and that the four

collisions referenced in the complaint were not legitimate collisions.

The plaintiff also seeks leave to enter a judgment (1) on its second and fourth causes of action, declaring that there is no no-fault coverage for the May 26, 2015, loss because Alarcon, Lennon, and various medical providers asserting claims for this loss failed to appear for duly scheduled EUOs, (2) on its third and fifth causes of action declaring that there is no no-fault coverage for the claims of the medical providers seeking to reimbursement for the October 6, 2015, collision because Haynie, Grant, and Pickett, and various medical providers seeking reimbursement for services and equipment allegedly provided to Haynie, Grant, and Pickett failed to appear for scheduled EUOs, and (3) on its twelfth and thirteenth causes of action, declaring that there is no coverage for the January 3, 2016, loss because Bellevue transferred any ownership he may have had in the insured vehicle before the collision, and because the policy was cancelled for non-payment before that date.

Pursuant to CPLR 3215 (f), “[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant’s failure to answer or appear.” HSBC Bank USA, N.A. v Clayton, 146 AD3d 942, 944 (2nd Dept. 2017) (citation omitted); see 154 E. 62 LLC v 156 E. 62nd St. LLC, 159 AD3d 498 (1st Dept 2018); Bank of Am. N.A. v Agarwal, 150 AD3d 651 (2nd Dept. 2017). The plaintiff can satisfy this requirement through an affidavit of a party with personal knowledge of the facts. See Reynolds Sec. v Underwriters Bank & Trust Co., 44 NY2d 568 (1978); Goodman v New York City Health & Hosps. Corp., 2 AD3d 581 (2nd Dept. 2003).

By submitting the relevant affidavits of service, notices of default, and attorneys’

affirmations, the plaintiff has demonstrated service upon all of the individual defendants save Haynie and Lennon, and all of the defaulting provider defendants, along with proof of those defendants' defaults. With respect to its request for leave to enter a default judgment against all defaulting defendants on the first, seventh, eighth, ninth, tenth, eleventh, fourteenth, and fifteenth causes of action, all of which seek to disclaim all insurance coverage based on its conclusions that the collisions were staged, the plaintiff has also submitted proof of the facts constituting its claims.

An insurer may disclaim all insurance coverage based upon "the fact or founded belief that the alleged injury does not arise out of an insured incident." Central Gen. Hosp. v Chubb Grp. of Ins. Co., 90 NY2d 195, 199 (1997). In addition, "[a] deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident." State Farm Mut. Auto Ins. Co. v Laguerre, 305 AD2 490, 491 (2nd Dept. 2003). In meeting this burden, a no-fault insurer is "not required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence." V.S. Med. Servs., P.C. v Allstate Ins. Co., 25 Misc 3d 39, 41 (App. Term, 2nd & 11th Jud. Dists. 2009) (citation omitted). Rather, the insurer need only demonstrate the facts elicited during an investigation that support the founded belief. Circumstantial evidence is sufficient to prove such facts if a party's conduct "may be reasonably inferred based upon logical inferences to be drawn from the evidence" Benzaken v Verizon Communications, Inc., 21 AD3d 864, 865 (2nd Dept. 2005) (citation and internal quotation marks omitted).

The plaintiff has submitted significant evidence supporting its conclusion that the accidents were staged in order to obtain insurance benefits. This proof includes affidavits from

Bellevue and Yulles attesting to the fact that the subject policy was procured through fraud, and that the accident in which Yulles claimed to be involved was staged solely to defraud the plaintiff.

In her affidavit, investigator Sarchilli avers that "it is my opinion that the policy of insurance was procured through misrepresentation with the purpose of staging losses to commit insurance fraud." She asserts that she reached this conclusion based upon the admissions of Bellevue and Yulles that the insured vehicle was never garaged in or driven to Johnson City, as well as the facts that the insured vehicle never had the same occupants in any of the collisions, each loss followed the same pattern of minor collisions with livery vehicles, the alleged occupants of the insured vehicle all allegedly received virtually identical treatment from the same medical providers, the defendants Marclish and Alarcon were involved in a potential staged loss in 2014 also fitting the same fact pattern, and most of the parties requested to submit to EUOs failed to appear, while the parties that did appear offered testimony that was not credible. These facts are sufficient to create a founded belief that the collisions are not covered events, and the alleged injuries and treatment are not compensable. Accordingly, the plaintiff is entitled to the entry of a default judgment on its first, seventh, eighth, ninth, tenth, eleventh, fourteenth, and fifteenth causes of action

In addition to the staged-loss causes of action, the plaintiff is entitled to a default judgment declaring that it is not obligated to provide no-fault reimbursements in connection with the May 26, 2015 collision (second and fourth causes of action) for the defendants Alarcon, Lennon, Blanco Medical, P.C., Clear Water Psychological Services, P.C., Holy Star Acupuncture, P.C., Lev Tayts, M.D., Pro Edge Chiropractic, P.C., Prompt Medical Supply, Inc., Skapars

Health Products, Inc., SR Wellness PT, P.C., Therapeutic Chiropractic Services, P.C., Kensington Radiology Group, P.C., Barnert Surgical Center, Accelerated Surgical Center, Top Tap Acupuncture, P.C., American Kinetics Lab, Best Touch PT, P.C., Columbus Imaging, LLC, Daniel Cohen Psychological P.C., GC Chiropratic P.C., Hayek Chiropractic, P.C., Medicsurg, Ronald Hayek, D.C., Samuel Walters, M.D., Stone Acupuncture, P.C., Ultimed Healthcare, and F-R Mobile Physician, P.C., because they failed to appear for EUOs. Similarly, the plaintiff demonstrated, prima facie, that it is entitled to a default judgment declaring that it is not obligated to provide no-fault reimbursements in connection with the October 6, 2015 collision (third and fifth causes of action) for the defendants Haynie, Grant, Pickett, Best Touch P.T., P.C., Evergreen Acupuncture, P.C., F-R Mobile Physician, P.C. and State Chiropractic, P.C., because they also failed to appear for EUOs.

11 NYCRR 65-1.1 provides that, as may reasonably be requested, appearance at EUOs is a condition precedent to no-fault coverage. See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011). The plaintiff has demonstrated that the EUO requests were all timely made and in reasonable in form, and that it had a reasonable basis for asking that the defaulting defendants identified above appear for EUOs to provide proof that the injuries claimed and treatment allegedly provided were bona fide. The plaintiff submits the affidavits of attorneys Harlan S. Schreiber and Lawrence Wolkow, both assigned by it to conduct the EUOs of the defaulting defendants, and the affidavit of Deborah Schraven, one of the no-fault claims handlers for the May 26, 2015, and October 6, 2015, collisions. In these affidavits, Schreiber, Wolkow and Schraven all show that EUO requests were timely sent to those defendants, and they aver that the above-named defendants appeared for their EUOs.

These facts are clearly sufficient to support the plaintiff's claim that a condition precedent to no-fault coverage was not complied with. Accordingly, the plaintiff is entitled to a default judgment on the second, third, fourth, and fifth causes of action as well.

With respect to Axial, although Axial did appear for its EUO, the plaintiff has established facts sufficient to support its claim that Axial's refusal to respond to questions as to whether it violated New York's self-referral rules, governing medical referrals between related entities, was material, and a valid basis upon which to deny its claims for reimbursement as well. See American States Ins. Co. v Huff, 119 AD3d 478 (1st Dept. 2014).

Finally, the plaintiff is entitled to a default judgment on its twelfth and thirteenth causes of action, which seek a declaration that the January 3, 2016, collision was not a covered occurrence because the subject policy had been cancelled prior thereto for nonpayment of premiums, and the ownership of the insured vehicle had been illegally transferred to Estimond, as it has clearly set forth proof of the facts underlying these claims. The policy specifically prohibits any transfer in ownership of the insured vehicle without the plaintiff's prior consent, while the police report for the January 3, 2016, collision lists Estimond, rather than Bellevue, as the owner of the vehicle. The plaintiff has also demonstrated that the policy was cancelled in November 2015 for nonpayment of premiums, prior to the January 3, 2016, collision.

Accordingly, plaintiff's motion for leave to enter a default judgment is granted as against all of the defaulting defendants, save Haynie and Lennon, although the defaulting provider defendants who allegedly furnished treatment or equipment to Haynie and Lennon will not be entitled to reimbursement for such treatment and equipment.

B. Cross Motions and Other Opposition

1. Prompt Medical's Cross Motion

Prompt Medical's cross motion to compel acceptance of a late answer is denied.

CPLR 3012 (d) provides that “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” In the first instance, a party seeking to compel acceptance of an untimely answer pursuant to CPLR 3012 (d) must demonstrate a reasonable excuse for its default, regardless of whether it has a potentially meritorious defense to the action. See Nouveau El. Indus. Inc. v Tracey Towers Hous. Co., 95 AD3d 616 (1st Dept 2012); see also Mannino Dev., Inc. v Linares, 117 AD3d 995 (2nd Dept. 2014).

Prompt Medical was served by personal delivery of the summons and complaint to the Secretary of State on June 2, 2016. On April 28, 2017, Prompt Medical was served with a Notice of Default. Prompt Medical claims that its default in answering the complaint was not willful. That is the inappropriate standard for determining whether its excuse is reasonable. In his affidavit, Naum Gomberg, Prompt Medical's owner, states that “to the best of my knowledge and as indicated by a review of the business records maintained by Prompt, the company never received the Summons and Complaint in this action.” However, Gomberg admits receiving a Notice of Default.

It is well established that an affidavit of service of summons and complaint upon the Secretary of State is deemed valid service, and it is the obligation of the defendant to provide an explanation as to why such service was improper. See Gourvitch v 92nd & 3rd Rest. Corp., 146

AD3d 431 (1st Dept. 2017); Gonzalez v City of New York, 106 AD3d 436 (1st Dept 2013).

Prompt Medical does not deny that the address designated with the Secretary of State for the forwarding of service of process was correct. In fact, Gomberg admits that he received the Notice of Default in the mail. The address to which the Notice of Default was mailed is the same address listed with the Secretary of State for service of the summons upon Prompt Medical. Gomberg essentially only denies that a copy of the complaint was in Prompt Medical's file in connection with this matter. Under these circumstances, Prompt Medical has not made the requisite showing that it did not receive the complaint, and has not provided a reasonable basis for failing to timely answer.

Accordingly, Prompt Medical's cross motion is denied.

2. The Columbus Defendants' Cross Motion

The cross motion of the Columbus defendants to compel acceptance of their late answer is denied as untimely. The May 3, 2017, order to show cause initiating the plaintiff's motion specifically provided that any opposition was required to have been served and filed no later than August 5, 2017. However, the cross motion was not filed until November 7, 2017, more than three months later.

Accordingly, the cross motion of the Columbus defendants is denied.

3. Yuri Chernikau's Opposition

The defendant Yury Chernikau also opposes the motion, and asks for leave to answer the complaint. However, it would be procedurally improper to grant this request, as Chernikau failed

to include this request for relief in a notice of motion or cross motion. See CPLR 2214(a); see also Arriaga v Laub Co., 233 AD2d 244 (1st Dept 1996). In any event, Chernikau's attorney asserts that Chernikau never sought no-fault benefits from the plaintiff in the first instance. Since the plaintiff seeks, among other things, a declaration that neither Chernikau nor his medical providers are entitled to no-fault benefits under the plaintiff's policy, Chernikau effectively concedes that he does not have a meritorious defense to that claim for relief. Moreover, Chernikau's affidavit is insufficient to rebut the showing that the accident in which he was allegedly involved was staged or intentional, thus vitiating liability coverage under the plaintiff's policy.

Accordingly, Chernikau's request for leave to answer the complaint is denied.

The court has considered the remaining arguments, and finds them to be without merit. The court previously denied that branch of the motion of the non-defaulting provider defendants to sever the action as against them. However, since a declaratory judgment is now being rendered against most of the remaining defendants, and the action against the non-defaulting provider defendants is in the discovery phase, the court now deems it prudent to sever the action to permit the expeditious entry of the declaratory judgment, as the judgment may have an effect on pending actions and arbitration proceedings arising from the four subject accidents.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants Best Touch PT P.C., Evergreen Acupuncture, P.C., F-R Mobile Physician, P.C., Gara

Medical Care, P.C., GC Chiropractic P.C., Manhattan Beach Pharmacy, Inc., State Chiropractic, P.C., Blano Medical, P.C., Clear Water Psychological Services P.C., Holy Star Acupuncture, P.C., Lev Tayts, MD, Pro Edge Chiropractic P.C., Prompt Medical Supply Inc. (Prompt Medical), Skapars Health Products Inc., SR Wellness PT P.C., Therapeutic Chiropractic Services P.C., Kensington Radiology Group, P.C., Axial Chiropractic P.C., Accelerated Surgical Center of North Jersey, LLC, Top Tap Acupuncture, P.C., Medicsburg, American Kinetics Lab Inc., Columbus Imaging Center, LLC, Daniel Cohen Psychological, P.C., Hayek Chiropractic P.C., Samuel Walters, MD, Stone Acupuncture, P.C., Ultimed Healthcare, P.C., Lantsman Acupuncture P.C., Med Equipments Services, Inc., Queens Surgi-Center, Randall Pharmacy Inc., Seniorcare Emergency Medical Services Inc., Total Chiropractic P.C., Wave Medical Services, P.C., Action Chiropractic P.C., Mohamed Attya, M.D., Barnert Surgical Center, LLC, Farsam Medical Services, P.C., Lucky ChiropracticCare P.C., Stresscare Behavioral & Psychological Services, P.C., 21st Century Pharmacy, Arden M. Kaisman, MD, P.C., Bio-Reference Laboratories, Inc., Bradley Wasserman, MD, David Fleiss, MD, East Tremont Medical Center a/k/a Uptown Health Care Management, Inc., Forest Hills Medical, P.C., Joseph Fredrick, MD, Ronald Hayek DC, Sovereign Transportation Inc., Panjshir Leasing Inc., Joe Myers, Alice Alarcon, Cinamonne Charles, Gersy Louissant, Marquisia Grant, Shanice Pickett, Tara Taylor, Baptiste Marclish, Kara Keita Kissi, Seny Diop, Yury Chernikau, Travon Smith, Mahmoud Telab, Shirrod Bells Hall, Latisha Gannaway, Derron Smith, Joseph Benoit, and James Estimond is granted; and it is further,

ORDERED that the cross motion of the defendant Prompt Medical Supply, Inc., to compel the acceptance of a late answer is denied; and it is further,

ORDERED that the separate cross motion of the defendants Columbus Imaging Center, LLC, Pro Edge Chiropractic P.C., Blanco Medical, P.C., Total Chiropractic, P.C., Wave Medical Services, P.C., and Mohamed Attya, M.D., to compel the acceptance of a late answer is denied; and it is further,

ORDERED that the separate cross application of the defendant Yury Chernikau to compel the acceptance of a late answer is denied; and it is further,

ADJUDGED and DECLARED that the plaintiff, Kemper Independence Insurance Company, is not obligated to pay no-fault or other insurance benefits under Policy No. RB 710684 to the defendants Joe Myers, Alice Alarcon, Cinamonne Charles, Gersy Louissant, Marquisia Grant, Shanice Pickett, Tara Taylor, Baptiste Marclish, Kara Keita Kissi, Seny Diop, Yury Chernikau, Travon Smith, Mahmoud Telab, Shirrod Bells Hall, Latisha Gannaway, Derron Smith, Joseph Benoit, and James Estimond in connection with motor vehicle accidents that allegedly occurred on May 26, 2015 (Claim C 032701-NY-15), July 14, 2015, October 6, 2015 (Claim C 062482-MY-15), and January 3, 2016, involving a 2001 Ford van bearing license plate GVK6319 and VIN 1FBSS316HB54608; and it is further,

ADJUDGED and DECLARED that the plaintiff, Kemper Independence Insurance Company, is not obligated to reimburse the defendants Best Touch PT, P.C., Evergreen Acupuncture, P.C., F-R Mobile Physician, P.C., Gara Medical Care, P.C., GC Chiropractic P.C., Manhattan Beach Pharmacy, Inc., State Chiropractic, P.C., Blanco Medical, P.C., Clear Water Psychological Services P.C., Holy Star Acupuncture, P.C., Lev Tayts, MD, Pro Edge Chiropractic P.C., Prompt Medical Supply Inc. (Prompt Medical), Skapars Health Products Inc., SR Wellness PT P.C., Therapeutic Chiropractic Services P.C., Kensington Radiology Group,

P.C., Axial Chiropractic P.C., Accelerated Surgical Center of North Jersey, LLC, Top Tap Acupuncture, P.C., Medicsburg, American Kinetics Lab Inc., Columbus Imaging Center, LLC, Daniel Cohen Psychological, P.C., Hayek Chiropractic P.C., Samuel Walters, MD, Stone Acupuncture, P.C., Ultimed Healthcare, P.C., Lantsman Acupuncture P.C., Med Equipments Services, Inc., Queens Surgi-Center, Randall Pharmacy Inc., Seniorcare Emergency Medical Services Inc., Total Chiropractic P.C., Wave Medical Services, P.C., Action Chiropractic P.C., Mohamed Attya, M.D., Barnert Surgical Center, LLC, Farsam Medical Services, P.C., Lucky ChiropracticCare P.C., Stresscare Behavioral & Psychological Services, P.C., 21st Century Pharmacy, Arden M. Kaisman, MD, P.C., Bio-Reference Laboratories, Inc., Bradley Wasserman, MD, David Fleiss, MD, East Tremont Medical Center a/k/a Uptown Health Care Management, Inc., Forest Hills Medical, P.C., Joseph Fredrick, MD, Ronald Hayek DC, Sovereign Transportation Inc., Panjshir Leasing Inc., for medical and health-related services, treatment, and equipment that these defendants allegedly rendered to the defendants Joe Myers, Alice Alarcon, Cinamonne Charles, Gersy Louissant, Marquisia Grant, Shanice Pickett, Tara Taylor, Baptiste Marclish, Kara Keita Kissi, Seny Diop, Yury Chernikau, Travon Smith, Mahmoud Telab, Shirrod Bells Hall, Latisha Gannaway, Derron Smith, Joseph Benoit, James Estimond, John Lennon, Michelle Haynie, and Mahogany Yulles under Policy No. RB 710684 in connection with motor vehicle accidents that allegedly occurred on May 26, 2015 (Claim C 032701-NY-15), July 14, 2015, October 6, 2015 (Claim C 062482-MY-15), and January 3, 2016, involving a 2001 Ford van bearing license plate GVK6319 and VIN 1FBSS316HB54608; and it is further,

ORDERED that the action is severed against Lida's Medical Supply Inc., Metro Pain Specialists P.C., Ahmed Medical Care P.C., Horizon PT Care P.C., Ksenia Pavlova, DO, Allay

Medical Service, P.C., and Peterson Bellevue; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are thereupon directed to amend their records accordingly.

This constitutes the Decision, Order, and Judgment of the court.

Dated: June 19, 2018

ENTER:



J.S.C.

HON. NANCY M. BANNON