

Country-Wide Ins. Co. v Ospina
2019 NY Slip Op 30444(U)
February 22, 2019
Supreme Court, New York County
Docket Number: 155966/17
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

JIMENA OSPINA

("Eligible Injured Party Defendant")

And

JEFFREY COHEN, M.D. & MARK KRAMER, M.D., P.C.
LAXMIDHAR DIWAN, M.D.,
CENTRAL QUEENS DAY SURGICAL CENTER, INC.,
D/B/A QUEENS SURGI-CENTER,
BIO-REFERENCE LABORATORIES, INC.,
FOREST HILLS MEDICAL P.C.,
ALL COUNTY LLC,
PHOENIX MEDICAL SERVICES, P.C.,
NEW AGE MEDICAL, P.C.,
METROPOLITAN MEDICAL & SURGICAL P.C.,
HEEL TO TOE FOOT CENTER LLC,
MY RX PHARMACY, INC.,
NEW YORK SURGERY CENTER QUEENS, LLC,
VALUECARE PHARMACY, INC.,
RESTORALIGN CHIROPRACTIC, P.C.,
NORTHERN MEDICAL CARE, P.C.,
WEI DAO ACUPUNCTURE, P.C.,
NOVEL MEDICAL DIAGNOSTICS P.C.,
MOBILITY ORTHO SUPPLY CORPORATION

("Medical Provider Defendants"),

Defendants.

-----X
KATHRYN E. FREED, J.S.C. :

DECISION AND ORDER

Index No. 155966/17

Mot. Seq. Nos. 001 and 002

The following electronically filed documents, referred to by their NYSCEF document numbers, were reviewed in connection with the motions decided herein:

Motion Sequence 001: 27-46. 64-72, 74-76

Motion Sequence 002: 47-63

In this action for a declaratory judgment, plaintiff Country-Wide Insurance Company (Plaintiff or Country-Wide) seeks a judgment declaring that it has no obligation to pay defendant Jimena Ospina's (Ospina) claims for no-fault benefits in connection with a motor vehicle accident.

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In motion sequence number 001, plaintiff moves, pursuant to CPLR 3212, for an order granting it summary judgment against defendants Laxmidhar Diwan M.D. (Dr. Diwan) and Mobility Ortho Supply Corporation (Mobility) on the ground that Ospina (the eligible injured party defendant) failed to appear for duly scheduled examinations under oath (EUOs), thereby breaching a condition precedent to the policy of insurance issued by plaintiff.

Dr. Diwan and Mobility cross-move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint, with statutory attorneys' fees and costs.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3215, for an order granting it a default judgment against Ospina and Jeffrey Cohen, M.D. & Mark Kramer, M.D., P.C., Central Queens Day Surgical Center, Inc., D/B/A Queens Surgi-Center, Bio-Reference Laboratories, Inc., Forest Hills Medical P.C., All County, LLC, Phoenix Medical Services, P.C.,

New Age Medical, P.C., Metropolitan Medical & Surgical P.C., My RX Pharmacy, Inc., New York Surgery Center Queens, LLC, Restoralign Chiropractic, P.C., Northern Medical Care, P.C., Wei Dao Acupuncture, P.C. and Novel Medical Diagnostics P.C. (the defaulting defendants and, collectively with Dr. Diwan and Mobility, the medical provider defendants) on the ground that they have failed to appear and answer the complaint.

For the reasons set forth below, plaintiff's motions are denied, and defendants' cross motion for summary judgment is granted.

BACKGROUND

Ospina allegedly sustained personal injuries arising out of the use or operation of a motor vehicle insured by plaintiff. Based on the alleged injuries, Ospina received treatment from the medical provider defendants.

Plaintiff asserts that, on August 2, 2016, it requested that Ospina appear at an EUO within the prescribed time from the receipt of bills from the medical provider defendants. On the same date, plaintiff issued and mailed EUO appointment letters scheduling Ospina for an EUO on August 26, 2016, informing her of her obligation to attend the scheduled EUO pursuant to the insurance policy and the Insurance Regulations (*see* affirmation of R. Diego Velazquez, Esq., exhibit K [affidavit of Fatima Zuhra, plaintiff's EUO clerk]). The letter was addressed to Ospina at 4022 201st St #2R, Bayside NY 11361, the address indicated on the Claim Auto Loss Report (*see id.*, exhibit E), which was created when provider Northern Medical Care, P.C., reported the claim via phone on May 24, 2016. A copy of the EUO scheduling letter was also mailed to the Law Office of Bryan Barenbaum (BB Law), Ospina's attorney (*see id.*, exhibit F). Plaintiff

asserts that the letters, which were sent via regular mail, were not returned.

Ospina failed to attend the scheduled EUO (*see id.*, exhibit G [statement on the record of Ospina's non-appearance]). Plaintiff then requested that its attorney reschedule the EUO.

On August 31, 2016, plaintiff issued a letter rescheduling the EUO. Counsel for plaintiff issued and mailed the appointment letter rescheduling Ospina for an EUO on September 26, 2016, and informing her that she was obligated to attend the scheduled EUO pursuant to the insurance policy and the insurance regulations. The follow up letter was sent to Ospina and her attorney via regular mail (*see id.*, exhibit H).

Ospina once again failed to attend the scheduled EUO, and plaintiff placed a statement on the record reflecting her failure to appear (*see id.*, exhibit I).

On October 14, 2016, plaintiff issued a general denial of coverage on the ground that Ospina violated policy conditions by failing to appear for a scheduled EUO (*see id.*, exhibit L).

On June 30, 2017, plaintiff commenced this action by the filing of a summons and complaint against Ospina and the medical provider defendants/assignors who provided health care services to Ospina. Plaintiff seeks a declaration that it does not have to provide coverage on the ground that Ospina failed to appear for an EUO on August 26 and September 26, 2016.

Plaintiff asserts that Ospina and the medical provider defendants were all served with the Notice of Commencement of Action Subject to Mandatory Filing, and the summons and complaint (*see id.*, exhibit B [proofs of service]). On July 24, 2017, pursuant to BCL § 306, plaintiff served its notice pursuant to CPLR 3215 that the summons and complaint were also served on the corporate medical provider defendants via service on the Secretary of State (*see id.*, exhibit C).

Plaintiff asserts that Ospina and defendants Jeffrey Cohen, M.D. & Mark Kramer, M.D., P.C., Central Queens Day Surgical Center, Inc., D/B/A Queens Surgi-Center, Bio-Reference Laboratories, Inc., Forest Hills Medical P.C., All County, LLC, Phoenix Medical Services, P.C., New Age Medical, P.C., Metropolitan Medical & Surgical P.C., My RX Pharmacy, Inc., New York Surgery Center Queens, LLC, Restoralign Chiropractic, P.C., Northern Medical Care, P.C., Wei Dao Acupuncture, P.C. and Novel Medical Diagnostics P.C. have yet to answer or otherwise appear in this matter, and are currently in default (*see id.*, ¶¶ 6-20).

In their answer, Dr. Diwan and Mobility denied the material allegations in the complaint that Ospina had failed to appear for the EUOs, and in the seventh affirmative defense asserted that the August 26, 2016 EUO was mutually adjourned on consent. Dr. Diwan and Mobility also asserted that plaintiff failed to return phone calls, and ignored correspondence seeking to reschedule the EUO. Moreover, as a first affirmative defense, Dr. Diwan and Mobility alleged that they were seeking arbitration, and that Dr. Diwan had already filed the case with the American Arbitration Association (the AAA). The fifth affirmative defense was based upon arbitration and award, collateral estoppel and res judicata.

On April 20, 2017, the AAA initiated arbitration between Dr. Diwan and Country-Wide (*see* affirmation of David Jakubowitz, Esq., exhibit 3 [AAA initiation letter]). In that arbitration, Dr. Diwan's submissions included an affidavit from Veronica Nieves, who was in charge of confirming and scheduling EUOs for BB Law, which represented Ospina. In that affidavit, Nieves averred that she was personally involved in scheduling the EUOs, and that she had reviewed the records maintained in the ordinary course of business (Nieves aff, ¶¶ 2-4 [Jakubowitz affirmation, exhibit 4]).

According to Nieves, BB Law received an August 2, 2016 letter from plaintiff scheduling Ospina’s EUO for August 26, 2016 at 9:30 a.m, and requesting a phone call to Fatima Zuhra (Zuhra) (*id.*, ¶ 5). On August 5, 2016, Nieves called Zuhra on the phone, and explained that Ospina was in Colombia and could not attend the EUO on that date. Nieves avers that they agreed to adjourn the EUO, and that Zuhra told her she would inform her of a new date, and send a letter (*id.*, ¶ 6). Nieves further avers that she never heard anything, and called Zuhra on August 29 and 31, 2016 and left messages, which were not returned (*id.*, ¶ 7).

Nieves alleges that BB Law did not receive another letter rescheduling the EUO (*id.*, ¶ 8). Nieves avers that she knows, based on office procedures for handling incoming mail, including EUO notices, that another letter was not received. She explained that BB Law did not have the second EUO notice scanned into the digital file, and that it was not present in the paper file (*id.*, ¶ 9).

After BB Law received no-fault denials from plaintiff, Bryan Barenbaum sent plaintiff a letter dated February 2, 2017 to the insurance company explaining that the first EUO date was mutually adjourned on consent, and that BB Law had not received a subsequent letter rescheduling the first EUO date. He asked plaintiff to rescind denial of the no-fault benefits within 10 days and to send another letter rescheduling the EUO (*id.*, ¶ 10; *see* Jakubowitz affirmation, exhibit 4). However, Country-Wide ignored the letter (Nieves aff, ¶ 12).

On November 8, 2017, a hearing was held in the arbitration between Dr. Diwan and Country-Wide before arbitrator Marina O’Leary. On December 8, 2017, the AAA sent the arbitration award to the parties. In that award (Jakubowitz affirmation, exhibit 5), the arbitrator stated that “[t]he sole issue to be determined is [whether plaintiff] met its burden of establishing

non-appearance for an EUO” (award at 1). The arbitrator then found that Nieves swore that Ospina was unable to attend the first EUO, that she spoke to Zuhra and requested a mutual adjournment, that BB Law did not receive the second EUO letter, and that BB Law attempted to reschedule the EUO under cover of the letter dated February 2, 2017. The arbitrator also found that Country-Wide did not dispute those facts. Accordingly, the arbitrator felt “constrained to adhere to the evidence presented before me” and held that “[w]ith respect to [plaintiff’s] asserted defense that the Applicant breached a condition precedent to coverage by failing to appear for an Examination Under Oath, I find that Respondent has not met its burden” (*id.* at 3-4). The arbitrator awarded Dr. Diwan the sum of \$8,352.79, the full amount of his claim (*id.* at 7).

DISCUSSION

Motion and Cross Motion for Summary Judgment (Motion Sequence No. 001)

Plaintiff seeks a declaratory judgment that it is not liable to pay no-fault benefits to Dr. Diwan and Mobility for medical services allegedly provided to Ospina on the ground that she violated the terms of the insurance policy by failing to appear for her EUO.

Pursuant to the Insurance Regulations, an insurer may request that an eligible injured party appear for an EUO to verify the no-fault claim, and may deny no-fault benefits if the eligible injured party fails to appear for the EUO. Compliance with an EUO request is a condition precedent to no-fault coverage (*see* 11 NYCRR § 65-1.1, § 65-3.5 [e]). “The failure to comply with the provision of an insurance policy requiring the insured to submit to an examination under oath . . . is a material breach of the policy, precluding recovery of the policy proceeds” (*Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014] [citation omitted]);

see also *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [“(t)he failure to appear for IMEs requested by the insurer . . . is a breach of a condition precedent to coverage under the no-fault policy” and “plaintiff had the right to deny all claims retroactively to the date of loss”]).

To establish the failure of the party to appear for duly scheduled EUOs, the insurer must establish as a matter of law that it twice duly demanded an examination under oath, that the party twice failed to appear and that the insurer issued a timely denial (*Interboro Ins. Co.*, 113 AD3d at 597). It is also incumbent upon the insurer to submit proof by someone with personal knowledge of the non-appearance (*Alrof, Inc. v Safeco Natl. Ins. Co.*, 39 Misc 3d 130[A], 2013 NY Slip Op 50458[U], *1-2 [App Term, 2d Dept 2013]).

Assignees such as Dr. Diwan and Mobility may only obtain the rights of their assignor. The general rule of assignment provides that the assignee stands in the shoes of the assignor upon assignment of the interest, and takes the assignment subject to the defenses assertable against the assignor (*Kolbeck v LIT America Inc.*, 923 F Supp 557, 567 [SD NY 1996], *affd* 152 F3d 918 2d Cir 1998]; see also *Long Is. Radiology v Allstate Ins. Co.*, 36 AD3d 763, 765 [2d Dept 2007]).

Plaintiff contends that, because it has established Ospina’s failure to appear for two scheduled EUOs, through the affidavit of Jessica Mena-Sibrian (plaintiff’s no-fault litigation/arbitration supervisor, setting forth plaintiff’s regular business practice and procedure regarding the issuance and mailing of denial of claim forms and establishing the basis of plaintiff’s EUO requests) (Velazquez affirmation, exhibit J), and the affidavit of Zuhra (plaintiff’s EUO clerk) (*id.*, exhibit K), it is entitled to summary judgment against Dr. Diwan and Mobility, as Ospina’s assignees.

This Court disagrees. Because the arbitrator in the arbitration proceeding has already determined that Country-Wide failed to demonstrate that Ospina breached a condition precedent to coverage by failing to appear for an EUO, Country-Wide is barred, by the doctrine of collateral estoppel, from seeking a declaration that it does not have to provide coverage to Ospina on this ground (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984] [doctrine of collateral estoppel, or issue preclusion, is a “narrower species of res judicata,” which “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same”]; see also *Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 431-432 [2000]). It is well settled that collateral estoppel is applicable to no-fault arbitration awards, even if the awards are not judicially confirmed (see *Martin v Geico Direct Ins.*, 31 AD3d 505, 506 [2d Dept 2006]; *Lobel v Allstate Ins. Co.*, 269 AD2d 502, 502 [2d Dept 2000]). Indeed, the pendency of an appeal does not prevent the application of collateral estoppel (see *Anonymous v Dobbs Ferry Union Free School Dist.*, 19 AD3d 522, 523 [2d Dept 2005]; *Matter of Capoccia*, 272 AD2d 838, 847 [3d Dept 2000]).

“Collateral estoppel comes into play when four conditions are fulfilled: ‘(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits’” (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [citation omitted]). It is clear that Country-Wide was a party to the arbitration, fully and fairly participated in the arbitration and presented its evidence. It is also clear that the issues raised in the prior arbitration proceeding

were identical to, and decisive of, the issues raised here. Indeed, the arbitrator specifically stated that “[t]he sole issue to be determined is [whether] Respondent met its burden of establishing non-appearance for an EUO” (award at 1). Plaintiff bases its summary judgment motion here on that same issue. Because the arbitrator found that Country-Wide failed to meet its burden of showing that Ospina “breached a condition precedent to coverage by failing to appear for an Examination Under Oath” (award at 4), it is barred from relitigating that issue here (*Comprehensive Medical Care of N.Y., P.C. v Hausknecht*, 55 AD3d 777, 778 [2d Dept 2008] [“(t)he defendant met his burden of establishing that the issued raised herein was necessarily decided in a prior arbitration” and “(a)ccordingly, the Supreme Court erred in determining that the instant action was not barred by the doctrine of collateral estoppel”]; *Lobel*, 269 AD2d at 502 [because “(t)he defendant demonstrated that the issue in the arbitration proceeding was identical to and decisive of this cause of action . . . the first cause of action should have been dismissed pursuant to CPLR 3211 (a) (5)”]; *see also Martin*, 31 AD3d at 506 [“the court properly gave collateral estoppel effect to the arbitrator’s determination”]).

Accordingly, plaintiff’s motion for summary judgment is denied, and the cross motion by Dr. Diwan and Mobility for summary judgment dismissing the complaint is granted.

Country-Wide’s motion must also be denied on the ground that it has failed to establish proper mailing to Ospina’s correct address. Country-Wide used the address listed on the Claim Auto Loss Report provided by Northern Medical Care, P.C. to send the EUO notices: 40-22 201th St, #2R, Bayside NY 11361. However, Country-Wide failed to use the address listed on the policy, and did not attach the application for no-fault benefits (form NF-2), which would contain Ospina’s own statement as to the correct address.

Indeed, many of the bills from Northern Medical Care, P.C. have a different address than the one where Country-Wide sent the letters. The address used by Country-Wide had an apartment number, but the Northern Medical Care bills do not contain an apartment number. Additionally, Country-Wide sent the letters to 201st Street, while the address in the bills is listed as 201th Street. This is “proof tending to indicate that the [EUO] notices were misdelivered to the wrong address” (*SK Prime Med. Supply, Inc. v Hertz Claim Mgt. Corp.*, 37 Misc 3d 138[A], 2012 NY Slip Op 52192[U], *1 [App Term, 1st Dept 2012]). Accordingly, Country-Wide failed to demonstrate the proper mailing of the EUO notices to Ospina (*see Delta Diagnostic Radiology, P.C. v Citiwide Auto Leasing*, 46 Misc 3d 128[A], 2014 NY Slip Op 51801[U], *1 [App Term, 2d Dept 2014] [granting motion for summary judgment on the ground that “since defendant failed to demonstrate that the IMEs has been properly scheduled (*id.*), defendant’s denial of claim form lacked merit as a matter of law”]). The failure to send the EUO notices to Ospina is fatal, even if they were sent to BB Law (*see Matter of Mercury Cas. Co. (Patient Care Assoc.)*, 134 AD3d 1204, 1206 [3d Dept 2014]).

Finally, denial of the motion for summary judgment is warranted because the mutual rescheduling of the August 26, 2016 EUO did not count as a non-appearance. According to Nieves’ uncontradicted affidavit, the initial EUO had been rescheduled by mutual agreement prior to the date on which it was to occur. “A mutual rescheduling, which occurs prior to the date of the scheduled EUO, does not constitute a failure to appear” (*Five Boro Psychological Servs. v Utica Mut. Ins. Co.*, 41 Misc 3d 140[A], 2013 NY Slip Op 52005[U], *1 [App Term, 2d Dept 2013]; *see also Metro Psychological Servs., PC v Mercury Cas. Co.*, 49 Misc 3d 143[A], 2015 NY Slip Op 516449U], *1 [App Term, 1st Dept 2015]; *Vitality Chiropractic, PC v Kemper*

Ins. Co., 14 Misc 3d 94, 96-97 [App Term, 2nd Dept 2006]). Since plaintiff did not demonstrate that there had been a failure to appear at both an initial and a follow-up EUO, plaintiff failed to show that Ospina had failed to comply with a condition precedent to coverage (*see DVS Chiropractic, PC v Interboro Ins. Co.*, 36 Misc 3d 138[A], 2012 NY Slip Op 51443[U], *2 [App Term, 2d Dept 2012]).

Dr. Diwan and Mobility also seek statutory attorneys' fees and costs. 11 NYCRR 65-4.6

(c) provides that:

“For disputes subject to arbitration or court proceedings, where one of the issues involves a policy issue as enumerated on the prescribed denial of claim form (NYS form NF-10), subject to this section, the attorney’s fee for the arbitration or litigation of all issues shall be limited to a fee of up to \$70 per hour, subject to a maximum fee of \$1,400. In addition, an attorney shall be entitled to receive a fee of up to \$80 per hour for each personal appearance before the arbitration forum or court.”

In addition, CPLR 8201 (1) provides that “[c]osts awarded in an action shall be in the amount of . . . two hundred dollars for all proceedings before a note of issue is filed” and CPLR 8202 provides that “[c]osts awarded on a motion shall be in an amount fixed by the court, not exceeding one hundred dollars.”

This Court finds that Dr. Diwan and Mobility are entitled to costs in the amount of \$300, pursuant to the above-cited CPLR sections, as well as attorneys’ fees, pursuant to 11 NYCRR 65-4.6 (c) (*see Marigliano v New York Cent. Mut. Fire Ins. Co.*, 13 Misc 3d 1079, 1085 [Civ Ct, Richmond County 2006]). However, a request for attorneys’ fees must be supported by contemporaneous time sheets or other documentation (*Matter of Gamache v Steinhaus*, 7 AD3d

525, 527 [2d Dept 2015] [“Although both attorneys submitted brief summaries of their billable hours, they did not submit contemporaneous time sheets or otherwise adequately document how these alleged hours were accumulated”). Here, Mr. Jakubowitz, the attorney for Dr. Diwan and Mobility, submits only an estimate of the amount of time spent, without any supporting documentation. Accordingly, this Court directs that a referee conduct an inquest with respect to the issue of the amount of attorneys’ fees to which he is entitled.

Motion for a Default Judgment (Motion Sequence No. 002)

Plaintiff seeks a default judgment against Ospina and the defaulting medical provider defendants on the ground that they have failed to answer the complaint.

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 [2d Dept 2017] [citation omitted]; *accord 154 E. 62 LLC v 156 E. 62nd St. LLC*, 159 AD3d 498, 498 [1st Dept 2018]; *Bank of Am. N.A. v Agarwal*, 150 AD3d 651, 652 [2d Dept 2017]). The plaintiff can satisfy this requirement through an affidavit of a party with personal knowledge of the facts (*Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]; *Goodman v New York City Health & Hosps. Corp.*, 2 AD3d 581, 581 [2d Dept 2003]).

Plaintiff has clearly satisfied the first and third of these requirements by submitting the affidavits of service and the Velazquez affirmation, in which the latter asserts that the defaulting defendants have not answered or appeared. However, given that it has already been determined

by the arbitrator that Country-Wide has failed to demonstrate that Ospina breached a condition precedent to coverage by failing to appear for an EUO, plaintiff cannot fulfill the second requirement – proof of the facts constituting its claims. Accordingly, the motion for a default judgment is denied.

This Court has considered the remaining arguments, and finds them to be without merit.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion for summary judgment (motion sequence no. 001) is denied; and it is further

ORDERED that the cross motion of defendants Laxmidhar Diwan M.D. and Mobility Ortho Supply Corporation (motion sequence no. 002) is granted, and the complaint is dismissed as against these defendants, with costs to these defendants in the amount of \$300, pursuant to CPLR 8201(1) and 8202; and it is further

ORDERED that the amount of the legal fees to which defendants Laxmidhar Diwan M.D. and Mobility Ortho Supply Corporation are entitled, pursuant to 11 NYCRR 65-4.6 (c), is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet¹ upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that plaintiff's motion for a default judgment (motion sequence no. 002) is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: February 22, 2019

ENTER:



HON. KATHRYN E. FREED, J.S.C.

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.