SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 153814/2017

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

RAFAEL ORTIZ, 3RD AVE. PHYSICAL THERAPY P.C., ATP PT PC, JSP ACUPUNCTURE P.C., M DANIEL CHIROPRACTIC PC, MDAX INC., PRO-ALIGN CHIROPRACTIC P.C., ROCKWOOD MEDICAL HEALTH P.C., WAVE MEDICAL SERVICES, P.C., WESTCHESTER RADIOLOGY & IMAGING, P.C.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 24

were read on this motion to/for DECLARATORY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this no-fault action, plaintiff American Transit Insurance Company ("ATIC") moves: 1) pursuant to CPLR 3215, for a default judgment against defendant Rafael Melo-Ortiz ("Melo-Ortiz") and codefendants 3rd Avenue Physical Therapy P.C. ("3rd Avenue"), JSP Acupuncture P.C. ("JSP"), M Daniel Chiropractic PC ("M Daniel"), MDAX Inc. ("MDAX"), Pro-Align Chiropractic P.C. ("Pro-Align"), Rockwood Medical Health P.C. ("Rockwood"), Wave Medical Services, P.C. ("Wave"), and Westchester Radiology & Imaging, P.C. ("WRI") (collectively "the defaulting providers") due to their failure to answer or otherwise appear in the action; 2) pursuant to CPLR 3212, granting ATIC summary judgment against ATP PT P.C. ("ATP" or "the answering provider"; 3) granting ATIC a declaratory judgment that Melo-Ortiz is not an eligible injured person entitled to no-fault benefits under ATIC insurance policy number CAP613445 ("the policy"), claim number 785667-09; 4) granting ATIC a declaratory judgment that it is not obligated

to honor or pay claims for reimbursement submitted by the defaulting providers or the answering provider, as assignees of Melo-Ortiz under the policy, nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding, including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the policy from an alleged accident on November 12, 2015 in which Melo-Ortiz was involved and that Melo-Ortiz is not an eligible injured person as defined by the policy and/or New York State Regulation 68; 5) a declaratory judgment that ATIC is not required to provide, pay, or honor any current or future claim under the Mandatory Personal Injury Protection endorsement under the policy, nor is ATIC required to provide, pay, honor or reimburse any claims set forth herein, in any current or future proceeding including, without limitation, arbitrations and/or lawsuits seeking to recover no-fault benefits arising under the policy from the alleged accident of November 12, 2015 involving Melo-Ortiz and that Melo-Ortiz is not an eligible injured person as defined by the policy and/or New York State Regulation 68; and 6) for such other relief as this Court deems just and proper.

FACTUAL AND PROCEDURAL BACKGROUND:

On November 12, 2015, Melo-Ortiz was injured in an automobile accident involving a vehicle owned by nonparty City Livery Leasing Brooklyn, Inc. ("CLL") and insured by ATIC under the policy. Docs. 1, 9, 11, 12. ATIC issued the policy to its insured, CLL. Docs. 9 and 12. The policy, which contained a no-fault endorsement providing coverage to an insured or eligible injured person in the amount of $50,000 for all necessary expenses arising from a motor vehicle accident, was in effect as of November 12, 2015. Doc. 9 at par. 5. It also contained the mandatory no-fault endorsement required by the New York State Department of Financial Services. Doc. 12.

On December 1, 2015, ATIC received from Melo-Ortiz an application for no-fault benefits ("NF-2"). Doc. 9 at par. 14; Doc. 12. The NF-2 listed an address for Melo-Ortiz in Paterson, New Jersey. Doc. 12. On or about January 6, 2016, Suris & Associates advised ATIC that it was representing Melo-Ortiz. Doc. 12. Melo-Ortiz subsequently assigned his right to collect no-fault benefits to health care providers, including the answering provider and the defaulting providers. Doc. 9 at par. 15.

On May 12, 2016, ATIC sent Melo-Ortiz a notice at his New Jersey address requesting that he appear for an examination under oath ("EUO") in this matter on June 14, 2016. Doc. 9 at par. 20. The June 14 appointment was rescheduled. Doc. 9 at par. 21. On July 21, 2016, ATIC sent Melo-Ortiz and his attorneys a notice requesting that Melo-Ortiz appear for an EUO on August 4, 2016. Doc. 9 at par. 22. Melo-Ortiz failed to appear for an EUO on that date. Doc. 9 at par. 23. On August 9, 2016, ATIC sent Melo-Ortiz and his attorneys another EUO notice, this time requesting that he appear on September 1, 2016. Doc. 9 at par. 24. The appointment was rescheduled. Doc. 9 at par. 25. On September 12, 2016, ATIC sent Melo-Ortiz and his attorney another notice, this time requesting that he appear for an EUO on October 3, 2016. Doc. 9 at par. 26. After Melo-Ortiz failed to appear on that date (Doc. 9 at par. 27), ATIC issued him, as well as the appearing provider and the non-appearing providers, a general denial of coverage. Doc. 14.

ATIC commenced this action against defendants Melo-Ortiz, 3rd Avenue, ATP, JSP, M Daniel, MDAX, Pro-Align, Rockwood, Wave, and Westchester by the filing of a summons and verified complaint on April 25, 2017. Doc. 1. Defendants were thereafter served with process. Docs. 4 and 6. ATC joined issue by its answer filed October 19, 2017. Doc. 3. In its complaint, ATIC sought a judgment declaring that Melo-Ortiz is not an eligible injured person entitled to no-fault benefits under the policy, and that ATIC is not obligated to reimburse the answering provider

or the defaulting providers for any alleged medical treatment, therapy and/or medical supplies rendered to him. Doc. 1; Doc. 9 at par. 33. In seeking this relief, ATIC claimed that Melo-Ortiz breached a condition precedent to coverage under the policy by failing to appear for an EUO. Doc. 1; Doc. 9 at par. 29.

In April 2018, ATIC filed the instant motion seeking the relief set forth above. In an attorney affirmation in support of the motion, ATIC argues that it is entitled to summary judgment pursuant to CPLR 3212 declaring that Melo-Ortiz is not entitled to no-fault benefits under the policy because it established that he failed to appear for an EUO. ATIC asserts that it is also entitled to such a declaration as against ATP, the assignee of any right to benefits Melo-Ortiz had. Additionally, ATIC maintains that it is entitled to a default judgment against the non-appearing providers pursuant to CPLR 3215 due to their failure to answer.

In support of the motion, ATIC submits the affidavit of one of its claims representatives, Chevan Douglas. Ex. A to Doc. 10. Douglas states, inter alia, that Melo-Ortiz "failed to appear for properly requested and scheduled [EUOs]" on August 4 and October 3, 2016. Ex. A to Doc. 10 at par. 12. He further states that, on October 13, 2016, he issued a general denial to the appearing provider and the non-appearing providers. Ex. A to Doc. 10 at par. 18.

Luis Campbell, a mailroom supervisor for ATIC, also submits an affidavit in support of the motion. Ex. A to Doc. 10. In his affidavit, Campbell essentially describes ATIC's procedures for mailing EUO notices and denial letters.

Patrick Carr, a member of ATIC's special investigations unit, submits an affidavit in which he states that he waited for Melo-Ortiz to arrive for his EUO on August 4 and October 3, 2016 but that he never appeared. Ex. A to Doc. 10.

Didy Diaz, an employee of ATIC, submits an affidavit attesting to the fact that she personally mailed the EUO notices to Melo-Ortiz and his attorney. Ex. A to Doc. 10.

In opposition to the motion, ATP argues that ATIC's motion must be denied since the EUO was not scheduled in accordance with 11 NYCRR 65-3.5.[1] Doc. 22. ATP further argues that the motion must be denied because neither ATIC's complaint nor its motion for summary judgment identifies when Melo-Ortiz's claim was received. Additionally, ATP argues that, since Melo-Ortiz failed to appear for an EUO after his rights were assigned to the answering provider and the non-answering providers, said providers do not stand in his shoes after the date the rights were assigned. Further, ATP maintains that ATIC fails to lay a proper foundation for the evidence submitted in support of the motion.

In reply, ATIC argues that it established its prima facie entitlement to summary judgment by demonstrating that it requested the EUO in accordance with the procedures and time frames set forth in the no-fault implementing regulations and Melo-Ortiz failed to appear. Doc. 24 at par. 4. It further maintains that, in opposition to the motion, ATP failed to raise a triable issue of fact. ATIC then concedes that "the first EUO scheduling letter was sent beyond 15 business days of receipt of [the NF-2]" in violation of 11 NYCRR 65-3.5(b) but that its failure to schedule the EUO within 15 business days is excused by 11 NYCRR 65-3.5(p) and Melo-Ortiz's failure to appear for an EUO warrants the granting of the motion.

[1] ATIC's claims against ATP were discontinued by stipulation filed October 2, 2018, after ATP had opposed this motion. Doc. 27. ATIC's claims against 3rd Ave. and JSP were discontinued by stipulation filed September 12, 2018. Doc. 25.

LEGAL CONCLUSIONS:

ATIC's Motion for a Default Judgment

As noted previously, ATIC seeks a default judgment against Melo-Ortiz, 3rd Avenue, ATP, JSP, M Daniel, MDAX, Pro-Align, Rockwood, Wave, and Westchester. Since the complaint has been discontinued as against 3rd Avenue, JSP, and ATP, this Court need only address the motion for default as against Melo-Ortiz and the remaining non-appearing providers.

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him." It is well settled that in order to establish its entitlement to a default judgment pursuant to CPLR 3215, a party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). Here, ATIC has established that Melo-Ortiz and the non-appearing providers were served with process (Docs. 4 and 6) and that said defendants have failed to answer or otherwise appear herein. Doc. 9 at par. 36. However, ATIC has not established the facts constituting the claim.

In order to obtain a declaratory judgment, an insurer must establish that it requested an EUO in accordance with the procedures and time frames set forth in 11 NYCRR 65-3.5. *See American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 (1st Dept 2015). The claim procedure set forth in 11 NYCRR 65-3.5(b) requires an insurer to request an EUO within 15 business days after receipt of a completed verification form. Here, ATIC not only exceeded the 15-day period, but did not request an EUO until May 12, 2016, over five months after it received notice of the claim on December 1, 2015. Docs. 9 and 12. Indeed, even ATIC's counsel concedes that the EUO notice was untimely (Doc. 24 at pars. 9 and 10), despite urging that this this was a

"non-substantive technical or immaterial defect or omission" excusable pursuant to 11 NYCRR 65-3.5(p). However,

> [c]ontrary to plaintiff's contention, 11 NYCRR 65-3.5(p) does not excuse it of its obligation to demonstrate, on a motion for leave to enter a default judgment, that it timely requested the non-answering claimant to appear an [EUO]. Plaintiff sets forth no authority for its assertion which would require this Court to disregard the holdings of the Appellate Division, First Department (*see Kemper Indep. Ins. Co. v Adelaida Phys. Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]; *see also Natl. Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015]). "Those cases expressly hold that, where an insurer disclaims coverage based on an applicant's failure to appear for a scheduled EUO, or to provide other additional requested verification (i.e. IME), proof of timely mailing of a request for that additional verification is an integral part of an insurer's prima facie burden" (*Hertz Vehicles, LLC v Cliffside Park Imaging & Diagnostic Ctr.*, 2017 N.Y. Misc. LEXIS 7788, 2017 WL 5972806 [NY Sup November 29, 2017], *2).

Unitrin Advantage Ins. Co. v Advanced Orthopedics & Joint Preserv. P.C., 2018 NY Slip Op 33296[U], *10 (Sup Ct, NY County 2018).

Given this authority, that branch of ATIC's motion seeking a default judgment against Melo-Ortiz and the non-appearing providers is denied.

ATIC's Motion for Summary Judgment

As noted previously, ATIC seeks summary judgment against ATP and Melo-Ortiz, specifically requesting a declaration that the latter is not an eligible injured person entitled to no-fault benefits under the policy due to his failure to appear for an EUO. Since ATIC's claims against ATP have been discontinued, this Court need only address the branch of the motion seeking relief as against Melo-Ortiz.

"Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating [no-fault] coverage" (*Kemper*

Independent Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437, 438 [1st Dept 2017] [citation omitted]), ATIC's attorney concedes, as noted above, that Melo-Ortiz's EUO was not properly noticed in accordance with 11 NYCRR 65-3.5(b). Doc. 24 at pars. 9 and 10. Since ATIC "failed to meet its [prima facie] burden of establishing either that the [EUO was] not subject to the procedures and time frames set forth in the no-fault implementing regulations or that it properly noticed the [EUO] in conformity with their terms" (*Kemper*, 147 AD3d at 438 [citations omitted]), its motion for summary judgment must be denied.

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

ORDERED that the motion is denied as moot as to defendants 3rd Avenue Physical Therapy P.C., ATP PT PC, and JSP Acupuncture P.C.; and it is further

ORDERED that the motion is denied in all other respects; and it is further

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

4/11/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE