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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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STATE FARM MUTUAL ATOMOBILE INSURANCE,

Plaintiff,

Index No.: 700655/18
Mot. Date: 2/4/20

-against-

Mot. Seq. 6

TIFFANY A. BURKE, ONIQUE R. PORTER, LYLA JAI SMITH, BRANDON A. WALLACE, ALEX KAMINSKY, DC, AMILOR ACUPUNCTURE, PC, ANDREW J. DOWD, MD, DEMETRIOS KARAKIZIS DC, PC, ELDAR KADYMOFF MEDICAL, PC, JFF MEDICAL SERVICES, PC, LIFESTYLE REHAB PT, PC; LI CHIROPRACTIC, PC, METROPOLITAN MEDICAL & SURGICAL, PC; MKR MEDICAL, PC, NEW YORK ANESTHESIA, PC, NEW YORK SURGERY CENTER QUEENS, LLC, OMEGA DIAGNOSTIC IMAGING, PC, PATCHOGUE OPEN MRI, PC, PATCHOGUE OPEN MRI, PC D/B/A SOUTHWEST MEDICAL IMAGING, SP ORTHOTIC SURGICAL AND MEDICAL SUPPLY, INC., and TRIBOROUGH ORTHOPEDICS, PC,

Defendants.

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The following papers were read on this motion by plaintiff seeking declaratory relief, pursuant to CPLR 3001.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits	EF122-137
Answering Affirmations - Exhibits	EF 145-158

Upon the foregoing papers it is ordered that the motion by plaintiff seeking declaratory judgment is denied, in its entirety.

As initial matter, after searching the record, the Court grants dismissal of the action ONLY as against defendant Lyla Jai Smith.

Plaintiff filed the instant declaratory judgment action seeking a declaration that it is not obligated to pay any bills for any "No-Fault related" expenses arising from a motor vehicle accident of March 6, 2017, based on the "failure and refusal to cooperate" of defendants Tiffany A. Burke (Burke), Onique R. Porter (Porter), and Brandon A. Wallace (Wallace). Plaintiff's complaint alleges that Burke was the registered owner of a vehicle being operated by Porter, which was involved in an accident with a vehicle owned and operated by defendant Lyla Jai Smith on the above date. Wallace was a passenger in the Burke/Porter vehicle. Porter and Burke were covered under an automobile policy issued by plaintiff. Porter and Wallace filed No-Fault claims against the plaintiff.

The instant motion seeks declarative relief against "all defendants," based on the allegations of lack of cooperation by the three above-mentioned defendants, and a default judgment against the non-appearing defendants. However, at the same time this motion was filed, plaintiff moved, separately, for a default judgment against all non-appearing defendants, which motion was decided by this Court on February 14, 2020, granting such relief against all non-appearing defendants, except Andrew Dowd, M.D. As a result, the branch of the instant motion seeking a default judgment is denied, as moot, and this motion now seeks only declaratory relief against the answering defendants only, *i.e.*, Lyla Jai Smith; JPF Medical Services, P.C. (JPF Medical); SP Orthotic Surgical & Medical Supply, Inc. (SP Orthotic); and LI Chiropractic, P.C. (LI Chiropractic).

The complaint alleges that Porter, Burke, and Wallace were, on April 18 and 9, 2019, notified by the plaintiff that it "specifically reserved" its right to deny coverage due to questions of whether the property damage or personal injuries were caused by the accident; whether coverage would not be applicable due to the "exclusionary provisions" of the policy regarding "use of the vehicle for carrying persons for a charge;" whether the applicants made "false statements with intent to conceal;" and whether there was compliance with the provisions concerning "assistance and cooperation of the insured" for "refusal to give pertinent information" to the plaintiff. Plaintiff further alleges that it notified the three defendants of a demand for a deposition under oath (DUO) and for information regarding the accident and their claims, and that each one failed to appear or submit such information after several notifications. Plaintiff alleges that said three

defendants thereby failed to comply with 11 NYCRR § 65-3.5 (o), and that, under the terms of the applicable policy of insurance, the plaintiff could disclaim for such failure to cooperate; which the plaintiff states it did in timely fashion. Defendants LI Chiropractic and Smith oppose.

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing and uncertain or disputed jural relation either as to present or prospective obligations" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; *see 159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 [2d Dept 2018]). An action for declaratory judgment may be utilized only for a justiciable controversy, *i.e.*, where the court has jurisdiction over the subject matter of the action, and the dispute is genuine, rather than academic, between parties with a stake in the outcome (*see Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d 1072 [2d Dept 2018]; *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725 [2d Dept 2013]; *Chanos v MADAC, LLC*, 74 AD3d 1007 [2d Dept 2010]). A declaratory judgment action, brought by the disclaiming insurer, would be the appropriate vehicle to test the insurer's right to disclaim coverage or deny liability (*see McDonald v Shore*, 100 AD3d 602, 603 [2d Dept 2012]; *see Iacobellis v A-1 Tool Rental, Inc.*, 65 AD3d 1015 [2d Dept 2009]; *Monoghan v Meade*, 91 AD2d 1014 [2d Dept 1983]).

Initially, defendant LI Chiropractic, opposes this motion based on the allegations that it is "procedurally defective," pursuant to CPLR 2214 (a). However, such claims that the motion lacks the grounds; the specific relief requested; and the pleadings, are factually incorrect. Further, the allegation that timely service of the denial could not be determined, because the date of receipt of the bills by providers was not provided, is without merit, as such information was included on the said denials. Additionally, the contentions regarding the alleged inadequacy of proof as to the EUO demands, and the failures of the insureds to appear for each, are belied by the documentary exhibits, and the affirmations attesting to each appearance and default, included with the motion papers.

However, movant-insurer's submission that it had no duty to defend the insureds, based upon the disclaimer letters, was insufficient to establish, *prima facie*, that the disclaimer letters were timely and properly mailed (*see Matsil v Utica First Ins. Co.*, 150 AD3d 982 [2d Dept 2017]). A presumption of proper mailing "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2d Dept 2001]; *see Deutsche Bank Natl. Trust*

Co. v Dennis, 181 AD3d 864 [2d Dept 2020]). In the case at bar, there is nothing on the face of the disclaimer letters that establishes when they were actually mailed, and movant has failed to proffer independent evidence of the mailing date of such disclaimers (*see Soroush v CitiMortgage, Inc.*, 161 AD3d 1124 [2d Dept 2018]; *Matsil v Utica First Ins. Co.*, 150 AD3d 982 [(2d Dept 2017]). As such, movant has failed to demonstrate "the absence of all factual issues so that a determination as to the rights of the parties could be determined as a matter of law" (*Guthart v Nassau County*, 178 AD3d 777, 778 [2d Dept 2019]).

As the plaintiff has failed to substantiate its *prima facie* burden in the first instance, it is unnecessary to consider whether the defendants' opposition papers were sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Mobley v J. Foster Phillips Funeral Home, Inc.,* 178 AD3d 916 [2d Dept 2019]). Consequently, plaintiff's motion is denied with regard to LI Chiropractic, PC, JPF Medical Services, P.C., and SP Orthotic Surgical & Medical Supply, Inc.

Defendant Smith submitted an appearance and answer to the suit, which pleading contained affirmative defenses of failure to state a cause of action, and that there was "no accident involving this defendant." Smith contends that the plaintiff has asserted no "just controversy" as to him, as he has not filed a No-Fault claim against the plaintiff arising from the subject accident, and that, not only should the instant motion be denied as against Smith, but that Smith is entitled to dismissal of the complaint herein. Smith's evidence in opposition includes: a March 1, 2018 demand for a bill of particulars and for discovery and inspection; a September 10, 2018, a letter to plaintiff requesting compliance with such demands; a Compliance Conference order directing plaintiff to comply with such demands within thirty days, which was not done; and a May 15, 2019 letter to the plaintiff inquiring about the stipulation of discontinuance allegedly promised to Smith, but not received. Such opposition has raised a triable issue of fact sufficient to deny plaintiff's motion as against Smith, and plaintiff has failed to offer evidence in rebuttal thereto. As such, the plaintiff's motion is denied as to defendant Smith.

CPLR 3212 (b) states, in relevant part, that a "motion shall be granted if ... cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Therefore, while the court cannot award judgment to a nonmoving party "on an issue not presented by the motions" (*Dunham v Hilco Constr. Co.,* 89 NY2d 425,429 [1996]; *see 63-65 Corp. v Prevosti*, 28 AD3d 469

[2d Dept 2006]; *Y. Costello v Hapco Realty, Inc.*, 305 AD2d 445 [2d Dept 2003]), the court may search the record as to an issue that was the subject of another party's motion, and direct judgment to an entitled party thereto (*see Galasso, Langione & Botter, LLP v Galasso*, 176 AD3d 1184 [2d Dept 2019]; *Baron v Brown*, 101 AD3d 915 [2d Dept 2012]). As such, without opposition, summary judgment is granted to defendant, Smith, dismissing the complaint as against him.

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, it is

ORDERED that the plaintiff's motion seeking declaratory judgment is denied, in its entirety; and it is further

ORDERED that the branch of plaintiff's motion seeking a default judgment is denied, as moot; and it is further

ORDERED, that after searching the record, the Court grants dismissal of the action ONLY as against defendant Lyla Jai Smith.

Dated: May 13, 2020

TIMOTHY J. DUFFICY, J.S.C.

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COUNTY CLERK
QUEENS COUNTY