SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

DANIEL AMERICAN, LONGEVITY MEDICAL SUPPLY, INC.,EASY ACCESS CHIROPRACTIC P.C.,CITIMEDICAL I, PLLC, JULES FRANCOIS PARISIEN MD, EMIS CHIROPRACTIC, P.C., INTEGRATED PAIN MANAGEMENT, PLLC,LIFE REHAB PT, P.C.,LIFESCIENCE ACUPUNCTURE P.C., ECLIPSE MEDICAL IMAGING P.C.,STARK MEDICAL SUPPLY INC, NYC COMMUNITY MEDICAL CARE P.C., MMA PHYSICAL THERAPY, P.C.,NGM ACUPUNCTURE P.C., DIW ACUPUNCTURE P.C.,ROSS A. FIALKOV DC, P.C., RF CHIROPRACTIC IMAGING, P.C., REHAB CARE PHYSICAL THERAPY P.C., QUAZI T RAHMAN MD, COMFORT PHYSICAL THERAPY, PLLC

Defendants.

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INDEX NO. 657697/2019

MOTION DATE 1/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 61, 62, 63, 64, 65, 66

were read on this motion to/for JUDGMENT - DEFAULT.

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against defendants Daniel American (the individual defendant), Easy Access Chiropractic PC, Emis Chiropractic PC, Life Rehab PT PC, Lifescience Acupuncture PC, Eclipse Medical Imaging PC, Stark Medical Supply Inc., NYC Community Medical Care PC, NGM Acupuncture PC, DIW Acupuncture PC, Ross A Fialkov DC PC, RF Chiropractic Imaging PC, Rehab Care Physical Therapy PC, Quazi T. Rahman MD, and Comfort Physical Therapy PLLC (the non-answering health-care defendants). The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to the individual defendant or to the non-answering health-care defendants to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained in an auto accident on May 15, 2018 on the grounds that the individual defendant failed to appear for duly scheduled Examinations

Under Oath (EUOs). Defendants Emis Chiropractic PC, Stark Medical Supply Inc., MMA Physical Therapy PC, and Rehab Care Physical Therapy oppose the motion and cross-move pursuant to CPLR 3012(d) to compel the plaintiff's acceptance of their late answer.

A. Cross-Motion to Compel Acceptance of Late Answer

In determining a motion pursuant to CPLR 3012(d), the court takes into account the excuse offered for the defendant's delay in answering, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001).

Here, the default in answering by the cross-moving defendants occurred on March 2, 2020, but they answered two day later and there is no indication of willfulness or bad faith. While taking on an unmanageable caseload is not a valid excuse (see Picardo-Garcia v Josephine's Spa Corp., 91 AD3d 413 [1st Dept. 2012]), the defendants have asserted through an affidavit of counsel's paralegal that the delay in answering is due in part to a delay in receiving the summons and complaint from the Secretary of State. Therefore, the court is inclined to find such a failure to be a reasonable excuse. See Imperato v Mount Sinai Med. Ctr., 82 AD3d 414 (1st Dept. 2011); Chelli v Kelly Group, P.C., 63 AD3d 632 (1st Dept. 2009). Nor is there any discernible prejudice to the plaintiff in accepting the late answer. While the defenses asserted in the proposed answer are not certain to succeed, at least one is potentially meritorious. Further, the court is mindful of the strong public policy favoring resolution of disputes on the merits. See Wimbledon Financing Master Fund, Ltd. v Weston capital Mgmt. LLC, 150 AD3d 427 (1st Dept. 2017); Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 (1st Dept. 2016); Jones v 414 Equities LLC, supra.

Thus, the cross-motion is granted and plaintiff shall accept the cross-moving defendants' answer, filed March 4, 2020, as timely. As the cross-motion is granted, the plaintiff's motion for leave to enter a default judgment against those defendants is denied.

B. Motion for Default Judgment as against the Remaining Defendants

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, and proof of the defendant's defaults (see CPLR 3215[f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept. 2016]), timely move for that relief (see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455, 457 [1st

Dept. 2015]), and satisfy the notice requirements for the motion (CPLR 3215[g]). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In the application for no-fault benefits, the individual defendant alleged, *inter alia*, that he was injured in a motor vehicle accident on May 15, 2018, and that he thereafter obtained medical treatment or medical supplies from the health-care defendants. According to the plaintiff, the health-care defendants sought payment under claim number 336725-002, as assignees of the individual defendant, for no-fault benefits under insurance policy number CS 4101102-17. See Insurance Law 5106(a); 11 NYCRR 65-1.1. The plaintiff received a series of at least 17 claims from July 16, 2018 through July 30, 2018. The plaintiff mailed its first notice for an EUO on July 31, 2018 scheduling the individual defendant's EUO on August 16, 2018. The individual defendant did not attend either the first EUO or the second rescheduled EUO on September 13, 2018. The plaintiff denied the insurance claims on September 17, 2018. The plaintiff now seeks a judgment declaring that it is not required to pay the no-fault benefits as the individual defendant's coverage is vitiated.

The plaintiff's submissions demonstrate that the initial notice for an examination under oath (EUO) on July 31, 2018 was timely mailed to the individual defendant within 15 business days of its receipt of the health-care defendants' NF-3 forms, as required by 11 NYCRR 65-3.5(b). See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept. 2017); National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851 (1st Dept. 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441 (1st Dept. 2015). They also show that the individual defendant did not appear for the initially scheduled EUO, and was provided timely notice of a rescheduled EUO, but failed to appear for that as well. The plaintiff consequently provided *prima facie* evidence that, by failing to appear, the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., supra; Hertz Corp. v Active Care Med. Supply Corp., 124 AD3d 411 (1st Dept. 2015); Allstate Ins. Co. v Pierre, 123 AD3d 618 (1st Dept. 2014).

In opposition, the cross-moving defendants argue that the proof submitted by the plaintiff does not establish that i) the plaintiff's EUO scheduling letters were timely or properly mailed

within its receipt of all of the health-care defendants' NF-3 forms, or ii) that the individual defendant failed to appear for his EUO. These contentions are without merit.

The affidavit of Kyaw Nyein is sufficient to establish a rebuttable presumption of proper mailing. Timely mailing can be established by an affidavit from an employee with knowledge of the party's standard office practices and procedures designed to ensure the items were properly addressed and timely mailed. See Am. Transit Ins. Co. v Lucas, 111 AD3d 423 (1st Dept. 2013). To rebut proper mailing an opposing party must show that that the routine office practice was not followed in this instance or that the scheduling letters were never mailed. See Nassau Ins. Co. v Murray, 46 NY2d 828 (1978). The opposing defendants fail to make any allegations of a deviation from routine office practice or non-mailing, or otherwise rebut the presumption. Moreover, the plaintiff's submission of the affidavit of Annie Persaud, the administrative assistant for the plaintiff who prepares and mails the EUO notices, is sufficient to demonstrate that pursuant to log sheets kept in the regular course of business American failed to appear for his duly scheduled EUOs. See CPLR 4518(a).

There is no merit to the argument of the opposing defendants that the first EUO letter was not sent within 15 business days of all of the NF-3 claims forms, and thus the claims made outside of that time limit must be paid. The argument is contrary to the Appellate Division's holding in Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011) *lv denied* 17 NY3d 705 (2011) [failure to appear for IME]. Like an IME, a failure to request an EUO within the 15-day limit under 11 NYCRR 65-3.5(b) only serves to reduce the 30-day time limit imposed under New York Insurance Law § 5106 and 11 NYCRR 65.15(g)(3). Under Unitrin, any assignor's failure to appear for a requested EUO voids the policy *ab initio* such that an insurer may retroactively deny claims to the date of loss regardless of whether the denials were timely issued.

C. Severance of Claims Against Remaining Defendants

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants**.** *See* Woodson v Mendon Leasing Corp., 259 AD2d 304 (1st Dept. 1999); see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003)*;* Holt v Holt, 262 AD2d 530 (2nd Dept. 1999); Frolish v. Ryder Truck Rental*,* 63 AD2d 799 (3rd Dept. 1978). A judgment obtained by a plaintiff as against a defaulting defendant does not entitle the plaintiff to collateral estoppel against the

non-defaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability. See Woodson v Mendon Leasing Corp., supra; Frolish v Ryder Truck Rental, supra.

Accordingly, it is,

ORDERED that the cross-motion of defendants Emis Chiropractic PC, Stark Medical Supply Inc., MMA Physical Therapy PC, and Rehab Care Physical Therapy is granted and the answer filed March 4, 2020 is deemed to have been timely served and the plaintiff shall accept the same pursuant to CPLR 3012(d), and it is further

ORDERED that the plaintiff's motion for leave to enter a default judgment is granted as against non-answering defendants Daniel American, Easy Access Chiropractic PC, Life Rehab PT PC, Lifescience Acupuncture PC, Eclipse Medical Imaging PC, NYC Community Medical Care PC, NGM Acupuncture PC, DIW Acupuncture PC, Ross A Fialkov DC PC, RF Chiropractic Imaging PC, and Quazi T. Rahman MD, and is otherwise denied; and it is further,

ADJUDGED AND DECLARED that the plaintiff is not obligated to pay no-fault benefits to the defendant Daniel American for injuries that he allegedly sustained in a motor vehicle accident on May 15, 2018, or to defendants, Easy Access Chiropractic PC, Life Rehab PT PC, Lifescience Acupuncture PC, Eclipse Medical Imaging PC, NYC Community Medical Care PC, NGM Acupuncture PC, DIW Acupuncture PC, Ross A Fialkov DC PC, RF Chiropractic Imaging PC, and Quazi T. Rahman MD to reimburse them for treatment they rendered or medical equipment they provided to the individual defendant, under policy number CS 4101102-17, claim number 336725-002 for injuries allegedly sustained in the motor vehicle accident of May 15, 2018; and it is further,

ORDERED that this action is severed and continued as against all answering defendants, Longevity Medical Supply Inc., Citimedical I PLLC, Jules Francois Parisien MD, Integrated Pain Management PLLC, Emis Chiropractic PC, Stark Medical Supply Inc., MMA Physical Therapy PC, and Rehab Care Physical Therapy; and it is further,

ORDERED that the parties shall confer and jointly contact chambers on or before February 26, 2021 to schedule a preliminary/settlement conference; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/20/2021
DATE

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER