SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

VICTORIA WINSLOW, EXON MEDICAL EQUIPMENT, INC, PARK AVENUE CHIROPRACTIC HEALTHCARE, P.C.,ESHEL TREE PT P.C.,ATLAS RADIOLOGY P.C.,G.M. WELLNESS MEDICAL, P.C.,HARMONIZED ACUPUNCTURE P.C.,CROSSTOWN MEDICAL P.C.,ACCU REFERENCE MEDICAL LAB LIMITED LIABILITY COMPANY, ARON ROVNER MD, PLLC,DR. JULY GAYSYNSKY M.D., MDJ CHIROPRACTIC WELLNESS P.C.

Defendant.

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INDEX NO. 655726/2018

MOTION DATE 10/06/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

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

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment as against medical provider defendant Exon Medical Equipment, Inc. ("Exon") and to dismiss Exon's counter-claims against plaintiff, is granted.

Background

Prior to May 14, 2018, plaintiff, Country-Wide Insurance Company, issued an insurance policy (number RT7118356 18) that was in effect from April 11 to May 21, 2018. On May 14, 2018, the claimant-defendant, Victoria Winslow, was allegedly injured in a motor vehicle accident and submitted a claim (number 000336516-002) to plaintiff as an alleged eligible injured party of the subject insurance policy. The claimant-defendant sought medical treatment for injuries allegedly arising out of the subject alleged accident from the medical provider defendants, namely, Exon Medical Equipment, Inc. ("Exon"); Park Avenue Chiropractic Healthcare, P.C.; Eshel Tree PT P.C.; Atlas Radiology P.C.; G.M. Wellness Medical, P.C.; Harmonized Acupuncture P.C.; Crosstown Medical P.C.; Accu Reference Medical Lab Limited Liability Company; Aron Rovner MD, PLLC; Dr. July Gaysynsky M.D.; and MDJ Chiropractic Wellness P.C. The claimant-defendant assigned her right to collect No-Fault benefits to the medical provider

defendants, who, in their capacities as the claimant-defendant's assignees under the subject insurance policy, submitted claims for reimbursement to plaintiff. In August 2018, the claimant-defendant failed to appear for a scheduled and rescheduled Examination Under Oath ("EUO"), thereby breaching a condition of plaintiff's subject insurance policy. Thus, plaintiff disclaimed coverage. (NYSCEF Doc. 1.)

On November 15, 2018, plaintiff commenced the instant action against defendants, seeking a judgment (1) declaring that plaintiff owes no duty to defendants to pay No-Fault claims that defendants submitted to plaintiff arising out of the subject alleged accident; (2) staying all No-Fault lawsuits and arbitrations arising from No-Fault claims that defendants submitted to plaintiff arising out of the subject alleged accident; and (3) awarding costs, disbursements, and attorney's fees to plaintiff (NYSCEF Doc. 1, at 12-13).

On December 24, 2018, Exon answered the instant complaint with various admissions, denials, fifteen Affirmative Defenses, and three counter-claims (NYSCEF Doc. 14). On December 26, 2018, plaintiff replied to said counter-claims (NYSCEF Doc. 15).

By Decision and Order dated December 23, 2019, this Court granted plaintiff's motion, pursuant to CPLR 3215, for a default judgment as against the claimant-defendant and medical provider defendants Park Avenue Chiropractic Healthcare, P.C.; Eshel Tree PT P.C.; Atlas Radiology P.C.; G.M. Wellness Medical, P.C.; Harmonized Acupuncture P.C.; Crosstown Medical P.C.; Accu Reference Medical Lab Limited Liability Company; Aron Rovner MD, PLLC; Dr. July Gaysynsky M.D.; and MDJ Chiropractic Wellness P.C. In that Decision and Order, this Court also requested that plaintiff and Exon appear for a preliminary conference on February 4, 2020. (NYSCEF Doc. 35.)

Plaintiff now moves (1), pursuant to CPLR 3212, for summary judgment as against Exon for the relief requested in the subject pleadings on the ground that the claimant-defendant failed to appear for her EUO, thereby breaching a condition of plaintiff's subject insurance policy; and (2) for an order dismissing all Counter-Claims made against plaintiff (NYSCEF Doc. 39).

In opposition, Exon asserts, inter alia, the following: (1) there are issues of fact as to whether plaintiff submitted the subject EUO requests in a timely manner; (2) plaintiff has failed to establish that it denied Exon's claim(s), as the NF-10 form that plaintiff e-filed as an exhibit did not specify that plaintiff mailed a carbon copy to Exon; (3) plaintiff has not e-filed the subject NF-3 forms; and (4) plaintiff has failed to establish that the claimant-defendant failed to appear for the subject EUO; (NYSCEF Doc. 56).

In reply, plaintiff cites to Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011), and asserts, inter alia, the following: (1) "even if the applicant believed the EUO was improper, Applicant or Applicant's counsel still had a duty to communicate with the insurer regarding the request"; (2) plaintiff had the right to deny the subject claims retroactively regardless of the timeliness of the subject denial(s); and (3) the claimant-defendant waived her objection to the EUO (NYSCEF Doc. 57).

Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept. 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

This Court is convinced that plaintiff has made out a prima facie case for summary judgment as against Exon, including by submitting affidavits of fact by individuals with personal knowledge detailing plaintiff's attempts to notify the claimant-defendant about the scheduled and rescheduled EUO and by submitting proof that the claimant-defendant failed to appear at least twice. Exon has submitted boilerplate arguments that plaintiff has failed to provide sufficient detail of these efforts at notifying the claimant-defendant and documenting the claimant-defendant's failure to appear. A common-sense view of plaintiff's statements demonstrates that they are more than sufficient. The judicial system of the State of New York could not survive if it had to conduct trials to determine who worked in plaintiff's mailroom on a given day and what route he or she took through the office to place the appropriate mailings in an outbox to the United States Postal Service. Nor can anyone expect plaintiffs to record the entrance doorway of the doctor's office on the days in question and to use facial recognition software to determine who entered the offices at the appointed times. Exon, for its part, apparently has failed to reach out to its own customer to determine whether or not the customer (the claimant-defendant) received the notices of the scheduled and rescheduled EUO and claims to have appeared for an EUO or has simply thumbed her nose at the notices or claims. Enough is enough.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion (Seq. No. 002) by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment against medical provider defendant Exon Medical Equipment, Inc. ("Exon") is granted; and, accordingly, all three counter-claims (all for attorney's fees) that Exon has asserted (NYSCEF Doc. 14) against plaintiff are hereby dismissed. The Clerk is hereby directed to enter judgment declaring that plaintiff owes no duty to Exon to pay No-Fault claim(s) (number 000336516-002) that Exon submitted to plaintiff under the subject insurance policy (number RT7118356 18) arising out of the alleged May 14, 2018 accident; (2) staying all No-Fault lawsuits and arbitrations arising from No-Fault claim(s) (number 000336516-002) that Exon submitted to plaintiff under the subject insurance policy (number RT7118356 18) arising out of the alleged May 14, 2018 accident; and (3) awarding costs and disbursements to plaintiff.

Plaintiff's claim that the events described herein have voided the subject insurance policy is hereby denied without prejudice. See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy,

PLLC, 82 AD3d 559 (1st Dept. 2011).

3/30/2021
DATE

ARTHUR F. ENGORON, J.S.C.

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