SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 656336/2019

MOTION SEQ. NO. 002

LIBERTY MUTUAL INSURANCE COMPANY and LM GENERAL INSURANCE COMPANY,

Plaintiffs,

- v -

JASON CARRANZA, DOS MANOS CHIROPRACTIC P.C., FIVE BOROUGH SUPPLY INC., et al.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49

were read on this motion for DEFAULT JUDGMENT.

Burke, Conway & Stiefeld, White Plains, NY (Asher Grossman of counsel), for plaintiffs.
The Gabriel Law Firm, Rockville Centre, NY (Joseph Padrucco of counsel), for defendants Dos Manos Chiropractic P.C. and Five Borough Supply Inc.

Gerald Lebovits, J.:

This is a no-fault insurance action for a declaration of no-coverage brought by plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company (collectively, Liberty Mutual) against no-fault benefits claimant Jason Carranza and various medical providers to whom Carranza assigned his right to collect no-fault benefits. On this motion, Liberty Mutual moves under CPLR 3215 for a default judgment against defendant Carranza and against defaulting medical-provider assignees of Carranza. Defaulting defendants Dos Manos Chiropractic P.C. and Five Borough Supply Inc. (collectively, defendants) cross-move under CPLR 3012 (d) to compel Liberty Mutual to accept their otherwise-untimely answer.

DISCUSSION

I. Liberty Mutual's Motion for Default Judgment

Liberty Mutual moves for a default judgment under CPLR 3215 against Carranza and the various defaulting medical-provider assignees of Carranza. The motion is denied.

Liberty Mutual has not shown proof of the facts necessary to constitute its claim, as the CPLR requires. (*See* CPLR 3215 [f].) In particular, Liberty Mutual has not established that it complied with the regulatory timeliness requirements for the processing of no-fault insurance

claims. (*See American Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015].) Liberty Mutual's motion papers do not include claimant's NF-2 application for benefits or any NF-3 verification forms or bills submitted by the claimant or his treating medical providers. Liberty Mutual thus cannot establish that it requested an examination under oath (EUO) or independent medical examination (IME) within 15 business days of receiving claimant's verification forms (*see* 11 NYCRR § 65-3.5 [b]); or that it scheduled the requested IME to be held within 30 calendar days from receipt of the verification forms (*see id.* § 65-3.5 [d]).

Liberty Mutual contends that it established its compliance with the applicable no-fault regulatory timeframes through the affidavit of Dawn Smith, its "Claims Department Team Manager[,] regarding the bill handling process and timely denials." (NYSCEF No. 49 at ¶ 30.) This court disagrees. The Smith affidavit states only that "[a]ll the requests that have been made a part of this motion have been timely requested by a member of my team, having been requested within the regulatory time frame after each of the bills was received by Liberty Mutual," and that "[a]ll verification requests and denials were timely mailed." (NYSCEF No. 40 at ¶¶ 5, 13.) The affidavit does not identify which bills prompted Liberty Mutual to seek further verification in the form of an EUO or IME, nor when Liberty Mutual received those particular bills.[1] And, as noted above, Liberty Mutual has not provided the bills themselves. The conclusory assertions contained in the Smith affidavit are not sufficient, standing alone, to provide proof of the timeliness element of plaintiffs' claim.

Liberty Mutual claims, alternatively, that it is "not required to state when Defendants' bills were received, as Plaintiffs are not requesting the EUO of the Defendants." (NYSCEF No. 49 at ¶; *see also id.* at ¶¶ 34-35.) Instead, Liberty Mutual says, it must show only that it timely requested EUOs relative to "receipt of the claim filed by the Individual Defendant since it is the Individual Defendant's EUO being sought." (*Id.* at ¶ 33.) Liberty Mutual asserts that having (supposedly) met *that* burden, it is entitled to default judgment. This position—for which Liberty Mutual provides no authority—is without merit.

The governing no-fault regulations do not necessarily measure timeliness of an EUO or IME request from receipt of an NF-2 benefits application submitted by the eligible injured person (as Liberty Mutual suggests). Rather, upon receipt of the NF-2, the insurer is directed to forward its prescribed verification forms "to the parties required to complete them." (11 NYCRR 65-3.5 [a].) That phrase on its face suggests that the insurer's request for verification can encompass individuals or entities other than the benefits applicant—a suggestion bolstered by § 65-3.5 [c], which provides that the "insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested." And it is receipt of those completed verification forms, *not* the NF-2 alone, that starts running the 15-business-

[1] The affidavit also does not state that Liberty Mutual had made its request that Carranza appear for an EUO or IME (or both) prior to receiving *any* bills. (*Cf. Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 469 [1st Dept 2016] [holding that "notification requirements for verification requests under 11 NYCRR 65–3.5 and 65–3.6 do not apply to EUOs that are scheduled prior to the insurance company's receipt of [an NF-3] claim form"].)

day deadline for request of an EUO or IME, and the 30-calendar-day deadline for conducting a requested IME. (*See id.* § 65-3.5 [b], [d].)

Relatedly, the regulatory provisions governing an insurer's request for additional verification upon review of the initial verification forms limit only the *timing* of that request. They do not say from *whom* the additional verification shall be sought; nor *which* verification forms, from which source, may prompt the insurer to seek further verification. (*See* 11 NYCRR 65-3.5 [b]-[d].) These provisions thus provide no basis for Liberty Mutual's apparent position, quoted above, that receipt of a medical-provider assignee's NF-3 verification form will starts the 15-day regulatory clock running for the insurer only if it wishes then to seek the EUO *of the provider*—as opposed to the injured-claimant assignor.

Indeed, on Liberty Mutual's interpretation, receipt of a medical provider's NF-3 form would presumably never start the 15-day and 30-day regulatory clocks running for seeking an *IME*, because an IME could only be requested from the benefits applicant, as opposed to one of his treating providers. Nothing in the regulations requires (or even supports) such an anomalous result. More broadly, it is often the receipt of substantial treatment bills for a seemingly minor accident that will first prompt an insurer to request an EUO or IME from the applicant, so as to investigate and assess the possibility of a staged accident or medically unnecessary treatment. And in that scenario, exempting the insurer from the regulations' tight 15-business-day and 30-calendar-day deadlines for requesting and scheduling EUOs and IMEs would undermine the regulatory goal of requiring the insurer to expeditiously investigate—and then expeditiously resolve—the claims for which it needs additional verification. (*See* 11 NYCRR 65-3.8 [a] [1], [c] [1] [requiring the insurer to pay or deny benefits claims within 30 calendar days from receipt of all requested verification].)

In any event, even if one were to regard receipt of the initial claim as the trigger for the insurer's regulatory deadlines, Liberty Mutual does not attempt to establish—either in its opening papers or on reply—when it "recei[ved] the claim filed by the Individual Defendant" in *this* case. (NYSCEF No. 49 at ¶ 33.) At best, Liberty Mutual falls back on the conclusory statements in the Smith affidavit. (*See id.* at ¶ 30.) That will not do.[2]

[2] Defendants also challenge Liberty Mutual's basis for requesting that Carranza appear for an EUO. The no-fault regulations require a "specific objective justification" for requiring an EUO. (*See* 11 NYCRR 65-3.5 [e].) But the only justification that Liberty Mutual has provided for requesting Carranza's EUO was that it was part of "an investigation . . . begun due to material misrepresentation-financial payments to policy." (NYSCEF No. 35 at ¶ 3; NYSCEF No. 40 at ¶ 2.) This court is skeptical that this vague and cryptic statement meets Liberty Mutual's burden under § 65-3.5 [e]. That said, the parties have not addressed whether an insurer seeking a no-coverage declaration based on an EUO no-show must affirmatively establish as an element of its claim the justification for the EUO request, such that an insurer's failure to do so would warrant denial of a default-judgment motion. This court therefore declines on this motion to reach the merits of defendants' challenge to Liberty Mutual's justification for its EUO request.

II. Defendants' Cross-Motion to Compel Liberty Mutual to Accept Their Late Answer

Defendants cross-move under CPLR 3012 (d) to compel Liberty Mutual to accept their answer, which was served and filed approximately one month late. The cross-motion is granted.

In considering whether to grant a CPLR 3012 (d) motion or cross-motion, the court should take into account "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense." (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472-473 [1st Dept 2017].) Here, the delay was only a matter of weeks. Plaintiff has not attempted to identify any prejudice from that delay. The excuse offered by defendants—essentially law-office failure stemming from a combination of an excessive caseload, service via the Secretary of State, and an ongoing firm reorganization and office move—although "not overwhelming," is sufficient, particularly given the brief length of the delay. (*Cirillo v Macy's Inc*, 61 AD3d 538, 540 [1st Dept 2009].) And for the reasons set forth in Point I, *supra*, this court concludes that defendants have established a potentially meritorious defense. Given the State's "policy of resolving disputes on the merits," defendants should be "granted an opportunity to defend plaintiffs' claims" rather than having them be resolved on default. (*Naber Elec. v Triton Structural Concrete, Inc.*, 160 AD3d 507, 598 [1st Dept 2018].)

Accordingly, it is hereby

ORDERED that Liberty Mutual's motion under CPLR 3215 for a default judgment is denied; and it is further

ORDERED that the motion of defendants Dos Manos Chiropractic P.C. and Five Borough Supply Inc. under CPLR 3012 to compel Liberty Mutual to accept their late answer is granted; and it is further

ORDERED that Liberty Mutual has 30 days from service of a copy of this order with notice of its entry to bring a renewed default-judgment motion or the action will be dismissed as to the remaining defaulting defendants; and it is further

ORDERED that Dos Manos Chiropractic and Five Borough Supply shall serve notice of entry on all parties.

4/7/2021
DATE

HON. GERALD LEBOVITS
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