SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

- v -

CENTER FOR REHABILITATION, SPORTS MEDICINE, AND PAIN MANAGEMENT, CITI MEDICAL, PLLC, AXIS P.T., P.C., BIG APPLE MED EQUIPMENT INC., BRUCE L. FELDMAN M.D., PLLC, BSS METROPOLITAN MEDICAL, P.C., COMPLETE NEUROPSYCHOLOGY, P.C., DOS MANOS CHIROPRACTIC, P.C., JOSEPH A. RAIA, M.D., P.C., LIVING WATER ACUPUNCTURE, P.C., MONTEFIORE MEDICAL CENTER, REFUA RX, INC., THOMASINA STRIANO, D.C., 5 BOROUGH ANESTHESIA, PLLC, JAMAICA SUPPLIES CORP., ANI KALFAYAN, M.D., QUALITY ORTHOPEDICS AND COMPLETE JOINT CARE, P.C., PATSY BAILEY, and ALWAYNE PALMER

Defendants.

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INDEX NO. 154226/2020

MOTION DATE 06/15/2021

MOTION SEQ. NO. 001

DECISION, ORDER, AND JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

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

In this declaratory judgment action, the plaintiff insurer, State Farm Mutual Automobile Insurance Company (State Farm), moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants Patsy Bailey and Alwayne Palmer (together the claimant defendants), as well as the defendants Citi Medical, PLLC, Axis P.T., P.C., Bruce L. Feldman, M.D., PLLC, BSS Metropolitan Medical P.C., Complete Neuropsychology, P.C., Dos Manos Chiropractic, P.C., Joseph A. Raia, M.D., P.C., Montefiore Medical Center, Refua Rx, Inc., 5 Borough Anesthesia, PLLC, Jamaica Supplies Corp., and Quality Orthopedics and Complete Joint Care, P.C. (collectively the nonanswering medical defendants). Specifically, State Farm seeks a judgment declaring that it is not obligated to pay no-fault benefits to or on behalf of the

claimant defendants in connection with injuries that they allegedly sustained in a motor vehicle accident, or to reimburse the nonanswering medical defendants for treatment they rendered or equipment and supplies they provided to the claimant defendants for those injuries. No opposition is submitted. The motion is granted.

The claimant defendants asserted that they were injured in a motor vehicle accident on August 19, 2019, and that they thereafter obtained medical treatment or medical supplies from the nonanswering medical defendants, among others. The nonanswering medical defendants sought payment, as assignees of the claimant defendants, for no-fault benefits under insurance policy number 2289-339-32, issued by State Farm to Bailey, as the owner of the subject vehicle, under claim number 32-B133-0Q4 (*see* Insurance Law 5106[a]; 11 NYCRR 65-1.1). Palmer submitted his NF-2 no-fault claim form to State Farm on August 22, 2019, and State Farm marked it received as of August 28, 2019.

On September 4, 2019, or seven days after its receipt of Palmer's NF-2 form, State Farm transmitted a demand to Bailey, in her capacity as the insured, that she appear for an examination under oath (EUO) on September 24, 2019 to give testimony relevant to the claim. After making a record of her failure to appear on that date, State Farm, transmitted a follow-up letter to Bailey, dated October 3, 2019, informing her that she had failed to appear on September 24, 2019, and that it would permit her to cure that default if she appeared for an EUO on October 17, 2019. She did not appear on that date either, and State Farm made a record of her default in appearing.

On September 9, 2019, or the first business day following the lapse of 10 days subsequent to its receipt of the NF-2 form, State Farm transmitted a demand to Palmer's attorneys that he appear for an EUO on September 24, 2019. By letter dated October 2, 2019, State Farm agreed to adjourn Palmer's EUO until October 16, 2019. By letter dated October 16, 2019, State Farm agreed to further adjourn Palmer's EUO until October 28, 2019. Palmer appeared for his EUO on that date. On November 4, 2019, State Farm transmitted copies of

the Palmer's EUO transcript to his attorneys, and requested that Palmer sign a copy of the transcript under oath and return it to State Farm. State Farm's attorney noted therein that applicable no-fault regulations provided that "[u]pon request by the Company, the eligible injured person or that person's assignee or representative shall: . . . as may reasonably be required submit to examinations under oath by any person named by the Company *and subscribe the same* (emphasis added), and cautioned Palmer's attorney that "[s]hould you fail to return this subscribed transcript, our client reserves the right to rescind all coverage." Specifically, State Farm's attorney explained that, pursuant to an amendment to 11 NYCRR 65-3.8(b),

> "an insurer or self-insurer may issue a denial if, more than 120 calendar days after the initial request for verification, the applicant has not submitted all such verification under the applicants control or possession or written proof providing reasonable justification for the failure to comply. If a signed transcript is not returned within 120 days of this request, our client reserves the right to deny coverage for failure to provide an executed transcript within the allotted time period."

On January 6, 2020, State Farm's attorney transmitted a follow-up letter to Palmer's attorneys, reminding them that Palmer had yet to return an executed transcript of his EUO, and again cautioning them that his failure to do so with 120 days of November 4, 2019, or by March 2, 2020, could result in a denial of coverage. According to the State Farm's attorney, Palmer did not return the executed EUO transcript by that date.

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the facts constituting the claim, and proof of the defendant's default (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp*., 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc*. 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]). The affidavits of service filed by the plaintiff establish that the nonanswering medical defendants were served with process, as a process server's affidavit of service is prima facie

evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]). The affirmation of State Farm's attorney established that the nonanswering medical defendants failed to answer the complaint, timely move with respect to the complaint, or appear in the action.

With respect to the proof of the facts constituting the claim,

> "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts"

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered" (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (*see id*.; *Silberstein v Presbyterian Hosp*., 95 AD2d 773 [2d Dept 1983]).

"Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Green v Dolphy Constr. Co*., 187 AD2d 635, 636 [2d Dept 1992]; *see Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must "state a viable cause of action" (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating whether the plaintiff has fulfilled this obligation, the defendant, as the defaulting party, is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (*see Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]).

Proof that the plaintiff has submitted "enough facts to enable [the] court to determine that a viable" cause of action exists (*Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *see Gray v Doyle*, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability (*see* CPLR 105[u]; *Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc*., 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; *see also Michael v Atlas Restoration Corp*., 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc*., 20 AD3d 521, 522 [2d Dept 2005]; *see generally Mitrani Plasterers Co., Inc. v SCG Contr. Corp*., 97 AD3d 552, 553 [2d Dept 2012]).

"[A]n insurer must affirmatively establish that it complied with claim procedures in order to obtain a judgment declaring that no coverage exists based on the failure of a claimant to appear for a medical examination" or an EUO (*American Tr. Ins. Co. v Garcia*, 2016 NY Slip Op 31602[U], *5, 2016 NY Misc LEXIS 3072, *8 [Sup Ct, N.Y. County, Aug. 11, 2016]; *see American Tr. Ins. Co. v Camille,* 2019 NY Slip Op 33560[U], 2019 NY Misc LEXIS 6429 [Sup Ct, N.Y. County Dec. 3, 2019]; *Unitrin Advantage Ins. Co. v Better Health Care Chiropractic, P.C.,* 2016 NY Slip Op 30837[U], *4, 2016 NY Misc LEXIS 1698, *5 [Sup Ct, N.Y. County, May 4, 2016]); *Mapfre Ins. Co. of N.Y. v Aubry*, 2016 NY Slip Op 31017[U], *4-5, 2016 NY Misc LEXIS 2030, *4-5 [Sup Ct, N.Y. County, Mar. 30, 2016, Singh, J.]).

The Appellate Division, First Department, has explained that, for a no-fault insurer to establish its prima facie entitlement to judgment as a matter of law in a declaratory judgment action on the ground that a defendant failed to appear for an EUO, it must show that it mailed its initial request for verification to the claimant or his or her health care providers within 10 days of receipt of the NF-2 benefits claim form submitted by the claimant (*see* 11 NYCRR 65-3.5[a]), and mailed an additional request for verification within 15 days of receipt of the patient's response to the initial request for verification (*see* 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v*

Significant Care, PT, P.C., 157 AD3d 600 [1st Dept 2018] *see also* 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing follow up notice within 10 days of defendant's nonappearance]). The demand for an IME or EUO constitutes a request for an additional verification (*see* 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient's or provider's response to the initial verification request, unless the insurer demonstrates that the IME or EUO was sought prior to the filing of claims by any medical provider (*see PV Holding Corp. v Hank Ross Med., P.C.,* 188 AD3d 429, 429 [1st Dept 2020]; *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.,* 147 AD3d 437 [1st Dept 2017]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med. Supply Corp*., 131 AD3d 851, 851 [1st Dept 2015]; *American Tr. Ins. Co. v Vance*, 131 A.D.3d 849, 850 [1st Dept 2015]; *American Tr. Ins. Co. v Jaga Med. Servs. P.C*., 128 AD3d 441, 441 [1st Dept 2015]).

State Farm established that it timely demanded Bailey to appear for an EUO, that she failed to appear on the date noticed for the EUO, that it timely gave her an opportunity to cure her default in appearing, but that she failed to do so. Although Palmer timely appeared for and submitted to an EUO, he did not timely provide proof of verification subsequent to his EUO. The court notes that the 120-day deadline for a claimant's submission of proof of verification, as set forth in 11 NYCRR 65-3.8(b)(3), and cited by State Farm in its November 4, 2019 and January 6, 2002 letters to Palmer's attorneys, expressly provides that "[t]his subdivision shall not apply to a[n] . . . examination under oath request." The court construes this provision to exclude only the EUO request itself from the 120-day deadline, and not to any documentary proof of verification thereafter requested, such as a signed verification of the transcript. Hence, Palmer failed to comply with the requirement that he submit the signed transcript within 120 days of receiving State Farm's request that he do so. In any event, where, as here, the insured herself fails to appear for an EUO, coverage may be vitiated with respect to all of the claimants who made

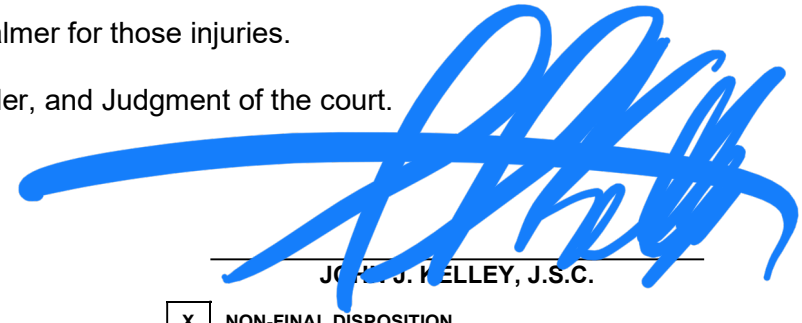
claims for benefits (*see Nationwide Affinity Ins. Co. of Am. v George*, 183 AD3d 755, 756 [2d Dept 2020]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d at 468).

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants Citi Medical, PLLC, Axis P.T., P.C., Bruce L. Feldman, M.D., PLLC, BSS Metropolitan Medical P.C., Complete Neuropsychology, P.C., Dos Manos Chiropractic, P.C., Joseph A. Raia, M.D., P.C., Montefiore Medical Center, Refua Rx, Inc., 5 Borough Anesthesia, PLLC, Jamaica Supplies Corp., Quality Orthopedics and Complete Joint Care, P.C., Patsy Bailey, and Alwayne Palmer for declaratory relief is granted, without opposition; and it is,

ADJUDGED that it is declared that the plaintiff, State Farm Mutual Automobile Insurance Company, is not obligated to pay no-fault benefits to or on behalf of the defendants Patsy Bailey and Alwayne Palmer in connection with injuries that they allegedly sustained in an August 19, 2019 motor vehicle accident, or to reimburse the defendants Citi Medical, PLLC, Axis P.T., P.C., Bruce L. Feldman, M.D., PLLC, BSS Metropolitan Medical P.C., Complete Neuropsychology, P.C., Dos Manos Chiropractic, P.C., Joseph A. Raia, M.D., P.C., Montefiore Medical Center, Refua Rx, Inc., 5 Borough Anesthesia, PLLC, Jamaica Supplies Corp., and Quality Orthopedics and Complete Joint Care, P.C., for treatment they rendered or equipment and supplies they provided to Patsy Bailey and Alwayne Palmer for those injuries.

This constitutes the Decision, Order, and Judgment of the court.



10/25/2021
DATE

JOHN J. KELLEY, J.S.C.

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