SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

SHELDON JACOB, DYNAMIC MEDICAL IMAGING P.C., METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, SMART CHOICE MEDICAL P.C., MICHAEL GEORGE ALLEYNE, M.D., P.C., BROWNSVILLE CHIROPRACTIC P.C., AHA ACUPUNCTURE P.C., HARMONIZED ACUPUNCTURE P.C., ENS MEDICAL, P.C., KATAEVA ACCESS PT P.C., MASPETH RX INC., UNION DME, BEST HANDS-ON PHYSICAL THERAPY, P.C., BIG APPLE MED EQUIPMENT INC, and SMS THERAPY SUPPLY, INC.,

Defendants.

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INDEX NO. 656812/2019

MOTION DATE 08/03/2020, 03/30/2021

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 103, 104, 105

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

Upon the foregoing documents, it is hereby ordered that plaintiff's motions for summary judgment are hereby consolidated for decision and granted, based on the following memorandum decision.

Background

In this declaratory judgment action, plaintiff Country-Wide Insurance Company ("plaintiff") seeks a declaratory judgment that it owes no duty of coverage under its motor vehicle insurance policy for injuries resulting from an accident involving defendant Sheldon Jacob, an eligible injured person, on the grounds that Jacob violated a term of the policy by

repeatedly failing to appear for an Examination Under Oath ("EUO") as provided for in the no-fault insurance regulations. The remaining defendants are medical service providers who rendered services to Jacob following the accident and have now sought reimbursement from plaintiff. Plaintiff sought and obtained a default judgment against the majority of the defendants for their failure to appear and answer the complaint (NYSCEF Doc. No. 85).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants Big Apple Med. Equipment Inc. ("Big Apple Med"), Union DME ("Union"), and Brownsville Chiropractic, P.C. (Mot Seq. No. 001). After the motion was fully submitted, plaintiff and Brownsville Chiropractic, P.C., entered into a stipulation of discontinuance (NYSCEF Doc. No. 106), and the motion against Brownsville Chiropractic is dismissed as moot. Neither Big Apple Med nor Union submitted opposition to the motion. Additionally, plaintiff separately moves for summary judgment against defendant Metro Pain Specialists Professional Corporation ("Metro") (Mot. Seq. No. 003), which opposes the motion.

On February 26, 2019, Jacob submitted to plaintiff an Application for Motor Vehicle No Fault Benefits, in which he stated on February 2, 2019 he had been a passenger in a car owned by nonparty Fernando de los Santos when it was involved in an accident, in which he suffered "Multiple Body Injuries" (NYSCEF Doc. No. 28). Thereafter, plaintiff received various bills from the medical provider defendants for services allegedly rendered to Jacob arising out of the accident (NYSCEF Doc. Nos. 80, ¶ 9; 83).

As part of its investigation into Jacob's claims, plaintiff requested that Jacob appear for an EUO pursuant to the no-fault regulations (11 NYCRR 65-1.1, 65-3.5[e]; NYSCEF Doc. No. 29). The EUO notice was mailed to Jacob at his address and was scheduled for May 8, 2019 at 11:00 AM (NYSCEF Doc. No. 76). Jacob was warned that his failure to appear could result in

denial of his claim (*id.*). Jacob failed to appear for the EUO (NYSCEF Doc. No. 77), and on May 13, 2019 plaintiff sent him a second notice at his address for an EUO to be held on June 5, 2019 at 11:00 AM (NYSCEF Doc. No. 78). Jacob was again warned that his failure to appear could result in plaintiff denying his claim (*id.*). Nevertheless, Jacob again failed to appear (NYSCEF Doc. No. 79). As a result, plaintiff denied Jacob's claim for his failure to appear for either EUO (NYSCEF Doc. No. 82).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

The no-fault regulations provide that, in order to receive no fault benefits, a claimant must "execute a written proof of claim under oath," and, inter alia, "as may be reasonably required submit to examinations under oath by any person named by the Company and subscribe the same" (11 NYCRR 65-1.1, Proof of Claim, § a). If a claimant fails to appear for a duly noticed EUO, it is a breach of the insurance contract, and neither the claimant nor any assignees of such claims may recover no-fault benefits (*Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014]). Here, plaintiff submits the EUO notices sent to Jacob at the address he listed on his

application for no-fault benefits (NYSCEF Doc. Nos. 75, 76, 78), the statements on the record establishing that Jacob failed to appear on both occasions (NYSCEF Doc. Nos. 77, 79), the denial of claim form attesting to a general denial due to Jacob's failure to appear (NYSCEF Doc. No. 82), and the affidavits of Jessica Mena-Sibarian, plaintiff's No-Fault Litigation/Arbitration Supervisor (NYSCEF Doc. No. 80), and Annie Persaud, plaintiff's EUO Clerk (NYSCEF Doc. No. 81), establishing plaintiff's practices for the mailing of EUO notices and the scheduling of EUOs, and the facts supporting plaintiff's processing and denial of defendants' claims. Accordingly, plaintiff has established a prima facie case that Jacob failed to appear for duly noticed and scheduled EUOs, and that as a result plaintiff was permitted to, and did in fact deny defendants' claims for reimbursement.

Metro, the only defendant presently opposing either motion, fails to raise a triable issue of fact in opposition. Many of its objections concern alleged technical defects to plaintiff's moving papers, some of which are belied by the papers themselves and appear to be no more than form objections that have been carried over from other motion briefings. For example, Metro alleges that plaintiff's supporting affidavits are not sufficiently notarized, yet the affidavits manifestly bear the stamp of a notary public indicating the affidavits were sworn to before them (NYSCEF Doc. No. 80 at 8; NYSCEF Doc. No. 81 at 6). The Court gives such arguments little, if any credence. Moreover, in light of the detailed assertions set forth in the affidavits regarding plaintiff's mailing and scheduling practices, the Court also finds that Metro has not raised an issue of fact regarding whether the EUO notices were appropriately mailed and whether Jacob failed to appear. Moreover, the failure to appear at an EUO "constitutes a breach of a condition precedent to coverage under a no-fault policy and voids coverage regardless of the timeliness of

the denial of coverage" (*Allstate Ins. Co. v Pierre*, 123 AD3d at 618). Accordingly, Metro's arguments regarding the timeliness of the denial of claims are unavailing.

Finally, Metro argues that the record does not establish that the EUP notices were timely mailed to Jacob in the first instance. "[A]n EUO need not be scheduled within 30 days of defendant-insurer's receipt of the claim" (*Dover Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 28 Misc 3d 140[A], 2010 N.Y. Slip Op. 51605[U] [1st Dept, App Term 2010]). While an insurer may not unduly delay requesting an EUO, an EUO request complies with the regulations where it is made within a reasonable amount of time (*Eagle Surgical Supply, Inc. v Progressive Cas. Ins. Co.*, 21 Misc 3d 49, 51 [2d Dept, App Term 2008] ["The date selected for the initial EUO, June 27, 2005, was not unreasonable"]). Here, plaintiff scheduled the EUOs while it was still receiving claims from the medical provider defendants, and accordingly the time selected was reasonable. Metro's argument that without the precise date of Metro's bills included in the record it is impossible to judge the reasonableness of the time frame for requesting the EUOs is unavailing. It is settled law that "a party appearing in opposition to a motion for summary judgment must lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact" (*Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Metro, which certainly has access to and knowledge of its own claims to plaintiff, failed to submit any evidentiary proof in opposition to the motion, relying solely on the affirmation of its counsel (NYSCEF Doc. No. 87). An affirmation of counsel without personal knowledge of the facts is insufficient to raise a triable issue of material fact (*e.g. Van Guilder v Sands Hecht Const. Corp.*, 199 AD2d 164, 164 [1st Dept 1993]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against Brownsville Chiropractic, P.C. is denied as moot; and it is further

ORDERED that plaintiff's motions for summary judgment against Big Apple, Union, and Metro are granted; and it is further

ADJUDGED and DECLARED that plaintiff owes no duty to Big Apple, Union, or Metro to pay No-Fault Claims with respect to the February 2, 2019 accident referenced in the complaint; and it is further

ADJUDGED and DECLARED that all No-Fault lawsuits and arbitrations arising from No-Fault claims submitted to Plaintiff by Big Apple, Union, and Metro in connection with the February 2, 2019 accident referenced in the complaint are permanently stayed.

This constitutes the Decision and Order of the Court.

Louis L. Nock

5/13/2022
DATE

LOUIS L. NOCK, 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**