SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

INDEX NO. 158662-2020

MOT. DATE

- v -

MOT. SEQ. NO. 004

Allied Care PT, P.C. et al.

The following papers were read on this motion to/for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

In this action, plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") seeks a declaration that it has does not have an obligation to pay no-fault benefits in connection with a motor vehicle accident. The accident occurred on November 22, 2019, at the intersection of Avenue M and East 88th Street in Brooklyn, New York. Plaintiff now moves pursuant to CPLR § 3215 for a default judgment against defendants Joseph A. Raia, M.D., P.C. and Yasik 2, Inc. (the "motion defendants"). Plaintiff has demonstrated proof of service of the motion on the motion defendants via regular mail. Despite such service, there is no opposition to the motion from the motion defendants or any of the defendants who have already appeared in this action. Therefore, the motion is considered on default.

Plaintiff has provided proof that the summons and complaint were served on both Joseph A. Raia, M.D., P.C. and Yasik 2, Inc. via personal service on Ms. Nancy Dougherty, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306. Neither of the motion defendants have answered the complaint and their time to do so has not been extended by the court. Therefore, plaintiff has established that these defendants have defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Dated: 3/8/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☒ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

The motion is supported by the sworn affidavit of Lisa Chaparos, plaintiff's employee/claim specialist, who states based upon personal knowledge the following. Prior to November 22, 2019, State Farm issued a personal automobile policy to T&S Industries ("T&S") which covered any occupants of the insured vehicle for any medically necessary or causally related medical expense arising out of the use or operation of the insured vehicle as a result of an accidental collision. The insured vehicle was involved in a collision on November 22, 2019, and afterwards, the claimants submitted multiple bills for medical treatment that they alleged was provided to them because of the accident.

However, State Farm believes that the accident was fraudulent because: 1) the policy originated on October 31, 2019, was cancelled on December 14, 2019, for nonpayment, and then was reinstated on January 9, 2020; 2) T&S' corporate and business address is 8910 Ditmas Ave., Brooklyn, NY 11236, however the policy address is listed as 9511 Schenck St., Brooklyn, NY 11236. Additionally, after the loss, the policy address was changed to 5249 Kings Highway, Brooklyn, NY 11234, which is the business address of Zaid Auto Body, the body shop that repaired the damages to the insured vehicle; 3) The listed owners of T&S, nonparties Adrian Simpson ("Simpson") and Stephan Figaro ("Figaro"), claimed that it was a "real estate transportation company". However, the business located at 8910 Ditmas Ave., Brooklyn, NY 11236 is a car wash called "Early B Car Detailing"; 4) Neither Simpson nor Figaro were occupants of the insured vehicle at the time of the collision. In statements to State Farm, Simpson stated that he did not know the driver of the vehicle, Wright, and that he believed that the loss was being hidden from him. In a separate statement, Figaro told State Farm that Wright was a freelance worker for T&S and had permission to use the vehicle at the time of the loss; 5) T&S procured five policies with State Farm for five new model vehicles within a short time frame; 6) the adverse vehicle in the collision is also insured by State Farm. The driver of the adverse vehicle, Gerbier, provided a sworn affidavit that he was intentionally struck by the insured vehicle while stopped at a stop sign; 7) there were no injuries listed on the police report, yet claimants have filed medical bills totaling over $55,000; 8) on January 3, 2020, in a recorded statement from Wright, he stated that he was not injured in the collision and did not know any of the other passengers to be injured either, but then State Farm received multiple bills associated with Wright's treatments; 9) Claimants Wright and Alcindor have extensive claim histories including another claim currently being investigated by plaintiff; 10) Wright's address listed on the police report is 1364 Rittenhouse St., Philadelphia, Pennsylvania 19138-1917. This address has 54 claims related to it and Wright personally has 8 claims dating back to 2008 associated with the address. Some of the claims have been investigated by the National Insurance Crime Bureau.

Due to States Farm's doubts about the legitimacy of the underlying claims, it demanded an Examination Under Oath ("EUO"s) from Simpson and Figaro on behalf of the insured as well as from the claimants, Wright, Alcindor, Jackman and Gardner, to confirm the legitimacy of the loss. Wright and Figaro both failed to appear for their EUOs on two occasions. Simpson, Alcindor, Jackman, and Gardner appeared for their EUOs, but their testimony led State Farm to conclude that the loss was an intentional act. Alcindor's testimony was not credible because she testified: 1) that she met a random man on the street in Brooklyn on the day of the loss who invited her out that night. The man picked her up in the insured vehicle. There were two other women in the vehicle who she did not know, and she never learned any information about either one of the other women. After the collision, she was dropped off, deleted the man's number and never talked to anyone from the collision again; 2) that the plan was for the occupants of the vehicle to go to dinner at the Arch Diner which was 1.7 miles from where she claimed to have been picked up. State Farm points out that the collision occurred on a block that is not on the way between where she was allegedly picked up and Arch Diner.

State Farm believed that Jackman's testimony was not credible and contradicted Alcindor's testimony because: 1) she believed that Gardner's first name was "Lacinda" instead of her actual name, "Lassania" despite claiming to be friends with her; 2) she claimed that the collision took place between two blocks and that the adverse vehicle was coming out of a driveway, contradicting the driver of the adverse vehicle, Alcindor and the police report; 3) she testified that the fourth occupant of the vehicle, who would be Alcindor, was Wright's sister and that they lived together, directly contradicting Alcindor's testimony; 4) She stated that the four occupants of the car were at Wright's house and Wright was

giving Jackman and Gardner a ride home when the collision occurred; 5) She claimed that Gardner and Wright's sister (Alcindor) are close friends, and that Wright's sister was going to stay at Gardner's house on the night of the loss.

Finally, State Farm found that Gardner's testimony was not credible because she claimed: 1) that there were only three people in the car including herself at the time of the collision; 2) that other than the driver, the other person in the car was named "Vonna" and that Vonna told her the vehicle was a rental; 3) that Gardner was on her way home from work when Vonna called her to get some food, and picked her up in the car 20 minutes later; 4) that despite receiving said call, she does not know Vonna's real name, address or phone number; 5) that she fell asleep and therefore did not see how the loss occurred; 6) that she knew very little details about her treatment.

Plaintiff has provided to the court a copy of the police report generated in connection with the underlying collision. The police report states that airbags in neither of the vehicles deployed as a result of the incident and that no one claimed to have any injuries at the scene of the accident.

Finally, the motion is supported by the sworn affidavit of Fedrice Gerbier, the driver of the adverse vehicle involved in the underlying accident. Gerbier states based upon personal knowledge the following. Gerbier was driving a friend home on November 22, 2019. He was driving down East 88th Street in Brooklyn, New York and approached the intersection of Avenue M. He stopped at the stop sign at the intersection of East 88th Street and Avenue M. The traffic traveling perpendicular to Gerbier did not have a stop sign, so he inched up in order to better view any oncoming cars. Two cars passed by him without incident, and the third, the vehicle insured by plaintiff, made contact with the front of his vehicle at the license plate. He states that there was very minor damage to both vehicles. Gerbier states that after the contact, both vehicles pulled to the right side of the road and that two minutes later, an additional vehicle pulled up, took a bag out of the trunk of the insured vehicle, and then left. He states that the police were called and that the police permitted him to take a picture of the insured vehicle for insurance purposes. Gerbier states that this picture shows minor paint scrapes to the front passenger side of the insured vehicle, on the bottom of the bumper. He states that it was clear at the scene of the accident that no one was hurt.

Plaintiff argues that given this evidence, as well as the claimants contradicting and incredible stories, the claimants could not have sustained the serious bodily injuries which were allegedly treated according to the numerous medical provider claims.

In its complaint, plaintiff asserts five causes of action. The first, second and fourth causes of action are based on a theory of fraud. Plaintiff states that the claimant's alleged injuries were not caused by the November 22, 2019, collision, the treatment submitted by the medical provider defendants was not for injuries proximately caused by the collision and the collision was not an insured event. The third cause of action asserts a violation of a condition precedent to coverage. Specifically, plaintiff claims that Wright failed to appear for an Examination Under Oath on two separate occasions which violates a condition precedent to coverage and thus relieves plaintiff of its obligations to pay any of Wright's claims. The fifth cause of action is for injunctive relief and seeks a permanent stay of arbitrations, lawsuits or claims pending determination of this action.

The general standard for a fraud defense to a no-fault claim is an assertion by the insurer that the defense is based on the founded belief that the alleged injury did not arise out of an insured incident, but rather, that it was a deliberate event staged in an effort to defraud the insurer (*Central General Hospital v. Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]). The evidence of this fraud cannot be based on suspicion; the insurer must come forward with admissible proof to establish the foundation for its belief that the incident was staged (*Inwood Hill Med. V. Allstate Ins. Co.*, 787 NYS2d 678 [Civ Ct NY County 2004]). An affidavit of someone who has personal knowledge of the alleged fraud investigation and police reports of the incident may be used to establish a founded belief of fraud. (*See Mount Sinai Hospital v. Triboro Coach Inc.*, 263 AD2d 11 [2d Dept 1999]).

Based on the foregoing, plaintiff has established a *prima facie* case based on a theory of fraud and is entitled to the declarations it seeks against the motion defendants. Accordingly, the motion is granted as to the first, second, fourth and fifth causes of action. In light of this result, plaintiff's third cause of action based on violation of condition precedent is denied as moot, since the relief is duplicative, and this claim is severed and dismissed as against the motion defendants.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for a default judgment against defendants Joseph A. Raia, M.D., P.C. and Yasik 2, Inc. is granted as to the first, second, fourth and fifth causes of action; and it is further

ORDERED and DECLARED that plaintiff has no duty to pay any no-fault, bodily injury/liability coverage, or uninsured motorists benefits, in the form of sums, monies, damage, awards, or benefits to Joseph A. Raia, M.D., P.C. and Yasik 2, Inc., their agents, employees, assignees, or heirs arising out of any current or future proceeding, including without limitation, arbitrations and lawsuits seeking to recover no-fault, bodily injury/liability coverage, or uninsured motorists benefits for the November 22, 2019 collision referenced in the complaint (claim no. 32-03X6-77D); and it is further

ORDERED that the motion is denied as to the third cause of action and this claim as against defendants Joseph A. Raia, M.D., P.C. and Yasik 2, Inc. is severed and dismissed; and it is further

ORDERED that the remainder of the action as against the remaining defendants shall continue; and it is further

ORDERED that Note of Issue is adjourned to 4/28/23. The parties are directed to meet and confer before then and submit a stipulation with deadlines for all outstanding discovery and extending note of issue further if necessary.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/8/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.