

**State Farm Mut. Auto. Ins. Co. v Abdul Massih
Family Health Nurse Practitioner, P.C.**

2023 NY Slip Op 31833(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 155174/2022

Judge: Lynn R. Kotler

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**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. 155174-2022

- v -

MOT. DATE

Abdul Massih Family Health Nurse Practitioner, P.C., et. al.

MOT. SEQ. NO. 001

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-insurer seeks a declaration that it does not have an obligation to pay no-fault benefits in connection with a motor vehicle accident. The alleged accident occurred on October 31, 2021. There are no further details about the accident because no police report or MV-104 were filed. Now, plaintiff moves pursuant to CPLR § 3215 granting it leave to enter a default judgment against defendants Basis Medical, P.C., BDS Diagnostic Corp., Chi Chinese Acupuncture, P.C., Emuna, Inc., Five Star RX, Inc., Gibbons Medical, P.C., Hudson Regional Hospital, Meadowlands Cardiology, P.C., Meadows RX, Inc., New York Physical Therapy Touch, PLLC, Northeast Medical Devices, LLC, NY Union Pharmacy, Inc., One RX Chemist, Inc., Pranevicius Medical, P.C., Pristine RX, Corp., Quality Anesthesia Services, Sedation Vacation Perioperative Medicine, PLLC, Sherrie Rawlins Medical, P.C., Spinal Pain & Rehab Medical, P.C., Star of N.Y. Chiropractic Diagnostic, P.C., Vua Pharmacy, Inc., Walmed Equipment, LLC, Wilkins Williams Medical, P.C., Pamela Jordan, Paul Powell and Jaquet M. Simpson. Plaintiff also moves pursuant to CPLR § 306-b granting it an extension of time to serve the complaint upon defendants Eric Kenworthy, M.D., Harvey Levitan, M.D., and Michael Zwirblich, PSYD. Finally, plaintiff moves pursuant to CPLR § 3025(b) granting it leave to amend the complaint to add defendant Scob, LLC.

The court first turns to the branch of the motion seeking an extension of time to serve the complaint upon defendants Eric Kenworthy, M.D., Harvey Levitan, M.D., and Michael Zwirblich, PSYD. In order to be granted an extension of time to serve a complaint, a party must demonstrate that there was good cause for the failure to serve and that granting such an extension is in the interest of justice (*Henneberry v. Borstein*, 91 AD3d 493 [1st Dept. 2012]). Good cause requires a threshold showing that the plaintiff was diligent in attempting to effect service (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]). Whether the extension is in the interest of justice is a discretionary consideration which includes consideration of: 1. Expiration of the statute of limitation; 2. Meritorious nature of the cause of action; 3. Length of delay in service; 4. Promptness of the request for the extension of time; and 5. Prejudice to the opposing party (*Id.*). Generally, "[a]n appearance by a defendant in an action is

Dated: 5/31/23



 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

deemed to be the equivalent of personal service of a summons upon him, and therefore confers personal jurisdiction over him..." (*Nat'l Loan Investors, L.P. v. Piscitello*, 21 AD3d 537 [2d Dept 2005] quoting *Skyline Agency v. Coppotello, Inc.*, 117 AD2d 135 [1986]).

Both Eric Kenworthy, M.D. and Michael Zwirblich, PSYD filed an answer through their counsel on March 14, 2023. The answer was accepted by plaintiff. Therefore, Eric Kenworthy, M.D. and Michael Zwirblich, PSYD have made an appearance in the case and the issue of service upon them is moot. However, the branch of the motion seeking an extension in time to serve the complaint continues as to defendant Harvey Levitan, M.D. State Farm has submitted an affidavit of nonservice demonstrating that service was attempted on Harvey Levitan, M.D. at his place of work, 1122 Coney Island Avenue Suite 207, Brooklyn, New York, but that the receptionist at the Medical Center located at that address informed the process server that she did not know of Harvey Levitan, M.D., and that he did not work there. Therefore, State Farm has demonstrated that it was diligent in attempting to effect service and there is good cause for an extension of time to serve the complaint. Additionally, the new defendant would not be prejudiced since discovery is in its early stages as demonstrated by the fact that a Preliminary Conference order has not yet been drafted in this case. Accordingly, the branch of the motion seeking an extension of time to serve is denied as moot with regard to Eric Kenworthy, M.D. and Michael Zwirblich, PSYD, and is granted as to Harvey Levitan, M.D.

The court now turns to the branch of the motion seeking a default judgment. In a stipulation dated March 27, 2023, the movant withdrew the motion as against defendants Basis Medical, P.C., Emuna, Inc., Five Star RX, Inc., and Pristine RX Corp. Prior to the filing of the motion, defendants BDS Diagnostic Corp., Gibbons Medical, P.C., Hudson Regional Hospital, Meadowlands Cardiology, P.C., Northeast Medical Devices, LLC, Pranevicius Medical, P.C., Spinal Pain & Rehab Medical, P.C., Star of N.Y. Chiropractic Diagnostic, P.C., and Walmed Equipment, LLC all obtained counsel and filed answers to the complaint. In letter dated January 17, 2023, and January 18, 2023, the plaintiff rejected these answers as untimely. However, the affidavit of service demonstrates that the motion was not served upon defendants BDS Diagnostic Corp., Gibbons Medical, P.C., Hudson Regional Hospital, Meadowlands Cardiology, P.C., Northeast Medical Devices, LLC, Pranevicius Medical, P.C., Spinal Pain & Rehab Medical, P.C., Star of N.Y. Chiropractic Diagnostic, P.C., and Walmed Equipment, LLC. Therefore, the motion must be denied as to these defendants. Additionally, plaintiff has failed to demonstrate that the summons and complaint were served upon Paul Powell. Therefore, the motion must be denied as to this defendant as well.

After the filing of the motion, defendants Vua Pharmacy, Inc., and One RX Chemist also obtained counsel and filed an answer to the complaint. However, plaintiff has filed a letter rejecting the answer as untimely and continuing the default motion as against these two defendants. Vua Pharmacy and One RX Corp. have not filed opposition and have not otherwise explained the reason for the lateness of their answer, so the default motion continues as to both of these defendants (see *Corvera v. Prime Source Dev., LLC*, 172 AD3d 1161 [2d Dept 2019]). The motion continues as against, Chi Chinese Acupuncture, P.C., Meadows RX, Inc., New York Physical Therapy Touch, PLLC, NY Union Pharmacy, Inc., One RX Chemist, Inc., Quality Anesthesia Services, Sedation Vacation Perioperative Medicine, PLLC, Sherrie Rawlins Medical, P.C., Vua Pharmacy, Inc., Wilkins Williams Medical, P.C., Pamela Jordan, and Jaquet M. Simpson (collectively the "defaulting defendants").

The motion has been submitted without opposition from any of the defaulting defendants. Plaintiff has provided proof that the summons and complaint were served on each of these defendants. The summons and complaint were served upon defendants Chi Chinese Acupuncture, P.C., Meadows RX, Inc., New York Physical Therapy Touch, PLLC, NY Union Pharmacy, Inc., One RX Chemist, Inc., Sedation Vacation Perioperative Medicine, PLLC, Sherrie Rawlins Medical, P.C., Vua Pharmacy, Inc., and Wilkins Williams Medical, P.C. via personal service to Tammy Alexander, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306 and LLC Law §303. The summons and complaint were served upon defendant Quality Anesthesia Services via personal service to "Indya Hurley," at 133 North Kinderkamack Road, Montvalle, New Jersey 07645. Indya Hurley works at the front desk and represented that she was authorized to accept service on behalf of

Quality Anesthesia Services (CPLR 311[a][1]). The summons and complaint were served upon defendant Pamela Jordan via personal service to a Jane Doe, a person of suitable age and discretion, at Ms. Jordan's last known residence, 1778 Fulton Street, Apt. 2B, Brooklyn, New York 11233, and by mailing a copy of the same to the same address pursuant to CPLR § 308(2). The summons and complaint were served upon defendant Jaquet M. Simpson by delivering a true copy of each to her at 29 Gaylord Street, Binghamton, New York 13904 pursuant to CPLR § 308(1). Despite such service, none of the defaulting defendants have answered the complaint nor has their time to do so been extended by the court. Therefore, they 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]).

The motion is supported by the sworn affidavit of Carolyn Upshaw-Ellis, a Claim Specialist for State Farm. Upshaw-Ellis states based upon personal knowledge the following. Upshaw-Ellis handles claims that arise from automobile policies. The claims at issue in this case arise from an alleged accident that occurred on October 31, 2021. Allegedly, Pamela Jordan ("Jordan"), Paul Powell ("Powell") and Jaquet M. Simpson ("Simpson"; collectively the "Claimants") were occupying a 2014 Kia (the "vehicle") when the vehicle was involved in an accident. The vehicle was insured by State Farm in Simpson's name. Due to the accident, the Claimants suffered alleged injuries that required medical attention. The Claimants filed these medical claims with State Farm. State Farm questioned the legitimacy of the claims and began a preliminary investigation. The preliminary investigation demonstrated that: 1) State Farm contacted Simpson who stated that she does not own the vehicle, has never owned a Kia, and does not have an insurance policy with State Farm. She stated that she owns a Dodge Charger that it is insured with GEICO; 2) Simpson stated that she was not involved in any collision on October 31, 2021 and that she does not know Jordan or Powell; 3) The policy originated on October 25, 2021, six days prior to the loss; 4) the policy address is 29 Gaylord Street, Binghamton, New York 13904. Simpson informed State Farm that she is not familiar with, nor has she ever been to the policy address; 5) the loss was a hit-and-run collision which occurred on 4021 12th Avenue, Brooklyn, New York; 6) there was no police report or MV-104 generated for the alleged loss.

Based upon its preliminary investigation, State Farm sought EUOs of the Claimants and of the insured, and began a more in depth investigation of the loss. Despite due demand, Jordan and Powell failed to appear for their EUOs on two separate occasions, which violated a condition precedent to coverage for all of their claims. Further investigation of the loss demonstrated that the policy was fraudulently procured using a stolen identity and that Simpson is actively working with the NYPD in a case for identity theft. Based on these factors, Upshaw-Ellis believes that there is a strong possibility that the injuries of the Claimants did not arise from an insured incident and that all subsequent medical treatment were not causally related to the alleged accident that occurred on October 31, 2021.

In its complaint, plaintiff asserts five causes of action. The first and third causes of action are based on a theory of founded belief, wherein the plaintiff states that it has a founded belief that the alleged injuries did not arise from the insured accident. The second cause of action is based on a theory of condition precedent wherein the plaintiff declares that despite due demand, Powell and Jordan both failed to appear for their scheduled EUOs which was a condition precedent to coverage for all claims submitted. The fourth cause of action is based on a theory of fraud wherein plaintiff claims that the policy was procured under a stolen identity and that the alleged driver at the time of the accident was not Simpson, and therefore that Simpson, and State Farm, bear no liability in connection with the loss. The fifth cause

of action is based on a theory of irreparable harm wherein plaintiff asserts that it will suffer irreparable harm if a permanent stay of all arbitrations, lawsuits and/or claims by the defendants is not issued.

An insurer may assert a lack of coverage defense based on the fact or founded belief that a claimant's alleged injury did not arise out of a covered accident (*Cent. Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]). To establish its entitlement to a default judgment based on a founded belief, a no-fault insurer need not "establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence" (See *V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 25 Misc 3d 39 [App Term. 2d Dept 2009]). "Rather, the no-fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief" (*State Farm Fire & Cas. Co. v All County, LLC*, 2019 NY Slip Op 33306[U] [Sup Ct. New York Cty 2019] and "[c]ircumstantial evidence is sufficient if a defendant's conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence" (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864 [2d Dept 2005]).

Here, Upshaw-Ellis has stated, based on personal knowledge, that she and the plaintiff believe that there is no causal relationship between the claims asserted by the Claimants and the alleged October 31, 2021 collision. Plaintiff has pointed to circumstantial evidence that makes up its founded belief that the injuries are not causally related to the collision. Such circumstantial evidence includes the fact that the policy was fraudulently procured using a stolen identity, that the policy was secured only six days before the accident and that there were no police report or MV-104 generated for the alleged loss. Based on the foregoing, plaintiff has established a *prima facie* case based on a theory of no causal relation. The second, fourth and fifth causes of action based on theories of condition precedent, fraud, and irreparable harm are therefore moot.

Finally, the court turns to the branch of the motion that seeks leave to amend the complaint pursuant to CPLR § 3025(b) to add Scob, LLC as a defendant. Plaintiff states that Scob LLC recently submitted a bill for medical services provided to the Claimants. The motion has been submitted without opposition. Since plaintiff has established a meritorious cause of action and there being no opposition to the relief sought, this branch of the motion is granted.

In accordance herewith, it is hereby

ORDERED that the branch of plaintiff's motion that seeks an extension of time to serve the complaint is denied as moot with regard to defendants Eric Kenworthy, M.D., and Michael Zwirblich, PSYD; and it is further

ORDERED that the branch of plaintiff's motion that seeks an extension of time to serve the complaint is granted as to defendant Harvey Levitan, M.D. Plaintiff shall serve the summons and complaint upon Harvey Levitan, M.D. within 90 days of entry of this order; and it is further

ORDERED that the branch of plaintiff's motion that seeks a default judgment is denied with regard to defendants BDS Diagnostic Corp., Gibbons Medical, P.C., Hudson Regional Hospital, Meadowlands Cardiology, P.C., Northeast Medical Devices, LLC, Pranevicius Medical, P.C., Spinal Pain & Rehab Medical, P.C., Star of N.Y. Chiropractic Diagnostic, P.C., and Walmed Equipment, LLC; and it is further

ORDERED that the branch of plaintiff's motion that seeks a default judgment is denied with regard to defendant Paul Powell. Plaintiff's failure to renew within 90 days will be deemed an unreasonable failure to prosecute and the court will *sua sponte* dismiss this action as to defendant Paul Powell pursuant to CPLR § 3216; and it is further

ORDERED that the branch of plaintiff's motion that seeks a default judgment against defendants Chi Chinese Acupuncture, P.C., Meadows RX, Inc., New York Physical Therapy Touch, PLLC, NY Union Pharmacy, Inc., One RX Chemist, Inc., Quality Anesthesia Services, Sedation Vacation

Perioperative Medicine, PLLC, Sherrie Rawlins Medical, P.C., Vua Pharmacy, Inc., Wilkins Williams Medical, P.C., Pamela Jordan, and Jaquet M. Simpson is granted on default; 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 Chi Chinese Acupuncture, P.C., Meadows RX, Inc., New York Physical Therapy Touch, PLLC, NY Union Pharmacy, Inc., One RX Chemist, Inc., Quality Anesthesia Services, Sedation Vacation Perioperative Medicine, PLLC, Sherrie Rawlins Medical, P.C., Vua Pharmacy, Inc., Wilkins Williams Medical, P.C., Pamela Jordan, and Jaquet M. Simpson, 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 October 31, 2021 collision referenced in the complaint; and it is further

ORDERED that the branch of plaintiff's motion that seeks leave to amend the pleadings pursuant to CPLR § 3025 (b), is granted; and it is further

ORDERED that plaintiff will serve the summons and complaint on the new party, Scob, LLC within 20 days from the date of entry of this decision and order; and it is further

ORDERED that the Clerk is directed to amend the caption so that it now reads:

X-----X
State Farm Mutual Automobile Insurance Company,
Plaintiff,

-against-

Abdul-Massih Family Health Nurse Practitioner, P.C., Basis Medical, P.C., BDS Diagnostic Corp., Chi Chinese Acupuncture, P.C., Emote Medical Services, P.C., Emuna, Inc., Eric Kenworthy, M.D., Five Star RX, Inc., Gibbons Medical, P.C., Grace Medical Health Provider, P.C., Harvey Levitan, M.D., Hudson Regional Hospital, KBJ Medical Practice, P.C., Meadowlands Cardiology, P.C., Meadows RX, Inc., Michael Zwirblia, PSYD., New York Physical Therapy Touch, PLLC, Northeast Medical Devices, LLC, NY Union Pharmacy, Inc., One RX Chemist, Inc., Pranevicius Medical, P.C., Pristine RX, Corp., Quality Anesthesia Services, Rockaways ASC Development, LLC, Sedation Vacation Perioperative Medicine, PLLC, Scob, LLC, Sherrie Rawlins Medical, P.C., Spinal Pain & Rehab Medical, P.C., Star of N.Y. Chiropractic Diagnostic, P.C., VUA Pharmacy, Inc., Walmed Equipment, LLC, Wilkins Williams Medical, P.C., Pamela Jordan, Paul Powell, and Jaquet M. Simpson
Defendants.

X-----X

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional party and/or corrected caption within 30 days from the date of entry of this decision and order; and it is further

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: 5/31/23
New York, New York

So Ordered:

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