NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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THE GENERAL INSURANCE, PERMANENT GENERAL ASSURANCE CORPORATION, PERMANENT GENERAL ASSURANCE CORPORATION OF OHIO, THE GENERAL AUTOMOBILE INSURANCE COMPANY, INC.,

Index No. **22825/2020E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

AYANNA PIQUION, ET AL.,

Defendants.

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The following papers numbered 1 to 1, read on this Motion noticed on 10/17/2024, and duly submitted as no. 12 on the Motion Calendar of 10/17/2024.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers- Order of Reference		
Memorandum of Law		

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:
11/21/24

Hon. **FIDEL E. GOMEZ, JSC**

1.CHECK ONE	☐ CASE DISPOSED	X NON-FINAL DISPOSITION
2. MOTION/CROSS-MOTION IS	☐ GRANTED (MOTION)	X DENIED (MOTION)
	☐ GRANTED IN PART	☐ OTHER
3. CHECK IF APPROPRIATE.	☐ SETTLE ORDER	☐ FIDUCIARYAPPOINTMENT
	☐ SUBMIT ORDER	☐ REFEREE APPOINTMENT
	☐ DO NOT POST	☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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THE GENERAL INSURANCE, PERMANENT GENERAL ASSURANCE CORPORATION, PERMANENT GENERAL ASSURANCE CORPORATION OF OHIO, THE GENERAL AUTOMOBILE INSURANCE COMPANY, INC.,

Plaintiffs,

DECISION AND ORDER
INDEX NO. 22825/2020E

- against -

AYANNA PIQUION, BARBARA ALTIME, CAMILLE DEROSE, CHEYENNE VAZQUEZ, CLYFFORD MAURICE, DAVID BROWN, ERIQUE BERTRAND, FARAH FELIX, FLIGHTDENICA PERARD, GREGORY REMEDOR, JOHN FRANCOIS, JUNIOR BEAUZILE, KINET DATILIEN, LORENZO DERBERRY, LOVENS FONTILUS, MARIE SYLVERT, MIKE PIERRE-PAUL, NASIA GASPARD, QUENCY NOEL, RAHEEM GILLESPIE, RASHEKA BRYAN, RUYSS ST FLEURANT, SACHA DESRAVINES, SADE LONG, SANDY CABA DURAN, SEAN CARY FRANCIS, STEEVE GUILLAUME, TYREIK WILLIAMSON,

(collectively the “Policy Defendants”)

- and -

ANASIA DESTINY SMITH, BETINA LAFORTUNE, BILLY SMITH, CHEYENNE VAZQUEZ, CLAUDY BELLANGER, DANA WHITE, DARRYN RIDDICK, DEJANE VERA, DONALD DEBROSSE, DUANE BOUCHER, EL DORVILE, ELIRUS WALTHUST, EMIYA TOLEDO, EVENSON SOUVERAIN, FARAH FELIX, FRANCESCA SYLVERT, FRANCKLIN ETIENNE, GUY JEAN-MICHEL, JAMES ANDERSON, JAMES CLARKE, JAMES COLEMAN, JAMES ELIASSAINT, JAMES JOSEPH, JAYDEN JULIEN, JEAN DREGEN, JEAN SAMSON ZAMOR, JOSEPH BARKLEY, JOSEPH ROBERT, JOSEPH WILLIAMS, JUNIOR GREEN, KERVENS LEANDRE, KERVIN RAMEAU, LAURA CELESTIN, LAWAN REESE, LEMAITRE VIDEAU, LEONARDO BEAUVAIS, LEONIE TRENCH, MARCELINE JULES, MARCO OREILLUS, MARIE

ALTIME, MARIE JEAN, MARK CHERY, MAYERLY MEJIAS, MEGAN MATTIS, MIESHAWN MOORE, MIKERSON ELIASSAINT, MILTON MARSHALL, MOSES FALL, NADEGE CANDIO, O'NIEL PERRISSAINT, ORELIEN HUGGINS, PETER JACKSON, PIERRIE METIVIER, PRESUME VILLER, RANDY HONORA, RAYMOND COLETTI, REGINALD IRIZARRY, REGGIE ROB, RODNEY-PIERRE PAUL, ROODY VIDO, RUSLEE SMARTT, SERGE CASTOR, SHAKEIM PETERS, SHALA UDDIN, SHARON CARTER-ROSS, SHAWN WILLIAMS, RICKY DORVIL, SHAYLIA WALTON, SHAZI MARAV, STEVE JOHNSON, TAIHEEN SHULER, TAREK BECKLES,

(collectively the "Staged Loss Defendants")

- and -

5 BOROUGH ANESTHESIA, PLLC, ACCESS CARE PT, P.C., ACTION CHIROPRACTIC, P.C., ACUCARE4U ACUPUNCTURE PLLC,AHMED ABDELAAL PT, DPT, ALL CITY FAMILY HEALTHCARE, ALTAI CORP. DBA GET READY MEDICAL SUPPLY, ANDREW J DOWD MD, ARD RX INC, ARISTA PHYSICAL THERAPY PC, ARON ROVNER MD, PLLC, ATLAS PHARMACY LLC, ATLAS RADIOLOGY, P.C., AVERROES PHYSICAL THERAPY PC, AXIAL CHIROPRACTIC, PC, BIG APPLE MED EQUIPMENT INC, BILLY H. FORD, MD PC, BROOKLYN MCDONALD MEDICAL CARE, PLLC, BURKE PHYSICAL THERAPY PC, CAVALLARO MEDICAL SUPPLY, CHI LEE ACUPUNCTURE PC, CHIROPRACTIC PAIN SOLUTIONS, P.C., CITY WIDE HEALTH FACILITY, INC, CLASS POINT ACUPUNCTURE, PLLC, CMA PSYCHOLOGY, P.C, COMPREHENSIVE PSYCHOLOGICAL PC, CONTEMPORARY DIAGNOSTIC IMAGING, CONTEMPORARY OTHOPEDICS, CORRECTALIGN CHIROPRACTIC PC, CUSTOM RX PHARMACY, DANIMARK PHYSICAL THERAPY PC, DELPHI CHIROPRACTIC PC, DIANA BEYNIN, DC, DNA PHARMACY INC, DOS MANOS CHIROPRACTIC PC, DR. OFFENBACHER MEDICAL IMAGING, PLLC, DR. S. MATRANGOLO, DC, DR. WATSON CHIROPRACTIC, PC, EAST 19 MEDICAL SUPPLY CORP., ENGLEWOOD ORTHOPEDICS GROUP PC, EZ ORTHO SUPPLY INC.,

FAIRPOINT ACUPUNCTURE PC, FLORID LEISURE ACUPUNCTURE P.C., FRANK ZHAN BEST PHYSICAL THERAPY, P.C., GC ACUPUNCTURE PC, GESHER PSYCHOLOGICAL SERVICES, P.C., GOOD LIFE ACUPUNCTURE, P.C., GOOD SPACE ACUPUNCTURE P.C, HAZAQ PSYCHOLOGICAL SERVICES, P.C., HEALTH AND COMFORT RX, INC, HEALTH EAST MED ALLIANCE, HMP ORTHOPAEDICS, HUDSON REGIONAL HOSPITAL, IGOR MAYZENBERG, LAC, JOHN LYONS MD, JOINT PHYSICAL THERAPY P C, JOSEPH A RAIA MD PC, JSJ ANESTHESIA PAIN MANAGEMENT PLLC, JULES F PARISIEN, KH LEE ACUPUNCTURE P C, KINGS COUNTY HOSPITAL, LINWOOD WEST MEDICAL, P.C., LONGEVITY MEDICAL SUPPLY, INC., LPM PHARMACY INC LR MEDICAL PLLC, M&D ELITE PHARMACY LLC, MACCABI PHARMACY RX INC, MALVINA DRUG CORP, LPM PHARMACY INC, MATTHEW HARLAN HOOVIS, MC PHYSICAL THERAPY, PC, MEDICAL PLAZA, METRO PAIN SPECIALISTS, PC, METROPOLITAN MEDICAL AND SURGICAL, P.C., MICHELE B. GLISPY, LAC., MIDWOOD METROPOLITAN MEDICAL, P.C., MILL NECK CHIROPRACTIC, MIN PHYSICAL THERAPY P.C., MOLNAR MEDICAL SERVICES PC, MOTION MEDICAL DIAGNOSTICS, PC, MULTISPECIALTY HEALTH GROUP, NEW CAPITAL 1 INC., NEW MILLENNIUM MEDICAL IMAGING, P.C., NEW YORK CORE CHIROPRACTIC PC, NEW YORK INJURY CHIROPRACTIC REHAB PC, NEW YORK THERA PT PC, NEXRAY MEDICAL IMAGING PC, NOVA MEDICAL DIAGNOSTIC, P.C., NY BEST SUPPLY, INC, NYC CARE CHIROPRACTIC P C., NYC CARE PT, PC, NYWWQASC, LLC, OP ACUPUNCTURE, P.C., PERFORMANCE CHIRO, P.C., PONCE ACUPUNCTURE, P.C., PROTECHMED INC., QIXIA ACUPUNCTURE PC, RAF SPORTS CHIROPRACTIC PC, RAINE M PESIDAS PHYSICAL THERAPY PC, RANDALL ACUPUNCTURE P.C., REHAB TIME PT PC REHABILITATION MEDICAL CENTER, RENAN MACIAS MD, ROMEO MARIMAT PHYSICAL THERAPY, ROXBURY ANESTHESIA, LLC RUN HONG LI, SABAS NY SERVICES INC, SAFE ANESTHESIA AND PAIN, LLC, SCOB, LLC, SEAN L. THOMPSON, SEDATION VACATION, PERIOP MED PLLC, SHAMAYIM CHIROPRACTIC, P.C., SHASHEK

CHIROPRACTIC PC, SKY RADIOLOGY, SOLID ROK PHYSICAL THERAPY, P.C, SONIA ARMENGOL, MD, SORREL ACUPUNCTURE P.C., ST. KYROLLOS PHYSICAL THERAPY, P.C., STRAND PHARMACY D/B/A ASTORIA DRUGS, INC., STRUCTURAL SYNERGY PHYSICAL THERAPY, PC, SURGERY CENTER OF ORADELL, SURGICORE OF JERSEY CITY, LLC, TAI QI WELLNESS ACUPUNCTURE PC, TANUJ PALVIA, TIME TO CARE MEDICAL, P.C., TIME TO CARE PHARMACY INC, TOPLAB UNICAST INC, UNION DME, UNIVERSITY HOSPITAL OF BROOKLYN, WELLNESS DIAGNOSTIC IMAGING, PC, YELLOWSTONE MEDICAL REHAB P.C.,

(collectively the "Provider Defendants")

Defendants.
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In the instant declaratory judgment action, plaintiffs move for an order, pursuant to CPLR § 3212, granting summary judgment against defendants EAST 19 MEDICAL SUPPLY CORP., GESHER PSYCHOLOGICAL SERVICES, P.C., MIDWOOD METROPOLITAN MEDICAL, P.C., SHAMAYIM CHIROPRACTIC, P.C., STRUCTURAL SYNERGY PHYSICAL THERAPY, P.C., HAZAQ PSYCHOLOGICAL SERVICES P.C., ARON D. ROVNER, MD PLLC, MIN PHYSICAL THERAPY, P.C., RANDALL ACUPUNCTURE, P.C., ROMEO MARIMAT, P.T., SOLID ROK PHYSICAL THERAPY, P.,., SONIA ARMENGOL, M.D., CITIWIDE HEALTH FACILITY, INC., GOOD LIFE ACUPUNCTURE, HEALTH AND COMFORT RX, INC., JULES F PARISIEN, NEW YORK CORE CHIROPRACTIC P.C., METRO PAIN SPECIALISTS, PC, 5 BOROUGH ANESTHESIA, PLLC, BIG APPLE MED EQUIPMENT, INC., CHI LEE ACUPUNCTURE PC, DELPHI CHIROPRACTIC PC, GC ACUPUNCTURE PC, M&D ELITE PHARMACY LLC, OP ACUPUNCTURE, P.C., QIZIA ACUPUNCTURE PC, SHASHEK CHIROPRACTIC PC, SORREL ACUPUNCTURE P.C., TIME TO CARE PHARMACY INC, ALL CITY FAMILY HEALTHCARE, PLLC, AVERROES PHYSICAL THERAPY, P.C., BURKE PHYSICAL THERAPY, P.C., CAVALLARO MEDICAL SUPPLY, JSJ ANESTHESIA PAIN MANAGEMENT, PLLC,

LONGEVITY MEDICAL SUPPLY INC., LR MEDICAL, PLLC, METRO PAIN SPECIALISTS, P.C., NOVA MEDICAL DIAGNOSTIC, P.C., CMA PSYCHOLOGY, P.C., DANIMARK PHYSICAL THERAPY PC, FAIRPOINT ACUPUNCTURE PC, NYEEQASC, LLC, GOOD SPACE ACUPUNCTURE, ALTAI CORP. DBA GET READY MEDICAL SUPPLY, PROTECHMED, INC., and SURGICORE OF JERSEY CITY, LLC. (collectively, the Answering Defendants).

For the reasons set forth hereinafter, plaintiffs' motion is denied.

Background

The instant action is for declaratory judgment. The verified complaint alleges the following: Plaintiffs, insurance companies, issued insurance policies, which included no-fault coverage, In New York, the no-fault laws are designed to ensure that those involved and injured in a motor vehicle accident have an efficient mechanism to pay for and receive medically necessary healthcare and medical services. Each policy issued by plaintiffs, while providing coverage for accidents, precluded coverage for deliberate and staged collisions caused in furtherance of insurance fraud schemes. Additionally, the policies did not provide coverage to any person who knowingly concealed and/or misrepresented any material fact related to insurance coverage at the time the policies were procured. Plaintiffs issued 28 insurance policies to 28 defendants in this action. Each policy provided liability coverage for bodily injury and property damage claims brought against those covered thereunder, no-fault benefits for those eligible thereunder, and UM/UIM coverage. On a host of different dates, as a result of different accidents occurring at different locations and involving different defendants, defendants were treated by Provider Defendants, who then made claims for payment to plaintiffs under New York's no-fault laws. Plaintiffs allege that all of the accidents giving rise to the claims by Provider Defendants were staged and did not involve a report or injury at the scene. Plaintiffs also allege that each of the insurance policies issued to defendants was procured through fraud and/or material misrepresentation. Based on the foregoing, plaintiffs interpose two causes of action for declaratory judgment. The first seeks a declaration that because the accidents giving

rise to the claims by Provider Defendants were staged and/or never occurred at all, defendants are not entitled to no-fault benefits and thus plaintiffs are not obligated to pay Provider Defendants for medical services provided by them. The second cause of action seeks identical relief on grounds that each of the policies issued by plaintiffs was procured through fraud.

By Decision and Order dated December 1, 2021, the Court (McShan, J.) granted plaintiffs' motion for a default judgment against those defendants that failed to interpose an answer (the Defaulting Defendants) and found that plaintiffs have no obligation to pay any of the claims submitted by the Defaulting Defendants.

Summary Judgment

Plaintiffs' motion for an order, pursuant to CPLR § 3212, granting summary judgment against the Answering Defendants and issuing a judgment declaring that the pertinent accidents were staged, not genuine, and plaintiffs, therefore, have no obligation to pay any first-party benefits on the subject policies to the Answering Defendants, is denied.

Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds*; *Ortiz v City of New York,* 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie,* 212 AD2d 1027, 1028 [4th Dept 1995]), or when the opponent fails to object to the admission of such evidence (*Bank of New York Mellon v Gordon,* 171 AD3d 197, 202 [2d

Dept 2019] ["However, as a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion."]; *see Greene v Kevin D. Greene, LLC,* 188 AD3d 1012, 1013 [2d Dept 2020]; *Rosenblatt v St. George Health and Racquetball Assoc., LLC,* f119 AD3d 45, 55 [2d Dept 2014] ["Thus, the Supreme Court erred when it, sua sponte, determined that the plaintiff's deposition transcript was inadmissible because of the lace of a certification and, as a result, concluded that Eastern Athletic had failed to meet its prima facie burden."]). The latter is premised on the well settled principal that a court ought not raise arguments never raised by the parties themselves (*Misicki v Caradonna,* 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made."]).

Once a movant meets its initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial on any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.,* 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, s/he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(s*ee also Yaziciyan v Blancato,* 267 AD2d 152, 152 (1st Dept 1999]; *Perez v Bronx Park Associates,* 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.,* 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]), When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson,* 8 NY2d 8, 12 [1960]).

Discussion

In support of the motion, plaintiffs contend that they are entitled to summary judgment because (1) they had a founded belief that the injuries claimed by the Policy Defendants and the Staged Loss Defendants did not arise out of an insured incident and (2) the doctrine of Law of the Case dictates that the Answering Defendants be bound by the Court's prior decision granting a default judgment against the Defaulting Defendants.

In support of their contentions, plaintiffs submit the affidavit of Rebecca Franklin (Franklin), a Policy Integrity Investigator/Analyst employed by plaintiff The General Insurance (General), wherein she states, *inter alia,* as follows: She has first-hand knowledge of procedures by which claims are investigated, policies are written, and how documents are created, obtained, and mailed from the offices of General. She is fully familiar with the facts and circumstances of this matter based upon her review of the handling of the investigation of all relevant, reported motor vehicle accidents and her review of the documents contained in each of the relevant no-fault and underwriting files, which are maintained in the ordinary course of General's business. Franklin briefly discusses each of the 28 insurance claims at issue and states, generally, that (1) each of the policies under which claims were made were procured through fraud and/or material misrepresentations; (2) had the policyholder disclosed their actual address and driving records, the policy in question would never have been issued; and (3) knowledge by General of the facts misrepresented by the policyholder would have led to a refusal by General to make the contract. Franklin states that each of the policies contains certain conditions to coverage including that there is no coverage for any person or any claims under the policy for any person who has concealed or misrepresented any fact or circumstance, engaged in fraudulent conduct, or directed others to do same. Franklin concludes that, based on the factual allegations in her affidavit and General's investigation, General has a founded belief that the subject alleged collisions were intentional, staged losses and a part of a staged accident scheme orchestrated for the purpose of illegally obtaining No-Fault benefits. Therefore, according to Franklin, plaintiffs are not obligated to pay any claims that arise from the subject policies.

Notably, Franklin does not aver that she has personal knowledge of the factual circumstances surrounding the alleged staged accidents, but rather, she relies exclusively on General's business records. However, as the Answering Defendants note, neither Franklin nor plaintiffs submitted any business records. Indeed, the record is bereft of any documentary evidence in support of plaintiffs' allegations, including the policies themselves. Significantly, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (*U.S. Bank N.A. v Zakarin,* 208 AD3d 1275, 1277 [2d Dept 2022] citing *Bank of N.Y.*

Mellon v Gordon, 171 AD3d 197, 205 [2d Dept 2019]["Accordingly, evidence of the contents of business records is admissible only where the records themselves are introduced. Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay."][internal citations and quotations marks omitted]). Accordingly, Franklin's affidavit is insufficient to establish plaintiffs' *prima facie* entitlement to judgment as a matter of law.

Nor may plaintiffs rely on the law of the case doctrine to establish *prima facie* that they have no obligation to pay any of the claims submitted by the Answering Defendants. The law of the case doctrine generally bars the re-litigation of a prior pre-judgment judicial determination made within the same action (*People v Evans,* 94 NY2d 499, 502 [2000]; *Brownrigg v New York City Housing Authority,* 29 AD3d 721, 722 [2d Dept 2006]). Judges of coordinate jurisdiction are thus prohibited from entertaining or deciding previously decided matters (*id.* at 503-504; *Gee Tai Chong Realty Corp. v GA Insurance Company of New York,* 283 AD2d 295, 296 [1st Dept 2001]). Significantly,

> [once] a point is decided within a case, the doctrine of law of the case makes it binding not only on the parties, but on all other judges of coordinate jurisdiction. While the adoption of the Individual Assignment System has greatly attenuated reliance upon the doctrine, where an application on an issue is directed to different justices, the finality to be ascribed to the prior ruling becomes a paramount consideration

(*Gee Tai Chong Realty Corp.* at 296 [internal quotation marks omitted]). In certain instances, however, the doctrine is not absolute and its applicability is circumscribed. Accordingly, the doctrine is only applicable when parties seek to re-litigate issues that were previously resolved on the merits (*Gee Tai Chong Realty Corp.* at 296), and where the parties were previously afforded a full and fair opportunity to litigate the issues being raised (*Evans* at 502; *Gee Tai Chong Realty Corp.* at 296). Moreover, a previously decided issue can be re-litigated if there exist extraordinary circumstances or there is a change in law applicable to the issues previously decided (*Brownrigg* at 722; *Foley v Roche,* 86 AD2d 887, 887 [2d Dept 1982]).

Significantly, however, an issue is not actually litigated if there has been a default (*Kaufman v Eli Lilly and Co.,*65 NY2d 449, 456-457 [1985] ;*GSB Gold Standard corporation*

AG v Google LLC, 227 AD3d 613, 614 [1st Dept 2024];*In re Abady,* 22 AD3d 71, 83 [1st Dept 2005]; *Chambers v City of New York,* 309 AD2d 81, 85-86 [2d Dept 2003]). Thus, it is well settled that a judgment obtained against a defaulting defendant has no estoppel effect against the nondefaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues on their merits (*Chambers* at 85-86; *Woodson v Mendon Leasing Corp.,* 259 AD2d 304, 304-305 [1st Dept 1999]; *Holt v Holt,* 262 AD2d 530, 530-531 [2d Dept 1999]).

In accordance with the foregoing authority, the Court's prior determination that plaintiffs have no obligation to pay any of the claims submitted by the Defaulting Defendants does not preclude the Answering Defendants, who have not had an opportunity to litigate the issues herein on their merits, from litigating whether they are entitled to reimbursement of any alleged benefits provided to the Defaulting Defendants.

For the foregoing reasons, plaintiffs fail to meet their *prima facie* burden to entitlement to judgment as a matter of law. As such, the burden to raise a triable issue of fact has not shifted to the Answering Defendants. Thus, the Court need not consider the opposition papers submitted by the Answering Defendants (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]; ["Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers."]; *Winegrad v New York Univ. Med. Center,* 64 NY2d 851, 853 [1985] ["Failure to make such [prima facie] showing requires denial of the motion, regardless of the sufficiency of the opposing papers."]).

Accordingly, it is hereby

ORDERED that all parties appear for a settlement conference on December 9, 2024 at 10:00 a.m. It is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
November 21, 2024

Hon. **FIDEL E. GOMEZ, J.S.C.**