At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on October 24, 2017.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY COMPANY, VITORIA FIRE & CASUALTY COMPANY, VICTORIA AUTOMOBILE INSURANCE COMPANY and any and all of their subsidiaries, affiliates and/or parent companies,

Plaintiffs,

v.

JAMAICA WELLNESS MEDICAL, P.C.,

Defendant.

DECISION AND ORDER ON MOTION

Index No.: 2017EF200
RJI No.: 33-17-0730

APPEARANCES: BRIAN E. KAUFMAN, ESQ., OF BRUNO, GERBINO & SORIANO, LLP
For Plaintiffs

DAVID LANDFAIR, ESQ., OF KIPELEVICH & FELDSHEROVA, P.C.
For Defendant

Defendant Jamaica Wellness Medical, P.C. moves pursuant to CPLR section 2221(d) to reargue this Court's Decision and Order dated June 7, 2017 which granted plaintiffs' motion for a declaratory judgment that plaintiffs are not obligated to provide coverage reimbursements or pay any monies to defendant for any no-fault related services submitted by defendant to the plaintiffs,

that defendant lacked standing to receive no-fault reimbursements and that defendant breached a condition precedent to coverage by failing to appear for an Examination Under Oath (EUO). The statute provides, *inter alia*, that the motion "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion..." *CPLR § 2221(d)(2)*. Motions for reargument are addressed to the sound discretion of the court. *See, Delcrete Corp v. Kling*, 67 AD2d 1099 (4th Dept. 1979). The purpose of such a motion is not to serve as an opportunity for the unsuccessful party to once again argue the questions previously decided. *See, Mangine v. Keller*, 182 AD2d 476 (1st Dept. 1992). Defendant argues that this Court misapprehended or overlooked facts and/or law on the issues of (1) whether plaintiffs satisfied their obligations to issue and mail a timely denial of the relevant claims based on the non-appearance for EUO's, thus preserving their right to litigate that defense to payment; (2) whether the EUO's were timely scheduled; and (3) whether plaintiffs submitted admissible evidence that they possessed a reasonable basis for requesting an EUO of the defendant.

Defendant is incorrect on the first issue concerning whether plaintiffs timely denied the claims based on the defendant's nonappearance for EUO's. As this Court noted in its Decision and Order, where a party fails to comply with a condition precedent to coverage said failure vitiates the contract as a matter of law. *See, Interboro Ins. Co. v. Tahir*, 129 AD3d 1687 (4th Dept. 2015). Therefore, whether plaintiffs established that they timely denied the claims is irrelevant because the subject policy was vitiated as a matter of law. This Court has previously found that defendant's failure to appear for the EUO was a violation of the applicable regulation (*see, 11 NYCRR 65-1.1*) and that "[w]here there is a failure to comply with a condition precedent to coverage, an insurer has

the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued. *See, Unitrin Advantage Insurance Co. v. Bay Shore Physical Therapy,* 82 AD3d 559 (1st Dept. 2011)." *Decision and Order, dated June 7, 2017.* Defendant has failed to establish that this Court misapprehended the facts or law on this issue or mistakenly arrived at its earlier decision. *See, Andrea v. EI Du Pont De Nnemours & Co.,* 289 AD2d 1039 (4th Dept. 2001).

With respect to the second issue as to whether the EUO's were timely scheduled, the Appellate Division, Fourth Department has not directly addressed the issue. Defendant relies on a First Department case published after this action was commenced. *See, Kemper Independence Ins. Co v. Adelaida Physical Therapy, P.C.,* 147 AD3d 437 (1st Dept. 2017). There the court held that the EUO request was subject to the timeliness requirements of the regulations. *See, Kemper, supra, citing 11 NYCRR 65-3.5(b) and 3-6(b).* A request for additional verification must be made within 15 days of receipt of the requisite verification forms. *See, 11 NYCRR 65-3.5(b*). However, it has been held that even where the initial request is not made within 15 days, the request is valid if it is made within 30 days of receipt of the claim. *See, Hospital for Joint Diseases v. Travelers Property Casualty Ins. Co.*, 9 NY 3d 319 (2007). Plaintiffs established the timeliness through the affidavit of Linda Arnold, its Claims Specialist that each initial EUO request was made within 30 calendar days, and as such are deemed timely. The Arnold affidavit addresses each of the five subject claims and establishes the date each bill was received and the date the scheduling letters were mailed. Again, defendant has failed to establish that this Court overlooked or misapprehended the law or facts concerning this issue. *See, CPLR § 2221(d)(2).*

Finally, the defendant is likewise incorrect in its contention that plaintiffs failed to submit admissible evidence that it possessed a reasonable basis for requesting an EUO of the defendant.

This Court thoroughly discussed the issue in its Decision and Order, as follows:

> With respect to plaintiffs' reasonable basis for requesting an EUO of defendant, plaintiffs have demonstrated that defendant is owned by Brij Mittall, M.D., who was previously found guilty of Medicare insurance fraud conspiracy and illegal kickbacks. Mittall suffered a medical emergency in early 2016 which required an extensive hospitalization, yet defendant continued to submit billing which indicated Mittall was the treating provider. The prior medical facility operating at the same location as defendant's was owned by Billy Garis, M.D., who was previously an employee of Mittall. Prior to Mittall taking over the subject location, Garis was indicted for conspiracy to commit healthcare fraud and conspiracy to commit mail fraud. Defendant has submitted billing for services for which the testing results were on the letterhead of Parkway Medical Care, P.C., a facility owned by Garis. Plaintiffs have shown that Mittall had previously appeared for an EUO with respect to another medical facility which he allegedly owned. During the course of the EUO Mittall indicated he was responsible for the hiring and firing of employees at his businesses, but did not know the names of most of them. At his appearance at the EUO for another business, Mittall indicated that he hired a nurse practitioner to supervise the business while he was hospitalized, but was unable to explain how he was able to hire and/or interview the individual during his hospitalization. It is further alleged that defendant Mittall, as its owner, and numerous other individuals and entities operating out of the same location were named as defendants in a complaint in a federal action filed by Liberty Mutual Insurance Company, alleging among other things RICO violations.
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> The plaintiffs have further met their burden by providing an affidavit from Linda Arnold with respect to the basis for the EUO. She is a Claim Specialist III and is responsible for investigating medical providers seeking no-fault benefits from plaintiff by verifying they are valid corporations and/or businesses as identified by *State Farm Auto Insurance Co. v. Mallela*, 4 NY3d 313 (2005). She indicates that as a result of plaintiffs' need to determine whether or not defendant was eligible to collect no-fault benefits, plaintiffs sought EUO's of defendant on four separate occasions; July 20, 2016; August 17, 2016; September 21, 2016; and October 20, 2016.
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> *Decision and Order, pp. 2-4.*

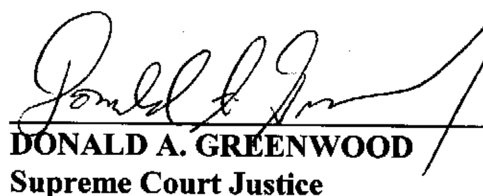
Defendant has again failed to establish that this Court misapprehended the facts or law on this issue or mistakenly arrived at its earlier decision (*see, Andrea, supra.)* and defendant cannot argue that this Court overlooked that issue.

Given that the defendant's motion for leave to reargue lacks merit, this Court will not consider plaintiffs' cross-motion for leave to renew and deems it to be moot.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendant's motion for leave to reargue pursuant to CPLR section 2221(d) is denied.

ENTER



Dated: November 28, 2017
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion to Reargue, dated June 16, 2017;
2. Affirmation of David Landfair, Esq. in support of defendant's motion, dated June 16 2017, and attached exhibits;
3. Plaintiffs' Notice of Cross-Motion to Renew, dated August 25, 2017;
4. Affirmation of Brian E. Kaufman, Esq. in support of plaintiff's cross-motion, dated August 25, 2017, and attached exhibits;
5. Affidavit of Linda Arnold, dated August 28, 2017, and attached exhibit; and
6. Affirmation of Brian E. Kaufman, Esq. in reply, dated October 18, 2017.