At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on April 25, 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: **ALLAN S. HOLLANDER, ESQ., OF BRUNO, GERBINO & SORIANO, LLP**
For Plaintiff

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

The plaintiffs move for summary judgment against the defendant based upon the failure of defendant to attend duly scheduled Examinations Under Oath (EUO's) pursuant to the Insurance Law and No-Fault Regulations. Plaintiffs contend that based upon the defendant's failure to appear for claims submitted under Claim Nos: 126538-GD; 056247-GD; 312150-GC; 344626-GC; and

424446-GD, they are not obligated to reimburse any claim in which the EUO was requested or for which defendant failed to appear. This declaratory judgment action was commenced in January of 2017 and seeks declaration pursuant to CPLR § 3001 that defendant breached a material condition precedent to coverage under the subject policies and no-fault regulations by refusing and failing to appear for an EUO and that plaintiffs are under no obligation to pay, honor or reimburse any of the defendant's claims under the aforementioned claim numbers. Defendant interposed its answer and subsequently served an amended answer, each with the same single counterclaim seeking attorney's fees in the event that defendant prevails in this action. Plaintiffs now move for summary judgment on the one sole cause of action. As the proponents of the motion the plaintiffs are required to establish their entitlement to summary judgment through the tender of admissible evidence before the burden shifts to the defendant to raise an issue of fact. *See, Hunt v. Kostarellis*, 27 AD3d 1178 (4th Dept. 2006). The plaintiffs have met their burden here.

Plaintiffs have demonstrated that defendant failed to meet a critical and material condition precedent to coverage by failing to appear for the EUO's that were reasonably requested by plaintiffs and thus breached a material condition precedent to coverage under the no-fault regulations and the applicable insurance policies inasmuch as plaintiffs' obligation to honor any bills submitted by defendant is negated and that defendant is thus not entitled to seek, keep or receive any no-fault reimbursements for those subject claims. 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.

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. Defendant had previously appeared for an EUO on January 14, 2013 with regard to the claims that are not

subject of this action. She notes that to date defendant has failed to submit to an EUO as requested by plaintiffs with regard to the claim listed in this matter, and due to its failure to appear at four EUO's plaintiffs timely and properly denied its claims within thirty days of the non-appearance. The documentation is provided with respect to the demands for each of the four EUO's which were scheduled, and for which defendant failed to appear.

Plaintiffs have demonstrated in the first instance that by refusing and failing to appear for the respective EUO's the defendant has breached a condition precedent to coverage. The failure to meet the condition precedent leaves defendant ineligible to receive no-fault reimbursements. The no-fault regulation contains explicit language that there is no liability on the part of a no-fault insurer if there has not been full compliance with condition precedence to coverage. *See, 11 NYCRR § 65-1.1.* The regulation states that "no action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage". *Id.* One condition contained in the regulation is the appearance if the eligible injured person or that person's assignee or representative at an EUO. The regulation also states that "upon request by the company the eligible injured person or that person's assignee or representative shall: ... (b) as may reasonably be required to submit to examinations under oath by any person named by the company and subscribed the same". *Id.* In addition, the provision of the condition section states that "no action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage" has been interpreted by the courts as establishing a condition precedent to coverage. *See, Dover Acupuncture, P.C. v. State Farm Mutual Auto Insurance Co.*, 28 Misc.3d 140(A) (2010). The appearance of an eligible person's assignee at an Examination Under Oath is a condition precedent to coverage. *See, id; see also, Stephen Fogel*

Psychological, P.C. v. Progressive Casualty Insurance Co., 35 AD3d 720 (2d Dept. 2006). Moreover, the regulation itself places an unconditional obligation on the provider to appear for the EUO, thus requiring the defendant to do so. Its refusal and failure to appear is thus a violation of the regulation. Where 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). Plaintiffs have demonstrated that they had the right to request the EUO under the subject policies and the regulations and defendant's failure to appear renders it ineligible to receive no-fault reimbursement from plaintiff for any services or supplies allegedly provided by defendant for the subject claim numbers. As such, defendant's failure to comply with the provision of the insurance policies requiring it to submit to an EUO is a material breach of the policy precluding recovery of the policy proceeds. *See, Argento v. Aetna Casualty & Surety Co.*, 184 AD2d 487 (2d Dept. 1992). Thus, plaintiffs have sufficiently established that defendant breached a material condition precedent to coverage, voiding any coverage at its inception. In addition, once the eligible injured person or provider fails to comply with a condition precedent, the carrier's requirement to timely denial of the bill is vitiated and the policy is voided ab initio. *See, Unity Advantage, supra.*

Plaintiffs have therefore met their burden in the first instance of showing its entitlement to a declaration that defendant is not entitled to the no fault benefits by submitting sufficient proof of mailing correspondence to defendant regarding the schedule of the EUO"s on two separate occasions and defendant's failure to appear. *See, Hertz Corp. v. Active Care Medical Supply Corp.*, 124 AD3d 411 (1st Dept. 2015). An affidavit is provided from Allan F. Hollander which set forth

that the notices were mailed and the standard practices and procedures in the office for mailing the EUO scheduling letters creating the presumption of receipts. *See, Longevity ME. Supply, Inc. v. IDS Prop. & Casualty Insurance Co.*, 44 Misc.3d 137(A) (2d Dept. 2014). The affidavit also indicates that counsel for defendant responded to the notices and thus established clear proof that they received the notices. In addition, objective proof of mailing was provided by the notices which contain the same certified mail number in their captions that was reflected on the certified mail return receipts. *See, Hertz Corp., supra*. Plaintiffs have also shown that defendant received the EUO notices as its counsel objected to same on multiple occasions. Objection letters are provided, dated June 30, August 22, September 15 and September 24, 2016. Plaintiffs' responses are likewise provided. In addition, plaintiffs have demonstrated that the non-appearance by affidavits of the attorney that was present on the dates of the scheduled examinations and who would have conduced the exam had the witness appeared. *See, Hertz Corp., supra*. In addition, plaintiffs have annexed the certified statements on the record for several of the dates to prove said non-appearance. *See, Active Chiropractic P.C. v. Praetorian Insurance Co.*, 43 Misc.3d 135(A) (2014). Inasmuch as plaintiffs have met their burden in the first instance concerning summary judgment on the first cause of action for declaratory judgment, the burden shifts to the defendant to raise an issue of fact.

The defendant opposes the motion for summary judgment and cross-moves for dismissal. The defendant, however has failed to meet its burden in opposition or its initial burden on its cross-motion for summary judgment dismissal. It first contends that the plaintiffs have defaulted in replying to the counterclaims alleged by the defendant. There is no dispute that there was an eight day delay in the service of plaintiffs' reply. On February 15, 2017 defendant electronically filed its answer with counterclaims and on March 2, 2017 filed a document entitled "Answer (Amended)".

Neither document, however, indicates that the document contained a counterclaim. Along with the filing of the amended answer defendant also filed a document entitled "Demand for change of venue (Amended)", which was actually defendant's discovery demands with a change of venue demand contained at page 19 of 20 of the document. On March 3, 2017 plaintiffs filed an affirmation pursuant to CPLR § 511(b) in response to the demand for change of venue, and counsel inadvertently failed to interpose a reply to the counterclaims. Plaintiffs have demonstrated that once the error was discovered it was quickly remedied by the filing of a reply to the counterclaim, which was filed on March 30, 2017. Defendant rejected same but failed to allege any basis for prejudice. It is well settled that there is a strong public policy in favor of resolving cases on the merits. *See, Calaci v. Allied Interstate, Inc.*, 108 AD3d 1127 (4th Dept. 2013). A party should not be deprived of its day in court by an attorney's neglect where there is no prejudice. *See, Pollack v. Eskander*, 191 AD2d 1022 (4th Dept. 1993). In addition, whether there is a reasonable excuse for a default is a discretionary determination to be made by the court including all relevant factors, including the extent of the delay, prejudice and whether there was willfulness, as well as a strong public policy in favor of resolving cases on the merits. *See, Harcztark v. Drive Variety, Inc.*, 21 AD3d 876 (2d Dept. 2005). Moreover, the defendant's motion for default on the counterclaim seeks attorney's fees in connection with the attempted recovery of no-fault claims is without merit inasmuch as it seeks relief to which defendant is not otherwise entitled to in the absence of any pertinent contractual or statutory provision with respect to the recovery of the amounts expended in the successful prosecution or defense of an action each party is responsible for its own legal fees. *See, Chapel v. Mitchell*, 84 NY2d 345 (1994). The argument is moot in any event inasmuch as the counterclaim is conditioned upon defendant's success here.

With regard to the portion of the defendant's cross-motion seeking to compel arbitration concerning two individuals, Eustice and Vorobeychik, the argument is flawed and inconsistent with the nature of a declaratory judgment action. The subject action does not seek to litigate any sole claim which defendant may have, but instead is to declare the rights and obligations of the parties, with the purpose being to determine whether plaintiffs have to afford any coverage based upon the failure of the defendant to appear for an EUO which is a condition precedent to coverage. Defendant is free to chose the forum in which it wishes to adjudicate any claims it may have, however only Supreme Court may award the declaratory relief plaintiffs seek. *See, CPLR § 3001.* Where no mandatory mechanism of settling a dispute is provided, a declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations. *See, Kalisch-Jarcho, Inc. v. New York*, 72 NY2d 727 (1988). Although defendant points to the insurance regulations to support its argument, neither the policy provision or regulation indicate that a policy dispute is subject to this provision. *See, 11 NYCRR § 65-1.1.* Likewise, although defendant relies on Insurance Law § 5106(b), that statute's arbitration clause extends to disputes "involving the insurer's liability to pay first party benefits or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of [§ 5106]". *Allstate Insurance Co. v. Lyons*, 843 F.Supp. 2d 358 EDNY (2012). The remainder of the defendant's cross-motion for dismissal lacks merit as well.

The defendant has likewise failed to meet its burden in its opposition to plaintiffs' summary judgment motion. The plaintiffs' submission of the Arnold affidavit sufficiently established its claim in the first instance as did the submission of counsel's affidavit and the scheduling letters concerning the multiple EUO's upon which defendant failed to appear. The affidavit sets forth the

reasons by which the EUO of defendant was requested and necessary. In her affidavit, Arnold states that she is responsible for investigating medical providers seeking no-fault benefits from Nationwide, that she is familiar with the claims presented by defendant in the scope of her responsibilities and that she has knowledge based on "my personal review and examination of documents and material kept and maintained in the file by Nationwide". She further sets forth the list of reasons as to why the EUO of defendant was requested and that upon information and belief defendant is owned by Mittall.

Plaintiffs have established and defendant has failed to dispute the fact that an EUO was a condition precedent to coverage and the failure to appear to same is a failure to comply with a condition precedent to coverage, and that thus plaintiffs had the right to deny all claims retroactively to the date of loss, regardless of whether the denials are timely issued. *See, Unitrin, supra.* A failure to comply with the condition precedent to coverage vitiates the contract as a matter of law. *See, Interboro Insurance Co. v. Tahir*, 129 AD3d 1687 (4th Dept. 2015). Defendant has failed to raise an issue of fact by alleging that plaintiffs failed to show the non-appearance of the defendant as the documentary evidence clearly supports that claim and defendant provides nothing in admissible form to dispute that.

NOW, therefore, for the foregoing reasons, it is

ORDERED, ADJUDGED AND DECREED, that Nationwide is not obligated to provide any coverage, reimbursements, or pay any monies, sums, or funds to Jamaica Wellness, for any and all No-Fault related services for which claims/bills have been, or may in the future be, submitted by Jamaica Wellness to the Plaintiffs for which an EUO of Jamaica Wellness was requested and for which Jamaica Wellness failed to appear, and it is further

ORDERED, ADJUDGED AND DECREED, that Jamaica Wellness lacks standing to seek or receive No-Fault reimbursements for ay bill submitted for which an EUO of Jamaica Wellness was requested and for which Jamaica Wellness had failed to appear, and it is further

ORDERED, ADJUDGED AND DECREED, that Jamaica Wellness breached a condition precedent to coverage as established by the subject policies of insurance and the accompanying No-Fault endorsement by failing to appear for an EUO, and it is further

ORDERED, ADJUDGED AND DECREED, that Jamaica Wellness breached a condition precedent to coverage as established by the No-Fault Regulation by failing to appear for an EUO.

ENTER

Dated: June 7, 2017
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiffs' Notice of Motion, dated March 1, 2017;

2. Affirmation of Brian E. Kaufman, Esq. in support of plaintiffs' motion, dated March 1, 2017, and attached exhibits;

3. Affidavits of Linda Arnold in support of plaintiffs' motion, dated March 3, 2017, and attached exhibits;

4. Affidavits of Allan S. Hollander, Esq. in support of plaintiffs' motion, dated March 6, 2017, and attached exhibits;

5. Defendant's Notice of Cross-Motion and Opposition, dated April 10, 2017;

6. Affirmation of David Landfair, Esq., dated April 10, 2017, and attached exhibits;

7. Affidavit of David Safir in opposition to plaintiffs' motion, dated April 6, 2017; and

8. Affirmation of Brian E. Kaufman, Esq. in opposition to defendant's cross-motion and in reply, dated April 18, 2017, and attached exhibits.

9. Reply Affirmation of David Landfair, Esq., dated April 20, 2017, and attached exhibits;