

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**NATIONWIDE AFFINITY INSURANCE  
COMPANY OF AMERICA,**

**Plaintiff,**

**- against -**

**TRIAL/IAS PART 18**

**Index No.: 604911-17**

**Motion Date: 10/13/15**

**Sequence No.: 001**

**MOD**

**DECISION AND ORDER**

**INDIVIDUAL CLAIMANT DEFENDANTS**

**WINSTON JACKSON, SHANELL LEWIS,  
ANDEL SAVILLE, DWAYNE SMITH, DESMANEKE  
ARGON, MICHAEL BAILEY, EMMA CARROLL,  
JAMAL A AFFLICK**

**HEALTHCARE PROVIDER DEFENDANTS**

**ALLBODY HEALING SUPPLIES, L.L.C.,  
ALMATCARE MEDICAL SUPPLY, INC.,  
BLISS DRUGS, INC., BRONX COUNTY MEDICAL  
CARE, P.C., COLUMBUS IMAGING CENTER,  
L.L.C., EA CHIROPRACTIC DIAGNOSTICS, P.C.,  
EXCEL SURGERY CENTER, L.L.C., HAMZA  
PHYSICAL THERAPY, P.L.L.C., METRO PAIN  
SPECIALISTS, P.C., MIISUPPLY, L.L.C.,  
OPTIMAL CARE SURGICAL SERVICES, L.L.C.,  
ORANGE CHIROPRACTIC, P.C., PRIMAVERA  
PHYSICAL THERAPY, P.C., URGENT  
CHIROPRACTIC CARE, P.C., NAPOLEON A.  
VALDEZ, M.D., P.C., WHIPLASH CHIROPRACTIC,  
P.C., YUMI ACUPUNCTURE, P.C.,**

**Defendants.**

The following papers were read on these motions:

Notice of Motion, Affirmation and Exhibits (3 Parts).....1

**PRELIMINARY STATEMENT**

Plaintiff brings this application for an order pursuant to CPLR § 3215 declaring that

Winston Jackson, Shanell Lewis, Andel Saville, Dwayne Smith, Desmaneke Argon, Michael Bailey, Emma Carroll, Jamal A Afflick, Almatcare medical Supply, Inc., Columbus Imaging Center, L.L.C., EA Hamza Physical Therapy, P.L.L.C., Metro Pain Specialists, P.C., Missupply, L.L.C., Optimal Care Surgical Services, L.L.C., Orange Chiropractic, P.C., Primavera Physical Therapy, P.C., Urgent Chiropractic Care, P.C., Napoleon A. Valdez, M.D., P.C., Whiplash Chiropractic, P.C. and Yumi Acupuncture, P.C. are in default in appearing or answering the summons and complaint and awarding plaintiff a default judgment against the aforementioned defendants based upon their failure to appear and/or serve an answer in the above-entitled action; and for such other and further relief that this Court may deem just, proper and equitable. Defendants have not submitted opposition to this application.

#### BACKGROUND

Plaintiff Nationwide Affinity Insurance Company of America ("Nationwide") contends that an incident of September 26, 2016 was not an accident, or covered event covered by their policy of insurance with Winston Jackson. Plaintiff commenced the action by filing a Summons and Complaint on May 30, 2017. Service was made upon defendants as follows:

#### Service on Individual Defendants

Defendant	Date of Service	Type of Service	Non-Military Affidavit
Winston Jackson	6/30/17	Nail and Mail	Yes
Shanell Lewis	6/30/17	Nail and Mail	Yes
Ardel Saville	6/30/17	Nail and Mail	Yes
Dwayne Smith	6/30/17	Nail and Mail	Yes
Desmaneke Argon	6/30/17	Nail and Mail	Yes
Michael Bailer	6/13/17	Suitable Age & Discretion	Yes
Emma Carroll	6/09/17	Suitable Age & Discretion	Yes
Jamal A. Afflick	6/30/17	Nail and Mail	Yes

#### Service Upon Secretary of State with Additional Mailing

Defendant	Date	Mailing
Allbody Healing Supplies, LLC	6/7/17	6/29/17
Almacare Medical Supply	6/7/17	6/29/17
Columbus Imaging Center, LLC	6/7/17	6/29/17
EA Chiropractic Diagnostics, P.C.	6/7/17	6/29/17
Excel Surgery Center, L.L.C.	6/7 & 6/9/17	6/29/17

Hamza Physical Therapy, P.L.L.C.	6/7/17	6/29/17
Metro Pain Specialists, P.C.	6/7/17	6/29/17
MH Supply, L.L.C.	6/7/17	6/29/17
Optimal Care Surgical Services, L.L.C.	6/7/17	6/29/17
Orange Chiropractic, P.C.	6/7/17	6/29/17
Primavera Physical Therapy, P.C.	6/7/17	6/29/17
Urgent Chiropractic Care, P.C.	6/7/17	6/29/17
Napolean A. Valdez, M.D., P.C.	6/7/17	6/29/17
Whiplash Chiropractic, P.C.	6/7/17	6/29/17
Yumi Acupuncture, P.C.	6/7/17	6/29/17

The only defendant to submit an Answer was Bronx County Medical Care, P.C., and no default judgment is being sought against this defendant.

Nationwide performed an initial investigation of the claims, and submits an affidavit of Brien McCamley, a field investigator in Nationwide's employ (Exh. TT). Among the factors upon which the initial investigation was based were the following:

- the insured vehicle, a 2008 BMW Sedan, owned by Winston Jackson, and operated by Shanell Lewis, was only added to the policy 20 days before the September 26, 2016 event;
- neither policy holder was operating their car at the time;
- both vehicles were older model BMWs;
- Passengers in both vehicles worked at neighboring body shops in the Bronx;
- Jamal Afflick, who claims to have been a passenger in the Carroll vehicle is not listed as such on the police report;
- Winston Jackson does not reside at the address listed in the policy;
- the Jackson vehicle was also involved in a prior loss on March 4, 2016;
- The Jackson vehicle was determined by All Star Automotive Corp. to be a total loss;
- defendant Andel Saville is an employee of All Star Automotive Corp.;
- All Star Automotive Corp. is adjacent to M-Dolla Body Shop and defendants Michael Bailey and Desmaneke Argon are employees of M-Dolla;
- upon inspection, the Jackson vehicle, the mileage was 46,494, while Carfax lists the vehicle as having 113,798 miles as of January 30, 2016, and Progressive

Insurance listed the mileage as of March 4, 2016 as 114,168 miles;

- Winston Jackson claimed he had the motor replaced after he obtained the vehicle, but could not remember where it was done;
- Jackson had a prior claim on April 29, 2015, and took his vehicle to M-Dolla for repairs;
- Jamal Afflick claims to have been a passenger in the Carroll vehicle, while the EMS report lists him as the driver of the Jackson vehicle;
- Afflick says the vehicle in which he was located was struck from behind, while the police report shows the Carroll vehicle rear-ending the Jackson vehicle;
- Jamal Afflick is the manager of M-Dolla, and Michael Bailey picked him up there to give him a ride home, but the vehicle was travelling in the opposite direction from Afflick's home;
- All parties inside the insured Jackson vehicle are represented by Goldin & Rivin. Dwayne Smith, passenger in the insured vehicle, had prior motor vehicle losses on August 2, 2014, and June 5, 2016, in which he was also represented by Goldin & Rivin;
- Michael Bailey, passenger in Carroll vehicle, had a prior claim in which he was represented by Goldin & Rivin.

Nationwide made repeated efforts to conduct an Examination Under Oath of Winston Jackson, but he failed to appear on December 13, 2016 and January 6, 2017. Nationwide contends that this breach relieves it from honoring any no fault claims from Healthcare Providers. Testimony provided by Anadel Saville, Dwayne Smith, and Shanell Lewis raised concerns as to facts surrounding the incident of September 26, including the relationships between and among the parties involved, the circumstances under which Dwayne Smith became a passenger in the Jackson vehicle, the route traveled, and the change in drivers from Shanell Lewis to Anadel Saville, allegedly after leaving Mingles Restaurant, where they met at 7:00 P.M. Shanell Lewis testified that she believed she was being set up for the incident, that she did not know Smith, that she was not the fiancé of Jackson, and had never met him, that she was asked to drive and was given specific instructions as to what route to take prior to the incident.

Based upon these, and other facts, Nationwide determined that the incident of September 26, 2016, was not a covered event; rather, that it was an intentional staged event. They therefore commenced the instant action.

## DISCUSSION

The decision whether to grant a default judgment is left to sound judicial discretion (*Shah v. New York State Dep't. Of Civil Service*, 168 F.3d 610, 615 [2d Cir.1999]; *Briarpatch Ltd. V. Geisler Roberdeau, Inc.*, 513 F.Supp.2d 1, 3 [S.D.N.Y. 2007]). In considering whether a default judgment is appropriate, the Court must first consider whether service of process has been properly effectuated upon the defaulting defendant; and second, whether the unchallenged facts alleged in the complaint state a legitimate cause of action (*Kee v. Hasty*, 2004 WL 807071 at 4 [S.D.N.Y] *citing*, 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2688 [3d ed. 1998 ]).

The plaintiff must establish by affidavit of an individual with personal knowledge, or similarly verified complaint, facts sufficient to establish the claims alleged (*Dyno v. Rose*, 260 A.D.2d 694 [3d Dept. 1999]). Where the verified complaint is conclusory, and devoid of factual allegations, constituting the claim alleged, a motion for default judgment shall be denied (*Celnick v. Freitag*, 242 A.D.2d 436 [1<sup>st</sup> Dept. 1997]; *Luna v. Luna*, 263 A.D.2d 470 [2d Dept. 1999]).

The next consideration which the Court must consider is the appropriate level of damages to be awarded plaintiff. By defaulting, a defendant admits to all well-pleaded allegations, except those pertaining to damages (*Greyhound Exhibitgroup, Inc. V. E.L.U.L Realty Corp.*, 973 F.2d 155, 158 [2d Cir.1992]; *Traffic Sports USA, Inc. v. Segura*, 2008 WL 4890164 [E.D.N.Y.]). “(W)here the plaintiff has filed reasonably detailed affidavits and a memorandum of law pertaining to the damages requested . . . and the defendant has failed to make an appearance in the case, the Court can make an informed recommendation regarding damages without an evidentiary hearing.” *Id.* at 5.

Plaintiff has established service of process and jurisdiction over all defendants against whom it seeks to obtain a Declaratory Judgment. The claims are set forth in a Verified Complaint, and are supported by an affidavit of the individual who undertook an investigation of the claims arising from the incident of September 26, 2016 (Claim No. 990687-GD). The claims set forth a legitimate cause of action for declaratory judgment. Nationwide is not seeking monetary damages, and the default by defendants constitutes an admission of the facts alleged. It is therefore

ORDERED that Nationwide is entitled to Declaratory Judgment as requested as follows:

- a. the individual defendants Shanell Lewis, Anel Saville and Dwayne Lewis violated the fraud provisions of the policy of insurance by making material misrepresentations of fact

- in the presentation of the claim;
- b. that the alleged motor vehicle incident of September 26, 2016 (claim number 990687-GD) was not the product of a covered event as defined by the applicable policy of insurance issued by Nationwide, since the incident of September 26, 2016 was the product of a staged and/or intentional event;
- c. that Nationwide, by reason of no coverage and since the alleged incident of September 26, 2016 (claim number 990686-GD) was the product of a staged and/or intentional event, Nationwide is not required to provide a defense and/or indemnification to any of the defendants who are an "insured" or an "insured operator" as those terms are set forth in the instant complaint for declaratory relief, in any current or future proceedings, all uninsured/underinsured motorist lawsuits and arbitrations, arbitrations and lawsuits seeking to recover no-fault benefits and third-party lawsuits and arbitrations arising out of the alleged incident of September 26, 2016;
- d. that Nationwide, by reason of no coverage, and since the alleged incident of September 26, 2016 (claim number 990687-GD), was the product of a staged and/or intentional event, is not required to pay any sums, monies, damages, awards and/or benefenefits to any of the defendants named herein, their agents, employees, assignors and/or heirs arising out of any current or future proceedings, including, but not limited to, all uninsured/underinsured motorist lawsuits and arbitrations, arbitrations and lawsuits seeking to recover no-fault benefits and third-party (bodily injury) lawsuits and arbitrations arising out of the alleged incident of September 26, 2016; and
- e. costs and disbursements of this action.

The action against Bronx County Medical Care, P.C., which joined issue by filing a Verified Answer with Counterclaims shall continue.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court

Dated: Mineola, New York  
December 15, 2017

**ENTERED**

DEC 20 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

ENTER:

*Jerome C. Murphy*  
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 JEROME C. MURPHY  
 J.S.C.