At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on March 30, 2021.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NATIONWIDE GENERAL INSURANCE COMPANY,

Plaintiff,

v.

DECISION AND ORDER ON MOTION

Index No.: 002537/2020

PANTALEON S. DE LEON PERALTA, ADVANTAGE MED INNOVATIONS, INC., AHARON GUTTERMAN, MD, PLLC, BRONX MEDICAL DIAGNOSTIC, P.C., CROSS RIVER PAIN MANAGEMENT, P.C., FLAWLESS QUALITY CARE SERVICES, INC., HAAR ORTHOPEDICS & SPORTS MEDICINE, P.C., HEALTHWAY MEDICAL CARE, P.C., HELPFUL MEDICAL SUPPLY, CORP., JAE CHUNG, D.C., JULES F. PARISIEN, ORTHOCARETECH, INC., PARK AVENUE ORTHOPEDICS, P.C., PRO BALANCE ACUPUNCTURE, P.C., PROTECHMED, INC., ROXBURY ANESTHESIA, LLC, SPINE CARE CHIROPRACTIC, P.C., SURGICORE OF JERSEY CITY LLC, UNICAST, INC., XINPING CAO ACUPUNCTURE & MASSAGE THERAPY, P.C.,

Defendants.

APPEARANCES: **ALAN HOLLANDER, ESQ. OF HOLLANDER LEGAL GROUP, P.C.**
For Plaintiff

MORTON POVMAN, ESQ. OF MORTON POVMAN, P.C.
For Defendants

The plaintiff moves for summary judgment against the following defendants who interposed answers in this matter: Peralta, Healthway, Parisien and Spine Care. The complaint seeks a declaratory judgment, declaring that plaintiff is not obligated to provide any first party

coverage, reimbursement or pay any monies to any of the defendants for any related services under the No Fault Insurance Law for bills they submitted as a result of an incident which occurred on July 12, 2019. Examinations Under Oath (EUO's) of defendant Peralta, who was involved in the incident, were requested and Peralta failed to appear. The subject automobile policy, underwritten by plaintiff, was issued on April 8, 2019 for a 2015 Jeep Grand Cherokee. Peralta was operating the vehicle at the time of the alleged accident and was listed as a driver on the policy. Peralta, along with Gutterman, Healthway, Parisien and Spine Care, acting as Peralta's assignees, have sought to obtain No Fault insurance benefits under the policy.

Plaintiff has met its burden in the first instance by establishing its *prima facie* case that the determination it is not obligated to provide said coverage was proper under the law and applicable regulations. The defense based on an EUO non-appearance is subject to the preclusion remedy and plaintiff has met its burden of establishing that timely denials were issued as well. *See, Nationwide Affinity In. Co. of America v. Jamaica Wellness Medical, P.C.,* 167 AD3d 192 (4th Dept. 2018). Plaintiff has demonstrated in great detail through its submissions that Peralta failed meet a critical and material condition precedent to the applicable insurance policy and No Fault regulations by failing to appear at the properly and timely requested EUO's and that as a result these defendants are not entitled to seek or receive No Fault reimbursements from the plaintiff for the subject claims.

Plaintiff has also shown that it had a reasonable basis for requesting the EUO. *See, 11 NYCRR § 65-3.16(a)(12); see also, Insurance Law § 5102(a)(1).* An affidavit is provided from David Holbrook, its No Fault Litigation Claims Specialist, which indicates that the preliminary

investigation into the facts of the accident revealed suspicious circumstances that warranted further investigation to determine whether the incident was in fact a covered loss as defined by the policy. He thoroughly sets forth plaintiff's practices and procedures, including how it receives No Fault documents, certification and mailing of verification letters, creation and mailing of No Fault denial claim forms, as well as his personal knowledge of this claim and the subject policy. His investigation determined that Peralta was 32 at the time of the accident, that vehicle was parked at the time of the alleged collision, that Peralta purported to not have sustained any injuries, he was not taken to the hospital or emergency room yet received substantial treatment from the defendant providers. He references video surveillance demonstrating that Peralta did not suffer any injuries and information indicating that he had been involved in multiple prior accidents. Despite these facts, plaintiff received billing in the amount of $67,379.56 from various defendants.

As a result, plaintiff properly gave notice of its EUO request on August 23, 2019. That examination was scheduled for September 24, 2019 and Peralta failed to appear. The second notice was sent on September 30, 2019, with an amended notice on October 22, 2019 for a November 19, 2019 EUO and again, Peralta failed to appear. The documentary evidence establishing all of the bills, scheduling, Peralta's failures to appear as well as the timely denials with respect to each defendant are also provided. Plaintiff has likewise demonstrated that by failing to appear, Peralta breached a material condition precedent to coverage under the subject policy and No Fault regulations that negated plaintiff's obligations to honor any bills submitted by the answering defendants. The plaintiff as the insurer was entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was

requested. *See, 11 NYCRR § 65-3.5(c.).* Nothing in the regulation prevents an insurer from requesting full and complete proof of claim prior to the issuance of any payment or denials. *See, 11 NYCRR § 65-3.8(f).* In addition, the policy provides that "[n]o action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage" and this language has been interpreted by the courts as establishing a condition precedent to coverage. *See, Nationwide, supra.* Plaintiff has shown that it issued timely denials as they were mailed within the 30 days of the second missed EUO. *See, 11 NYCRR § 65-3.8(a)(1).* Plaintiff has demonstrated proper mailing through admissible evidence in the form of an employee affidavit with knowledge of the standard office practices and procedures designed to ensure that the items were properly mailed. *See, St. Vincent's Hosp. of Richmond v. Government Employees Ins. Co.*, 50 AD3d 1123 (2d Dept. 2008). It has shown through the affidavit of its attorney that the notices were mailed and the standard practices and procedures of the office for the mailing of the scheduling letters, creating the presumption of receipt. *See, Liberty Mutual insurance Co. v. Five Boro Medical Equipment, Inc*, 130 AD3d 465 (1st Dept. 2015). It has also demonstrated that the notices were mailed to Peralta's correct address and to his attorney by first class mail, as those addresses were listed on the prescribed NF-2 forms and the letters of representation received by plaintiff on Peralta's behalf. *See, Central Park Physical Medicine & Rehab, P.C. v. IDS Property and Casualty Co.,* 64 Misc3d 135 (2d Dept. 2019). Peralta's failure to appear at the timely scheduled EUO's has also been sufficiently established through counsel's affidavit which indicates that he was present on the dates of the examinations and who would have conducted the examination here the witnesses appeared, along with transcripts of the actual nonappearance. *See, Hertz Corp v. Active Care*

Medical Supply Corp., 124 AD3d 411 (1st Dept. 2015). Therefore, plaintiff has met its burden of establishing that based on the totality of the its investigation and in conjunction with the breach of condition precedent for failing to appear as well as plaintiff's timely denial of coverage, that it is under no obligation to honor or pay any claims with respect to this accident.

Plaintiff has likewise met its burden on showing that the provider defendants are not eligible to receive the reimbursements based on Peralta's failure to appear at the EUO's. It has also shown that with respect to the defendant provider claims, the Assignment of Benefits granted those defendants the right to pursue collection of unpaid No Fault benefits directly from plaintiff and that they cannot argue as assignees that their rights are greater than the assignor. *See, American States Ins. Co. v. Huff*, 119 AD3d 478 (1st Dept. 2014). Therefore, they stood in Peralta's shoes and acquired no greater rights than he had. *See, New York & Presbyt. Hosp. v. Country-Wide Ins. Co.*, 17 NY3d 586 (2011). Inasmuch as plaintiff has met its burden in the first instance, the burden shifts to these defendants to raise an issue of fact. *See, Nationwide, supra.*

Defendants Peralta, as well as defendants Gutterman, Healthway, Parisien and Spine, have respectively opposed the motion. With respect to defendant Peralta, he contends that plaintiff did not provide him with more than two opportunities to appear for an EUO but fails to provide any legal authority to establish that he is so entitled. Nor has he offered any evidence that a formal request in writing seeking an additional examination was made prior to the nonappearance at the second noticed EUO. This defendant provides two affidavits to oppose the motion. This defendant alleges that on November 14, 2019, prior to the November 19, 2019 EUO, both plaintiff and its counsel were notified by new counsel that the previous law firm no longer represented him. An affidavit from a paralegal at the second law firm alleges that on

November 15, 2019, she called both plaintiff and its counsel and was told that the November 19th EUO would be adjourned and that a new location be selected. No documentation with respect to the substitution of attorney or the telephone call is provided. She further indicates that she advised that she would send written notification of the firm's representation. The affidavit from counsel, however, establishes that no written confirmation was sent until December 12, 2019, almost a month later and weeks after the EUO date, with the letter was being sent to directly to plaintiff and not its counsel. Peralta argues, therefore, that this raises an issue of fact as to whether he failed to appear for that scheduled EUO. This opposition is insufficient. Peralta has not disputed the accident, the appearance of his first counsel, that he failed to appear for the first or second properly noticed and scheduled EUO's and that newly substituted counsel did not timely provide a letter of representation or written request for an adjournment. Nor does Peralta address the significance of the failure to provide this letter within 10 days after the second missed EUO as the No Fault regulations place strict timeframes on when an insurer must notice an EUO as well as when a denial based on non-appearance must be issued. The regulation mandates the plaintiff must reschedule an EUO within 10 days of the last missed EUO. *See, 11 NYCRR § 65-3.6(b).* The failure to provide a letter of representation within 10 days of the second missed EUO would have severely prejudiced plaintiff had the claims not been denied as it would have been in violation of the regulation. *See, National Liability and Fire Insurance Co. v. Tam Med. Supply Corp.*, 131 AD3d 851 (2015). Therefore, if plaintiff would have waited more than 10 days after the second missed EUO for the letter of representation, it would have waived its right to an EUO on prior claims as the request would have been outside the timeframe set forth in the regulation. *See, Parisien v. 21st Century Ins. Co.*, 62 Misc. 3d 150(A) (2019).

Peralta requests that this Court order plaintiff to conduct an EUO on a date certain, contending that the violation of the condition precedent to coverage can be cured. However, an insurance company is entitled to obtain information promptly while the information is still fresh to enable it to decide upon its applications and protect against false claims. *See, IDS Prop. Cas. Co. v. Stacar Med. Servs., P.C.*, 116 AD3d 1005 (2d Dept. 2014). To allow Peralta's belated expression of willingness to cooperate in the face of a summary judgment motion two years after the loss would be a material dilution of the plaintiff's rights. *See, IDS Prop. Cas. Co., supra; see also, Johnson v. Allstate Ins. Co.,* 197 AD2d 672 (2d Dept. 1993). Contrary to Peralta's argument, the doctrine of willfulness applies in the context of liability policies and has no application in this context where the eligible injured party has full control over the requirements and conditions necessary to obtain coverage. *See, Unitrin Advantage Ins. Co v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 (1st Dept. 2011). Inasmuch as defendant Peralta has failed to raise an issue of fact in opposition, the motion is granted as against him.

Likewise, defendants Healthway, Parisien and Spine Care have failed to raise an issue of fact. These defendants have failed to provide an affidavit from a party with personal knowledge and opposition and as such the papers are insufficient as a matter of law. *See, Marine Midland Bank v. Hall*, 74 AD2d 79 (4th Dept. 1980). Even if the papers were facially sufficient, these defendants have failed to raise an issue of fact to dispute that the EUO notices were timely and properly mailed within the statutory timeframes. They point to no specific alleged defect in the notices and the timeliness argument is not advanced by defendant Peralta. Although they claim that plaintiff fails to demonstrate by admissible evidence when it received their claims and thus cannot establish that it issued timely denials or timely EUO requests, plaintiff's submissions

demonstrate that the EUO was scheduled within 30 days of receipt of the application for benefits and was timely requested. The application submitted by Peralta is dated July 22, 2019 and was received on July 25, 2019. The first EUO scheduling letter was mailed on August 23, 2019, within 30 days of receipt of the application. As such, the EUO was requested within a reasonable time and was timely noticed. Plaintiff has shown that the EUO was requested prior to the receipt of any assignment of benefits (AOB) made out to any of these defendants. Nor have these defendants raised an issue of fact as to whether plaintiff properly disclaimed coverage. While these defendants argue that plaintiff is precluded from raising the issues of the failure to appear on the mistaken belief that the claims were not timely denied and therefore plaintiff has not proved that it disclaimed coverage, the denials provided with plaintiff's motion demonstrate that defendants were informed that the claims have been denied based upon the failure to appear and the denials were issued within the required 30 days. Plaintiff has thus demonstrated, and defendants have not refuted, that it timely denied the claims based upon the failure to appear. *See, Nationwide Affinity Ins. Co. of Am. v. Jamaica Wellness Med. P.C.*, 167 AD3d 192 (4th Dept. 2018).

They also incorrectly argue that 11 NYCRR § 65-3.5(b) applies; however, the section only relates to request for additional verification. *See, 11 NYCRR § 65-3.5(b).* The regulations do not define an EUO as additional verification and instead provide that "upon request by the company, the eligible injured person or that persons assignee or representative shall … as may be reasonably required, submit to examinations under oath by any person named by the company and subscribed the same." *11 NYCRR § 65 -1.1(d).* The language in the endorsement is broad and because the provision is included in the mandatory endorsement conditions section and not

in the verification protocols, an examination may be requested when reasonable, including before the receipt of a claim form. *See, Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.,* 7 Misc3d 18, *aff'd* 35 AD3d 720 (2d Dept. 2004). They further provide that that "[a]ll examinations under oath … requested by the insurer shall be held at a place in time reasonably convenient to the applicant" and requests for examination "must be based upon the application of objective standards" *11 NYCRR § 65-3.5e*. Thus, taken together the regulations require that if an EUO is requested at a reasonable time based upon objective factors and if a claimant fails to appear, an insurer should be entitled to deny all claims arising out of the accident retroactive to the date of loss. *See, Stephen Fogel, supra.*

Defendants have likewise failed to establish that this motion is premature. While they claim that the special investigation unit file is needed, Peralta, the party who was requested to appear and who has appeared in this action, does not contest the basis of the request. Further, there is no proof in the record of any objection to the basis of the EUO request made when it was scheduled. The belated objection from these defendants cannot be considered now. *See, Crescent Radiology, PLLC v. American Tr. Ins. Co.*, 927 NYS2d 815 (2d Dept. 2011). These defendants have failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the plaintiff's knowledge and control. *See, Nationwide Affinity Ins. Co. of Am. v. Beacon Acupuncture, P.C.*, 175 AD3d 1836 (4th Dept. 2019). The mere hope that evidence sufficient to defeat the motion may be uncovered is not enough. *See, id.*

NOW, therefore, for the foregoing reasons, it is

ORDERED, that plaintiff's motion for summary judgment is granted, and it is further

ORDERED, ADJUDGED AND DECLARED, that pursuant to CPLR section 3001 that defendant Peralta breached a material condition precedent to coverage under the subject insurance policy and No Fault regulation by refusing and failing to appear for an EUO and that plaintiff is under no obligation to pay, honor or reimburse the individual defendant or any of the health care provider defendants' claims submitted on behalf of defendant Peralta arising out of the subject July 12, 2019 incident.

ENTER

Dated: April 15, 2021
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion for summary judgment, dated February 3, 3021.
2. Affirmation of Jennifer B. Ettinger, Esq. in support of plaintiff's motion for summary judgment, dated February 3, 2021, and attached exhibits.
3. Affirmation of Thomas Mountfort, Esq. in opposition to plaintiff's motion, dated March 17, 2021, and attached exhibits.
4. Reply Affirmation of Alan S. Hollander, Esq. in further support of plaintiff's motion, dated March 18, 2021, and attached exhibits.
5. Affirmation of Oleg Rybak, Esq. in opposition to plaintiff's motion, dated March 19, 2021, and attached exhibits.
6. Reply Affirmation of Alan S. Hollander, Esq. in further support of plaintiff's motion, dated March 22, 2021, and attached exhibits.