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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

LYN-N-MEDICAL, P.C. a/a/o ALAN ADAMS, JOSEPH BAZILE, ADELINA BENITEZ, GLADIS BONILLA, KENDRA BROWN, JOSE COLLADO, HIPOLITO CHAVEZ, NEIDA CASTRO, BLANCA CANALES, CAROLYN CANCEL, MARIO DIAZ, EVA LUZ ESCOBAR, MIRIAN FLORES, JOSE HERNANDEZ, CAROLS HUATAY, DEYSI HERRERA, FIOR JONES, ALIDO LEON, NANCY LEMOS, ANA LOPEZ, LIDIA LUNA, LINDA MARTINEZ, MARIANNE MARMOL, JOSE MELENDEZ, CARMEN MOSQUERA, CARLOS MEDINA, LILIAN MATA, VICTOR MORALES, ANGELICA PAEZ, GERALDIN ORTIZ, CESAR MENDEZ-PEREZ, HERNAN PORTILLO, RUFINO PERLA, JORGE OUIJADA, MARLON RIVAS, JORGE RIVERO, MARIA RIVERO, JAVIER RUIZ, WILFREDO RUIZ, MARINA SALMERON, JOSE SOSA, FRANCY SILVA, ANGELICA VASQUEZ, SANDRA VASQUEZ, HECTOR VARGAS, JEREMIAS VARGAS, LINDA MARTINEZ, EDWIN TORRES SR., EDWIN TORRES JR., WINKY CHHABRA, RONY BEAUGE, MARIE MILFORT, SANDY LARA, OSBIN PERDOMO JR., RONY ACOSTA, EDWIN PINEDA, MARITZA OLIVAS, ANDREA ROTHAMEL, ALEX MARTINEZ, ANA CRUZ and MARK BASDEO.

TRIAL/IAS, PART 36
NASSAU COUNTY

Sequence No.: 005
Index No.: 019792/02

Plaintiffs.

- against -

ALLSTATE INSURANCE COMPANY.

Defendant.

ALLSTATE INSURANCE COMPANY.

Third-Party Plaintiff.

- against -

TRED RISSACHER, D.D. and DAVID BASS, D.C. and TR HEALTHCARE MANAGEMENT, CORP.

Third-Party Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein,

defendant's motion for an order 1) striking the note of issue so as to permit defendant to conduct additional discovery; 2) directing that such additional discovery take place; and 3) for an out of state commission to take the depositions of R. Scott Scheer, M.D. and George Braff, M.D. is hereby determined as set forth below.

Plaintiff, a medical provider, sues defendant Allstate Insurance Company in breach of contract for no-fault payments which plaintiff alleges it is entitled to from defendant. On July 20, 2004 the court certified this matter ready for trial by short form order and a note of issue was filed on October 18, 2004.

Defendant first moves for an order herein striking the note of issue to permit the parties to conduct additional discovery, or, alternatively, for an order directing the parties to conduct such additional discovery. This branch of defendant's motion is denied. Defendant alleges, *inter alia*, that 1) plaintiff was fraudulently formed *ab initio*; 2) that it fraudulently billed defendant in that services were never provided or not provided as billed; and 3) that those doctors who provided the services were not licensed in New York State. In its motion defendant contends that it became aware of the need to obtain additional discovery from plaintiff when it reviewed plaintiff's tax returns for 1998 through 2002. Defendant asserts that based upon this newly discovered evidence that it needs a response to a discovery demand dated October 5, 2004 and a further deposition of Dr. Joseph Vitoulis, plaintiff's principal.

As set forth in plaintiff's opposition papers, plaintiff provided the tax returns and other documents upon which defendant bases its need for the additional discovery in July, 2004. Defendant never demanded the production of the documents until October, 2004 and, indeed, admittedly failed to serve same until it served plaintiff with the instant motion which included the demand as an exhibit. The court may order a party to comply with a discovery demand where that party fails to respond to same. CPLR 3124. In the instant matter defendant had not prepared the demand until after certification and, indeed, did not serve same until after the note of issue was filed. Accordingly, under these circumstances, the court concludes that plaintiff did not fail to respond to a discovery demand from defendant. Further, defendant did not seek these additional documents in a timely manner.

Accordingly, that branch of defendant's motion which seeks an order striking the note of issue or directing that additional discovery be conducted is hereby denied.

The court grants that branch of defendant's motion which seeks an open commission to take the depositions of non-party witnesses R. Scott Scheer, M.D. and George Braffs, M.D. Defendant has adequately demonstrated that these witnesses may have performed medical services for plaintiff despite not being licensed to practice medicine in New York State.

It is therefore:

Ordered, that defendant's motion for Open Commissions to enable defendants to take the

depositions of R. Scott Scheer, M.D. as a non-party witness in the State of Pennsylvania and that of George Braff, M.D. as a non-party witness in the State of New Hampshire is granted ; and it is further

Ordered, that a Commission issue to any duly appointed notary public or any other authorized person who may administer oaths pursuant to the law of the State of Pennsylvania to preside over the deposition on oral questions under oath of R. Scott Scheer, M.D. as a non-party witness; and it is further

Ordered, that a Commission issue to any duly appointed notary public or any other authorized person who may administer oaths pursuant to the laws of the State of New Hampshire to preside over the deposition on oral questions under oath of George Braff, M.D. as a non-party witness; and it is further

Ordered, that defendants shall bear the costs of conducting the depositions.

So Ordered.

Dated: February 25, 2005

Alce M. Martin
A.J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE