

**Loncr Ins. Co. v Saint-Elot**

2014 NY Slip Op 32282(U)

August 25, 2014

Supreme Court, New York County

Docket Number: 160781/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. EILEEN A. RAKOWER PART 15  
*Justice*

Lancer Insurance Company,  
  
Plaintiff,  
- v -

INDEX NO. 160781/2013  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

Individual Defendant

Carlo Saint-Elot,

Healthcare Provider Defendants

Star Medserve, P.C.,  
Charles Deng Acupuncture, P.C.,  
Action Potential Chiropractic, PLLC,  
Island Life Chiropractic Pain Care, PLLC,  
Gentlecare Ambulatory Anesthesia Services,  
Jules Francois Parisien, MD,  
Maria Shiela Masiglia, PT, and  
Magia Products Corporation,  
  
Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answer — Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits

PAPERS NUMBERED	
1-3	_____
4	_____
5	_____

J.S.C.

**Cross-Motion:**  Yes  No

This action was commenced by Plaintiff on November 19, 2013. This case arises from an automobile accident that allegedly occurred on April 4, 2013, where individual defendant, Carlo Saint-Elot ("Saint-Elot"), allegedly received personal injuries and sought medical treatment from Healthcare Provider Defendants. Plaintiff brings this action seeking a declaration that Defendants are not entitled to receive No-Fault reimbursements based on Saint-Elot's failure to meet a condition precedent to coverage as set forth in the applicable policy and the No-Fault Regulations.

Plaintiff previously obtained a default judgment against defendant, Star Medserve, P.C.

Plaintiff now moves for summary judgment against the following defendants based upon Saint-Elot's failure to attend duly scheduled examinations: Carlos Saint-Elot, Charles Deng Acupuncture, P.C., Action Potential Chiropractic, PLLC, Island Life Chiropractic Pain Care, PLLC, Gentlecare

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

Ambulatory Anesthesia Services, Jules Francois Parisien, MD, Maria Shiela Masiglia, PT, and Maiga Products Corporation.

Alternatively, Plaintiff moves for summary judgment as against the following defendants based upon said defendants' failure to appear for their duly scheduled EUO's: Charles Deng Acupuncture, P.C., Action Potential Chiropractic, PLLC, Island Life Chiropractic Pain Care, PLLC, Gentlecare Ambulatory Anesthesia Services, and Jules Francois Parisien, MD.

Plaintiff submits the following: the affirmation of Roshin Thomas, Esq., the affidavit of Allan S. Hollander, Esq., and the affidavit of Irene DeSimone-Ford, an investigator in Plaintiff's Special Investigative Unit.

Hollander's affidavit avers to the standard office procedure for mailing EUO scheduling letters and Saint-Elot and Defendants' failure to appear at the duly scheduled and noticed EUO's.

De-Simone Ford's affidavit avers to the investigation into the alleged facts and circumstances surrounding the alleged accident incident and medical treatment rendered to Saint-Elot, Saint-Elot's failure to appear at his duly scheduled and noticed EUO, and defendants Charles Deng Acupuncture, P.C., Action Potential Chiropractic, PLLC, Island Life Chiropractic Pain Care, PLLC, Gentlecare Ambulatory Anesthesia Services, and Jules Francois Parisien, MD's failure to appear at their duly scheduled and noticed EUOs.

Healthcare Provider Defendants, Charles Deng Acupuncture, PC, Action Potential Chiropractic, PLLC, Island Life Chiropractic Pain Care, PLLC, Gentlecare Ambulatory Anesthesia Services, Jules Francois Parisien, MD, Maria Shiela Masiglia, PT, and Maiga Products Corporation, (collectively, "Opposing Defendants") oppose. Defendant, Saint-Elot, does not oppose.

Opposing Defendants submit the attorney affirmation of Oleg Rybak, Esq.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg.*

*Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

The No-Fault Regulations provide that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

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.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to appear for an EUO is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 [1st Dep't 2011]; *Hertz Corp. v. V.S. Care Acupuncture, P.C.*, 2013 NY Slip Op 30895(U), \*3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A) [N.Y. App. Term 2012].

Accordingly, when the claimants or the assignors fail to appear for the requested exams, “the defendant insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the 30 day period . . . Since the contract has been vitiated, defendant may deny all the claims retroactively to the date of loss.” See *LK Health Care Prods. Inc. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1230(A), \*5 [N.Y. Civ. Ct. 2013].

“[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption.” *American Transit Insurance Company v. Lucas*, 111 A.D. 3d 423, 424 [1<sup>st</sup> Dept 2011]. A presumption of mailing “may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed.” *Residential Holding Corp.*

v. *Scottsdale Ins. Co.*, 286 A.D. 679, 680 [2d Dept 2001]).

Here, through the affidavits provided and exhibits thereto, Plaintiff has demonstrated prima facie entitlement to summary judgment, declaring that Defendants are not entitled to No-Fault Coverage for its assigned claims arising from the alleged collision in the Complaint based on the failure of Saint-Elot and Defendants to appear for their duly scheduled examinations under oath, violations of conditions precedent to No-Fault coverage and the No-Fault Regulations.

In opposition, Opposing Defendants fail to raise a triable issue of fact. Furthermore, Defendants failed to demonstrate a proper basis supporting its request for discovery. "Mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212(f), for postponing a decision on a summary judgment motion." *Kennerly v. Campbell Chain Co.*, 133 A.D. 2d 669, 670 [2<sup>nd</sup> Dept 1987]).

Wherefore, it is hereby,

ORDERED that plaintiff Lancer Insurance Company's motion for summary judgment is granted; and it is further

ORDERED and ADJUDGED that defendants Carlo Saint-Elot, Charles Deng Acupuncture, P.C., Action Potential Chiropractic, PLLC, Island Life Chiropractic Pain Care, PLLC, Gentlecare Ambulatory Anesthesia Services, Jules Francois Parisien, MD, Maria Shiela Masiglia, PT, and Maiga Products Corporation are not entitled to no-fault coverage for the motor vehicle accident that occurred on April 4, 2013 involving defendant, Carlo Saint-Elot, under Lancer Insurance policy Claim Number 1422393 as referenced in the Complaint.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

**Dated: AUGUST 25, 2014**



**HON. EILEEN A. RAKOWER**

**Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION**

**Check if appropriate:  DO NOT POST  REFERENCE**