

**Encompass Home & Auto Ins. Co. v Makendy**

2020 NY Slip Op 31907(U)

June 12, 2020

Supreme Court, New York County

Docket Number: 160580/2015

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

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ENCOMPASS HOME & AUTO INSURANCE COMPANY,

Plaintiff,

INDEX NO. 160580/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 012 013

- v -

ELIZINDA MAKENDY, MAXIME MAKENDY, MARCLISH DAVIDSON, ALICE ALARCON, JEFFERSON JUSTE, BEMBA KEITA, JEAN ADOLPHE, JOSEPH BLANC, VANESSA BLANC, SHANA DABADY, JEAN BAPTISTE EDRISZCARD, JOSEPH CARLINE, STEPHANIE LAURENT, MARIE LOUIS, ACCELERATED SURGICAL CENTER, ATLANTIC CHIROPRACTIC, P.C., AXIAL CHIROPRACTIC P.C., BARNET SURGICAL CENTER, COASTAL ANESTHESIA SERVICES, CPM MED SUPPLY INC., EFFECTIVE HEALTHCARE MEDICAL P.C., HUMAN TOUCH REHAB PT PLLC, ISURPLY LLC, LLJ THERAPEUTIC SERVICES PT P.C., MAXIM TYORKIN, MD, MEDICSURG, MIDDLE VILLAGE DIAGNOSTIC IMAGING P.C., NATASHA KELLY MD, NEW BEGINNING CHIROPRACTIC P.C., PRECISION MEDICAL PRODUCTS INC., PROMPT MEDICAL SUPPLY INC., SPECIALTY SURGERY OF SEACAUCUS, STAR OF N.Y. CHIROPRACTIC DIAGNOSTIC P.C., STATE CHIROPRACTIC P.C., TONG LI MD P.C., VISION REHAB PT P.C., VLADIMIR SHUR, XU GAO ACUPUNCTURE P.C., XVV INC., YEVGENIY MARGULIS PHD, AMERICAN ALTERNATIVE INSURANCE CORP., ADDITION ACUPUNCTURE P.C., ADVANCED RECOVERY EQUIPMENT AND SUPPLIES, LLC, AHMED MEDICAL CARE P.C., ANGELIC PHYSICAL THERAPY P.C., AOM MEDICAL SUPPLY, A.R.A MEDICAL CARE, P.C., APOLLO IMAGING MANAGEMENT LLC, ATLANTIC CHIROPRACTIC, PC, AXIAL CHIROPRACTIC P.C., BROOKLYN CARDIOVASCULAR CARE, P.L.L.C., CLEAR WATER PSYCHOLOGICAL SERVICES, P.C., DUNAMIS REHAB PT P.C., EAST SIDE PRIMARY MEDICAL CARE, P.C., EFFECTIVE HEALTHCARE MEDICAL P.C., EXCEL SURGERY CENTER, L.L.C., HAN XU ACUPUNCTURE, P.C., HORIZON PT CARE P.C., HUMAN TOUCH REHAB, PT, PLLC, KENSINGTON RADIOLOGY GROUP, P.C., LENEX SERVICES INC., LLJ THERAPEUTIC SERVICES, P.T. P.C., NEW BEGINNING CHIROPRACTIC P.C., NOEL BLACKMAN PHYSICIAN PC, ORTHOPRO SERVICES, INC., PARK AVENUE ORTHOPAEDICS, PC, PRECISION IMAGING OF NEW YORK, P.C., PROFESSIONAL CHIROPRACTIC CARE

DECISION + ORDER ON MOTION

P.C., PROMPT MEDICAL SUPPLY, INC., REGENCY HEALTHCARE MEDICAL, PLLC, SOVERA MEDICAL SUPPLY, CORP, SP ORTHOTIC SURGICAL & MEDICAL SUPPLY, INC., THERAPEUTIC CHIROPRACTIC SERVICES P.C., STATE CHIROPRACTIC, PC, TISBURY PSYCHOLOGICAL SERVICES P.C., TONG LI, MD, PC, US TECH REHAB INC., VISION REHAB PT, P.C., WEALTH OF HEALTH MEDICAL P.C., WINTHROP FIRST CARE MEDICAL SERVICES, P.C., XU GAO ACUPUNCTURE PC, ACCELERATED SURGICAL CENTER OF NORTH JERSEY, ANGELICA SARENAS, BARNETT SURGICAL CENTER, BARRY HUGHES, DANA WOLFSON, DR. LEE LOEWINGER, ELECTRO PHYSIOLOGIC MEDICAL DIAGNOSTICS, PC, EXCEL SURGERY CENTER, LLC, FRANCES SARIYA, GOTHAM MEDICAL SERVICES, HAAR ORTHOPEDICS & SPORTS MEDICINE, HEALTH EAST AMBULATORY SURGICAL CENTER, ILYCE MARANGA, JEFFREY BECK, JOHN IOZZIO, JUAN XU D/B/A ADDITION ACUPUNCTURE, PC, KSENIA PAVLOVA, D.O., MAXIMUM ORTHOPAEDICS AND SPORTS MEDICINE, MEDRITE URGENT CARE, MIDMARK DIAGNOSTICS GROUP, NATASHA KELLY, NEW YORK ORTHOPAEDIC SURGERY & REHABILITATION, NORTHEAST ANESTHESIA AND PAIN MANAGEMENT, PDCN EMERGENCY AMBULANCE, SOUTH DEAN ORTHOPAEDICS, SPECIALTY SURGERY OF SECAUCUS, LLC, SPORTS MEDICINE & ORTHOPAEDIC REHAB, PC, SPINE & ORTHOPAEDIC REHABILITATION CENTER, TITAN PHARMACY, USAA HEALTH PRODUCTS, INC., WINTHROP UNIVERSITY HOSPITAL,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 583, 585, 586

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 584, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598

were read on this motion to/for JUDGMENT - SUMMARY

In this staged accident, declaratory judgment action, plaintiff, Encompass Home & Auto Insurance Company (Encompass) moves for summary judgment pursuant to CPLR 3212 (Mot Seq No 012) on its remaining first two causes of action against defendants American Alternative

Insurance Corp. (American), Shana Dabady and CPM Med Supply Inc. (CPM)<sup>1</sup>. Cross-claim defendant American also moves for summary judgment (Mot Seq No 013) as against defendant, Dabady and remaining cross-claim defendants Prompt Medical Supply Inc., Brooklyn Cardiovascular Care, PLLC, Excel Surgery Center, LLC Orthopro Services, Inc., Prompt Medical Supply, Inc., Sovera Medical Supply Corp., SP Orthotic Surgical & Medical Supply, Inc., Dr. Lee Loewinger, Jeffrey Beck, John Iozzio, Ksenia Pavlova, DO, Midmark Diagnostics Group, Natasha Kelly, MD, Titan Pharmacy for declaratory and related relief.<sup>2</sup> By order dated January 2, 2020, Shana Dabady was afforded additional time to oppose Encompass's summary judgment motion but no opposition was filed on her behalf. Consequently, Encompass's summary judgment motion is only opposed by American to the extent Encompass seeks any relief as against American but otherwise American supports Encompass's motion. Cross-claim defendants Sovera Medical Supply, Corp., SP Orthotic Surgical & Medical Supply, Inc., and Ksenia Pavlova, DO (provider defendants) oppose American's summary judgment motion.

Motion sequence numbers 012 and 013 are consolidated for disposition.

### BACKGROUND

The subject of this action is an automobile collision that occurred on August 25, 2014.

According to a certified police report, a 2000 Honda registered to Encompass's insured, Elizinda

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<sup>1</sup> Encompass's first two causes of action seek: i) A declaratory judgment pursuant to CPLR 3001 that the alleged motor vehicle incident of August 25, 2014 (Encompass's claim # Z6228533) was not the product of a covered event as defined by the applicable insurance policy issued by Encompass inasmuch as the incident of August 25, 2014 was the product of a staged and/or intentional event; and ii) A declaratory judgment pursuant to CPLR 3001 that Encompass, by reason of no coverage, is not required to provide a defense and/or indemnification to any of the defendants who are an "insured" or an "insured operator" pursuant to those terms as set forth in the complaint for declaratory relief, in any current or future proceedings, including, but not limited to, any and 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 August 25, 2014 inasmuch as the incident was the product of a staged and/or intentional event.

Encompass obtained a default judgment against the remaining defendants by decision and orders dated June 9, 2017 and April 19, 2018 and the action was severed and continued as against American, Dabady and CPM.

<sup>2</sup> By decision and orders dated June 9, 2017 and September 28, 2017 Encompass obtained a default judgment against the defaulting parties listed in those decision and orders.

Maxime, and operated by Marclish B. Davidson was involved in a sideswipe collision on August 25, 2014 at approximately 1:50 am in Nassau County, New York with a 2007 Lincoln limousine operated by Bemba Keita. Alice Alarcon was a passenger in the Honda and the passengers in limousine were Jean Baptiste Edridzcar, Shana Dabady, Vanessa Blanc, Stephanie Laurent, Marie Louise, Jean Adolphe, Carline Joseph and Joseph Blanc (Ex 13, certified police report). The Encompass policy was issued to Elizinda Maxime and Makendy Maxime. The limousine was owned by Paris Limousine Services and insured by American. Subsequently, both Encompass and American opened investigations into the collision by among other things conducting examinations under oath of the individuals involved. Encompass's and American's investigations unearthed the following:

The driver of the Honda, Marclish B. Davidson resided at the time of the collision at 1290 Ocean Avenue, Brooklyn New York Apartment 3G (Exs 13 & 29, Davidson's driver's license) and his full name is Marclish Baptiste Davidson (Ex 29).

On July 14, 2015 a Marclish Baptiste was involved in an automobile collision where he struck a livery vehicle in Brooklyn, New York (Ex 30, certified copy of the MV-104 form). According to the police report and MV-104 form, Marclish Davidson and Marclish Baptiste share the same date of birth, address and driver's license number. On July 14, 2015 Marclish was operating a Ford registered to Peterson Bellevue, residing at 15 Taylor Street, Johnson City, NY (Ex 30).

On May 26, 2015 the Bellevue vehicle was being operated by Gersey Louissant when it sideswiped a livery vehicle. Alice Alarcon was a passenger in the Bellevue vehicle at the time, the same Alice Alarcon who was a passenger in the Encompass vehicle operated by Marclish on August 25, 2014 (Ex 31, certified copy of the May 26, 2015 police report).

Gersey Louissant, the driver of the Bellevue vehicle on May 26, 2015, was friends with her May 26, 2015 passenger, Alice Alarcon. Louissant was also friends with “Carly” and “Claud” residing at 499 Gates Avenue and had visited their apartment for parties (Ex 32, Examination Under Oath [EUO] of Louissant taken by Kemper Insurance, Peterson Bellevue’s insurer, pgs 6 – 31). “Carly” and “Claud” are Carline Joseph and Joseph Blanc, passengers in the limousine that Marclish sideswiped with the Honda on August 25, 2014. Louissant testified that “Carly’s” last name is Joseph and she resides at 499 Gates Avenue with her husband, Claud (*id.*). Carline Joseph testified that she lives at 499 Gates Avenue with Joseph Blanc, whose nickname is “Claud” (Ex 24, Carline Joseph’s EUO pgs14-24). Joseph Blanc testified that he lives at 499 Gates Avenue and his middle name is Claud, the name his friends call him (Ex 21, Joseph Blanc’s EUO, pgs 13-18).

In an action commenced by Kemper Insurance (NY Co Index No 154010/2016) seeking a declaration that the Bellevue vehicle was involved in staged accidents on May 26, 2015, July 14, 2015 (also involving Marclish) October 6, 2015, and January 3, 2016, Kemper obtained a signed stipulation from the driver of the Bellevue vehicle on January 3, 2016 that it was used to stage the accident (Ex 34, copy of the stipulation).

The 2000 Honda involved in the August 25, 2014 collision was purchased by Jefferson Juste but registered in his cousin’s name, Elizinda Maxime with whom he resides (Ex 14, Jefferson Juste’s EUO pgs 11 – 13; Ex 16 Elizinda Maxime’s EUO pgs 12 – 14). The Honda was insured by Elizinda and her husband, Makendy Maxime (Ex 1, summons and complaint with the Encompass policy annexed as Ex A). During his EUO, Juste first identified the driver of his Honda on August 25, 2014, as “Michael Marclish” then stated he knew the driver by his last name “Davidson”. The day before the collision Juste saw Marclish standing outside Juste’s home

and told him that he was too tired to follow through on his plans to help Marclish move (Ex 14 pg 25). During the conversation Juste had his keys but does not know how Marclish later came to possess them (Ex 14 pgs 27, 31, 42 – 45). Juste did not realize he did not have his keys until the next morning. He called Marclish to ask him if he had seen his keys and that is when he discovered Marclish had them (Ex 14 pg 36).

According to Elizinda Maxime, Juste gave her three different reasons why Marclish had the keys. First, he left them at Maxime's house by mistake, second, he gave Marclish the car to help him move, and third, Marclish took the keys without permission (Ex 16 pgs 27 -28).

Marclish testified that at the time of the collision he was driving a Nissan Pathfinder (not a Honda) owned by "Maxime" a female friend that he has known for two years but did not know her last name (Ex 18 pgs 14 – 15). Alarcon identified the woman as "Maxine Mackenzie" (Ex 15, Alice Alarcon's EUO pg 13). Marclish testified that he was given the car by Maxime's brother, "Richard" so he could pick up Maxime from a party on Long Island. "Richard" asked him to drive because his license was suspended. Marclish testified he does not know anyone by the name of Jefferson Juste. After the collision Marclish did not pick up Maxime and did not know what happened to her (Ex 18 pgs 16 – 29).

Juste testified that he has never used the name "Richard" and does not have any friends named Richard (Ex 14 pgs 9 & 56). Elizinda Maxime testified she does not know a Richard (Ex 16 pg 11) and that Juste is not her brother but her cousin (*id.* pg 6). Elizinda further testified she was not at a party on Long Island at the time of the collision, she was home (*id.* at 21). Juste testified that his license was never suspended (Ex 18 pg 11).

After the collision Marclish and Alarcon treated at the same medical facility located at Rutland Road and Utica Avenue in Brooklyn (Ex 15 pg 32; Ex 18 pg 51). The passengers in the



limousine also all treated at the same medical office on Ralph Avenue in Brooklyn. Except for Jean Adolphe, all the limousine passengers testified that Joseph Blanc referred them to the medical facility on Ralph Avenue (Ex 19 pg 61; Ex 20 pg 46; Ex 22 pg 59; Ex 24 pgs 37 – 38; Ex 25 pg 96; Ex 26 pg 39 – 40; Ex 20 pg 45 – 46; Ex 21 pgs 53 – 54). Jean Adolphe testified that Shana recommended the facility based upon the recommendation of an unknown friend (Ex 23 pgs 87 – 88 & 95 – 96). Shana Dabady testified that she was referred to the Ralph Avenue facility by Joseph Blanc (Ex 25 pg 96).

Again except for Jean Adolphe, the limousine passengers testified that the trip was arranged by Joseph Blanc or that they were going to a party for Blanc’s friend or family member (Ex 20 pg 13; Ex 21 pg 16 – 17; Ex 22 pg 21; Ex 24 pg 16; Ex 25 pg 24; Ex 26 pg 18). Jean Adolphe testified that Shana Dabady invited him to a party (Ex 23 pg 39) and Dabady testified that Blanc had invited her to a party (Ex 25 pg 24).

Encompass’s investigator discovered that Vanessa Blanc is “Facebook friends” with Marclish (Davis affd ¶ 16; Ex 36) although both Marclish and Vanessa denied knowing each other (Ex 18 pg 25; Ex 20 pg 30).

The drivers of both vehicles and all their passengers are named defendants in this action but only Shana Dabady answered the complaint and as mentioned above despite being afforded additional time to oppose Encompass’s summary judgment motion, Dabady did not submit opposition.

### DISCUSSION

“An intentional and staged collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance” (*Progressive Advanced Ins. Co. v*



*McAdam*, 139 AD3d 691, 692 [2<sup>nd</sup> Dept 2016]). The Court of Appeals described the modus operandi of staged accident rings in *Medical Society of the State of NY v Serio* as follows:

[R]ingleaders (often associated with organized crime) [ ] purchase minimum automobile insurance, perhaps under a fraudulent name, on wrecked or salvaged vehicles, and recruit others to fill up the vehicles and participate in staged accidents (typically sideswipes or fender benders). These purported victims [are] then steered to corrupt medical clinics, called ‘medical mills,’ where they feign[] aches, pains and soft tissue injuries. The medical mills [ ] then generate stacks of medical bills for each passenger, detailing treatments and tests that [are] unnecessary or never performed.

(100 NY2d 854, 861 2003]). Since direct proof of insurance fraud is rarely available, the requisite degree of proof can be satisfied by circumstantial evidence (*accord Liberty Mut. Ins. Co. v Young*, 124 AD3d 663, 664 [2<sup>nd</sup> Dept 2015] [circumstantial evidence at a framed issue hearing established that the subject collision was intentional]; 2423 *Mermaid Rlty. Corp. v NY Prop. Ins. Underwriting Assoc.*, 142 AD2d 124, 131 [2<sup>nd</sup> Dept 1988] [observing “[i]n view of the fact that direct proof of arson is seldom available, courts have recognized that the requisite degree of proof can be satisfied in civil cases by circumstantial evidence”]).

*Encompass’s Summary Judgment Motion*

Here, Marclish gained possession of the Honda without the consent or knowledge of the registered owner, Elizinda Maxime (Ex 16 pgs 19 – 24). Juste’s and Marclish’s explanations as to how Marclish obtained the keys to the Maxime’s Honda were contradictory and contrary to common experience and therefore, of no evidentiary value (*Moorhouse v Standard, NY*, 124 AD3d 1, 9 [1<sup>st</sup> Dept 2014] [observing “[i]n evaluating testimony, courts should not discard common sense and common knowledge”] [internal quotation marks omitted]). Marclish’s contradictory explanations as to how he obtained the keys to Maxime’s Honda are belied by the fact that Juste is not Maxime’s brother

and there is no brother named Richard. Further, Maxime was not at a party on Long Island, she does not know Marclish and he never picked her up at a party. Moreover, Marclish testified he does not know anyone by the name of Jefferson Juste, the individual who had the keys to the Honda before Marclish somehow obtained them.

Marclish's passenger Alarcon's explanation that they were driving to Long Island to pick up "Maxine Mackenzie" similarly lacks evidentiary value since there is no "Maxine Mackenzie." There is a "Makendy Maxime" who is Elizinda Maxime's husband and their names appear on the insurance documents and the police report. There is no reasonable inference that can be drawn from this evidence in favor of the nonmoving parties (*Rose v Da Ecib USA*, 259 AD2d 258, 259 [1<sup>st</sup> Dept 1999] [on a summary judgement motion the court is to draw all reasonable inferences in favor of the opposing party]). The various explanations for the trip to Long Island were fabricated since Marclish and Alarcon did not know the registered owner or insureds of the Honda, rather they obtained that information from the insurance documents without realizing Maxime is a surname.

Marclish's changing narratives surrounding the events of the accident are consistent with someone engaged in an ongoing staged accident ring. Marclish was involved in at least one other staged accident with a livery vehicle while he was driving a vehicle registered in someone else's name (Ex 30 [July 14, 2015 collision]). Marclish's July 14, 2015, collision occurred while he was driving the Bellevue vehicle which was involved in at least three other staged accidents on May 26, 2015, October 6, 2015 and January 3, 2016 (Ex M). Not only was Marclish connected to the Bellevue staged accidents, so was Alice Alarcon who was a passenger in the Bellevue vehicle on May

26, 2015 when it collided with a livery vehicle (Ex 31). The May 26, 2015 collision occurred when the Bellevue vehicle was being operated by Gersey Louissant. Louissant testified at her EUO that she was friends with Joseph Blanc and Carline Joseph who were passengers in the limousine in this case. Moreover, Joseph Blanc recruited all of the limousine passengers for the August 25, 2014 trip and he directed each of them to the same medical facility after the collision. While Marclish denied knowing anyone in the limousine, he is Facebook friends with one of passengers, Vanessa Blanc.

These direct and indirect interconnections among the individuals involved in the August 25, 2014 collision, “[i]n the absence of any explanation for these remarkable coincidences” is sufficient evidence to establish that Marclish, Alarcon and Joseph Blanc staged the August 25, 2014 collision and Joseph Blanc recruited the passengers for the limosine (*Access Capital v DeCicco*, 302 AD2d 48, 53 – 54 [1<sup>st</sup> Dept 2002] [circumstantial evidence sufficient to establish prima facie that defendant was involved in a financial fraud conspiracy]). Since plaintiff has made out its prima facie showing of entitlement of summary judgment, the burden shifts to defendants to demonstrate the existence of a triable issue of material fact (*Genger v Genger*, 123 AD3d 445, 447 [1<sup>st</sup> Dept 2014]). Since Marclish and Alarcon and all the other non-answering defendants failed to answer the complaint or oppose these motions, Marclish and Alarcon and all the other non-answering defendants are “deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). While Shana Dabady answered the complaint, she never opposed plaintiff’s summary judgment motion. Therefore, there

being no triable issue of fact presented, summary judgment must be granted in plaintiff's favor.

*American's Summary Judgment Motion*

American has established its prima facie entitlement of summary judgment for the same reasons' plaintiff has established its right to summary judgment; the direct and indirect interconnections among the individuals involved in the August 25, 2014 collision, "in the absence of any explanation for these remarkable coincidences" is sufficient evidence to establish that the August 25, 2014 collision was staged (*Access Capital*, 302 AD2d at 53 – 54). For the reasons that follow, the provider defendants' opposition to American's motion, fails to raise an issue of fact (*Genger*, 123 AD3d at 447). Indeed, the provider defendants are precluded from raising issues of fact since by decision and order dated February 7, 2019, they were precluded from "introducing any evidence in this case". Therefore, the provider defendants are only permitted to argue and do argue that American has failed to establish its prima facie entitlement to summary judgment.

The provider defendants first argue that American has failed to establish that the provider defendants submitted claims as an assignor of someone that was part of the scheme to create the intentional accident. The provider defendants cite *State Farm Mut. Auto. Ins. Co. v Langan* for the proposition that the August 25, 2014 collision must be viewed from the perspective of the innocent insured rather than the tortfeasor (16 NY3d 349, 356 [2011]). However, American (and Encompass) have established prima facie that none of the passengers in the limousine were innocent insureds. They were all

willing participants in the scheme, Joseph Blanc by organizing the trip to Long Island and the other passengers by allowing themselves to be recruited as willing participants.

The provider defendants next argue, without citation, that American has failed to meet its prima facie burden because American has not provided an assignment of benefits form for any of the individual defendants. However, since the crux of American's argument is that Article 52 of the Insurance Law ("motor vehicle accident indemnification act") is inapplicable because the August 25, 2014 collision was not an "accident" the assignment of benefits forms are irrelevant to establishing American's (and Encompass's) prima facie showing.

The provider defendant's arguments that the EUO's are inadmissible under CPLR 3117 and are inadmissible hearsay are similarly unavailing. EUO transcripts are admissible evidence on a motion for summary judgment provided they are certified by the court reporter and are EUOs of parties in the litigation since they would be considered party admissions (*Am. States Ins. Co. v Huff*, 119 AD3d 478, 479 [1<sup>st</sup> Dept 2014]). Here the EUO transcripts relied upon by American (and Encompass) are certified. To the extent that American (and Encompass) rely on non-party EUO transcripts they may be and were considered since they are accompanied by other direct evidence (*AIU Ins. Co. v Am. Motorists Ins. Co.*, 8 AD3d 83, 85 [1<sup>st</sup> Dept 2004]). Likewise, the provider defendants citations to a host of trial court decisions denying summary judgment to insurance companies on the grounds that the evidence presented was inadmissible are inapposite since as previously noted, the EUO transcripts are certified by court reporters and the other documentary evidence relied upon by American (and Encompass) are properly certified.

Finally, the provider defendants argue that summary judgment motions are premature as there has not been adequate time for discovery (in this case that is nearly five years old). A status conference order dated June 27, 2019, determined that “all outstanding discovery is complete[]” with no indication that the provider defendants, who appeared that day, objected or in any way disagreed that all discovery was complete. The June 27, 2019 order further provides that “[a]bsent good cause shown, any discovery issue not raised herein will be deemed waived.” If the provider defendants believed, as they argue now, that they were entitled to additional discovery, they were required to raise it on June 27, 2019 or at the very least make a motion pursuant to CPLR 2221 (d) to vacate the June 27, 2019 order. Since the provider defendants failed to indicate on June 27, 2019 that they believed they were entitled to additional discovery and because they failed to make a motion to vacate the June 27, 2019 order, as set forth in the June 27, 2019, they have waived their right to any additional discovery.

Accordingly, American’s summary judgment motion as it pertains to its third cross-claim (No Coverage for Staged Losses) and fifth cross-claim (Damages) must be granted. To the extent that American’s summary judgment motion addresses its remaining causes of action, it will be denied as academic in light of the granting summary judgment to American on its staged loss and damages cross-claims.

Based on the foregoing, it is hereby:

**ORDERED** that Encompass’s motion for summary judgment on its remaining first two causes of action against American, Shana Dabady and CPM Med Supply Inc. (Mot Seq No 12) is granted; and it is further

**ADJUDGED AND DECLARED** that the motor vehicle collision of August 25, 2014 was not the product of a covered event as defined by the applicable insurance policy issued by Encompass Home & Auto Insurance Company, the August 25, 2014 collision was the product of a staged and/or intentional event; and it is further

**ADJUDGED AND DECLARED** that Encompass Home & Auto Insurance Company, by reason of no coverage, is not required to provide a defense and/or indemnification to any of the defendants who are an “insured” or an “insured operator” pursuant to those terms as set forth in the complaint for declaratory relief, in any current or future proceedings, including, but not limited to, any and 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 August 25, 2014 collision, the August 25, 2014 collision was the product of a staged and/or intentional event; and it is further

**ORDERED** that American’s motion for summary judgment on its third cross-claim as against defendant, Dabady and remaining cross-claim defendants Prompt Medical Supply Inc., Brooklyn Cardiovascular Care, PLLC, Excel Surgery Center, LLC Orthopro Services, Inc., Prompt Medical Supply, Inc., Sovera Medical Supply Corp., SP Orthotic Surgical & Medical Supply, Inc., Dr. Lee Loewinger, Jeffrey Beck, John Iozzio, Ksenia Pavlova, DO, Midmark Diagnostics Group, Natasha Kelly, MD, Titan Pharmacy is granted; and it is further

**ADJUDGED AND DECLARED** that the motor vehicle collision of August 25, 2014 was not the product of a covered event as defined by the applicable insurance



policy issued by American Alternative Insurance Corp., the August 25, 2014 collision was the product of a staged and/or intentional event; and it is further

**ADJUDGED AND DECLARED** that American Alternative Insurance Corp. has no duty to either defend nor indemnify the defendants and cross-claim defendants in any action, claim, suit, arbitration or other type of proceeding brought as a result of the August 25, 2014 collision; and it is further

**ADJUDGED AND DECLARED** that American Alternative Insurance Corp. has no duty to provide coverage for any claims for No-Fault benefits, personal injury, property damage, uninsured motorist benefits or underinsured motorist benefits made by or on behalf of any person or entity in connection with the August 25, 2014 collision; and it is further

**ORDERED** that American's motion for summary judgment on its fifth cross-claim is granted and American is entitled to damages in the amount of insurance benefits conferred to the defaulting parties, American shall submit by NYSCEF with a copy to [vzlotar@nycourts.gov](mailto:vzlotar@nycourts.gov) written proof of same within 20 days of entry of this order, any opposition to the damages sought by American shall be submitted by NYSCEF with a copy to [vzlotar@nycourts.gov](mailto:vzlotar@nycourts.gov) within 20 days after submission American's proof of damages, any reply by American shall be submitted by NYSCEF with a copy to [vzlotar@nycourts.gov](mailto:vzlotar@nycourts.gov) within 15 days thereafter, and American's motion for summary judgment is denied as to its remaining cross-claims and those remaining claims are dismissed.

6/12/2020

DATE

*Paul A. Goetz*  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: