

**GC Chiropractic P.C. v State Farm Mut. Auto. Ins.
Co.**

2022 NY Slip Op 34508(U)

October 18, 2022

Civil Court of the City of New York, Kings County

Docket Number: Index No. CV-761577-19KI

Judge: Nicholas W. Moyne

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Civil Court of the City of New York
County of Kings
Part: 41, Room: 809
Date: August 11, 2022



Index #: CV-761577-19/KI
Motion Seq #: 001, 004

Decision/Order

GC CHIROPRACTIC P.C. AAO LINO, PABLO
Plaintiff(s)

Present: Hon. Nicholas W. Moyné
Judge

-against-

STATE FARM MUTUAL AUTOMOBILE INS. CO. PIP/BI CLAIMS
Defendant(s)

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion for:

Judgment - Summary

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits	3, 4
Replying Affidavits	_____
Exhibits	_____
Stipulations	_____
Other _____	_____
_____	_____

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

The defendant’s motion for summary judgment is granted to the extent that the defendant has established the timely denial of the claims and the mailing of Examination Under Oath scheduling letters. The motion is otherwise denied. The plaintiff’s cross-motion for summary judgment is granted to the extent that the plaintiff has established the timely mailing of the bills and that said bills remain unpaid.

"It is well established that the proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016] [citations and quotation marks omitted].)

The defendant’s motion is based upon the alleged failure of the plaintiff to appear for two duly scheduled Examinations Under Oath (“EUO”) on August 11, 2017, and September 1, 2017. As their proof that the plaintiff failed to appear for the EUOs, the defendant has submitted an affidavit from Michael Hanratty, Esq., which is dated June 24, 2020, approximately three (3) years after the alleged non-appearance. Due to the significant lapse in time between the alleged non-appearance at the EUOs and the date of the affirmation, this Court declines to credit the affidavit as proof of the non-appearance.

A “Court is not required to accept the affiant’s testimony as competent evidence merely because he ‘swore to the fact’” (*Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 254 [1st Dept 2011]). “A conclusory statement from an attorney which fails to demonstrate his or her personal knowledge is insufficient to support summary judgment” (*Alrof, Inc. v Safeco Nat. Ins. Co.*, 39 Misc 3d 130(A) [App Term 2d Dept 2013]). The affirmation at issue herein states that it is “Based on my personal knowledge and a review of our records” (Hanratty Aff.). However, the affiant does not set forth what records were reviewed or attach any records. As such, the only evidence in admissible form demonstrating that the plaintiff failed to appear at the EUOs is the personal knowledge of the affiant (*see Beauvoir v Samuel*, 204 AD3d 741, 742 [2d Dept 2022] [“Here, the plaintiff’s conclusory affidavit, which was based upon unidentified sources, was insufficient”]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 [1st Dept 1997]).

Generally, “[t]he attorney who was assigned to the file and who would have conducted the EUO if the defendants had appeared certainly was in a position to state that the defendants did not confirm their appearances as directed in the notice and did not otherwise appear in his office on the date indicated” (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]). However, where, as here, the affirmation regarding an alleged failure to appear at an IME/EUO fails to adequately state the basis for the affiant’s knowledge more than a year after the alleged no-show, the affirmation lacks probative value (*see Vil. Med. Supply, Inc. v Travelers Prop. Cas. Co. of Am.*, 51 Misc 3d 126(A) [App Term 1st Dept 2016] [“The affidavits of defendant’s IME doctors lacked probative value, since they failed to state the basis of their recollection, some 12 months later, that the assignor did not appear on the scheduled IME dates”]; *Utica Acupuncture P.C. v Amica Mut. Ins. Co.*, 55 Misc 3d 126(A) [App Term 1st Dept 2017] [“The conclusory affirmation of defendant’s IME doctor lacked probative value, since she failed to adequately state the basis of her recollection, some two years later, that the assignor did not appear on the scheduled IME dates”]; *Westmed Physician, P.C. v State Farm Auto Ins. Co.*, 17 Misc 3d 133(A) [App Term 1st Dept 2007] [“Although the affidavit indicated that the affiant personally mailed the bill to defendant, it did not explain the office mailing practice of her employer nor did it state the basis for the affiant’s recollection, three years later, of mailing the bill”]; *Metro 8 Med. Equip., Inc. v Elrac, Inc.*, 50 Misc 3d 140(A) [App Term 1st Dept 2016] [“The affidavit of defendant’s chiropractor/acupuncturist, who affirmatively stated that she does not maintain records of a claimant’s nonappearances at IMEs scheduled with her office, lacked probative value, since it failed to state the basis of her recollection, some 18 months later, that the assignor did not appear on the scheduled IME dates”]; *Satya Drug Corp. v Glob. Liberty Ins. Co. of New York*, 65 Misc 3d 127(A) [App Term 1st Dept 2019] [The conclusory affirmation of defendant’s IME doctor lacked probative value, since he failed to adequately state the basis of his recollection, some 16 months later, that the assignor did not appear on the scheduled IME dates]; *see also Active Care Med. Supply, Corp. v Am. Tr. Ins. Co.*, 61 Misc 3d 1208[A] [Civ Ct Kings County 2018]).

Although the Appellate Term Second Department has accepted affirmations similar to the affirmation at issue in this case, it does not appear that any Second Department Appellate Court decision has directly addressed the issue of the probative value of an affirmation or affidavit made over a year after the alleged IME or EUO no-show (*see e.g. SVP Med Supply, Inc. (B) v GEICO*, 75 Misc 3d 139(A) [App Term 2022] [the affirmation submitted by defendant’s attorney, who was present in her office to conduct the EUO of plaintiff on the scheduled dates,

was sufficient to establish that plaintiff had failed to appear on those dates]; *Nat. Therapy Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 42 Misc 3d 137(A) [App Term 2d Dept 2014] [“contrary to plaintiff’s argument on appeal, the affirmation submitted by defendant’s attorney, who was present in his office to conduct plaintiff’s EUO on the scheduled dates, was sufficient to establish that plaintiff had failed to appear]; *Ocean Diagnostic Imaging, P.C. v Nationwide Mut. Ins. Co.*, 11 Misc 3d 135(A) [App Term 2d Dept 2006]).

Accordingly, I find that the affirmation of Michael Hanratty, Esq. is insufficient to conclusively establish that the plaintiff failed to appear at two EUOs. Hence, there remains an issue of fact as to the plaintiff’s failure to appear at the EUOs. Therefore, defendant’s motion for summary judgment is denied. This matter shall proceed to trial on the sole issue of the plaintiff’s failure to twice appear for the duly scheduled EUOs.

This constitutes the decision and order of the court.

Date: October 18, 2022



Hon. Nicholas W. Moyne, Judge, Civil Court