

State Farm Fire & Cas. Co. v CitiMedical I, PLLC

2023 NY Slip Op 31542(U)

May 8, 2023

Supreme Court, New York County

Docket Number: Index No. 151921/2020

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

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STATE FARM FIRE & CASUALTY COMPANY,

Plaintiff,

- v -

CITIMEDICAL I, PLLC, COMFORT PHYSICAL THERAPY, PLLC, ELMWOOD PARK MEDICAL GROUP PC, ENTERPRISE HEALTH PRODUCTS, INC., LONGEVITY MEDICAL SUPPLY, INC, NEW YORK CORE CHIROPRACTIC, P.C., PDA NY CHIROPRACTIC, P.C., PREFERRED MEDICAL, P.C., RF CHIROPRACTIC IMAGING, P.C., RIGHTWAY PHARMACY, INC., SOVEREIGN MEDICAL SERVICES, P.C., SPRUCE MEDICAL & DIAGNOSTIC, P.C., ASHLEY LUCAS, ISAIAH PEREZ

Defendant.

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INDEX NO. 151921/2020

MOTION DATE 03/16/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY.

Before this Court is the motion filed by plaintiff, State Farm Fire & Casualty Company (“State Farm/ Plaintiff”), seeking an Order, pursuant to *CPLR §3212*, for summary judgment against defendants, CITIMEDICAL I, PLLC, LONGEVITY MEDICAL SUPPLY, INC., PDA NY CHIROPRACTIC, P.C., and RIGHTWAY PHARMACY, INC (hereinafter collectively, “The Defendants”) as a matter of law based on the fact that the claimants, Ashley Lucas and Isaiah Perez, violated the No-Fault Regulation and applicable policy of insurance by repeatedly failing to submit to Examinations Under Oath. Defendants filed opposition and Plaintiff filed a reply.

Pursuant to the Complaint, on October 3, 2018, insured-driver Ashley Lucas (“Ms. Lucas”) and Isaiah Perez (“Mr. Perez”) (hereinafter collectively “The Claimants”) were allegedly involved in a motor vehicle collision that took place on 1124 Metcalf Avenue, Bronx, New York. The claimants allege they were parked in a 2012 Honda Pilot (“Insured Vehicle”) when another vehicle struck the insured vehicle and then fled the scene.

Plaintiff’s Affirmation in Support of the Motion

In support of the instant motion, plaintiff asserts that the claimants violated the No-Fault Regulation and applicable policy of insurance by failing to submit to Examinations Under Oath (“EUOs”). Plaintiff argues that there was a reasonable basis for requesting EUOs of the claimants since the claim raised issues as to whether Ms. Lucas made a misrepresentation in procuring the policy since Ms. Lucas originated the policy with a Potsdam, New York residence, however, at

the time of the collision, Ms. Lucas' drivers' license listed a Bronx, New York residence. In addition, the claim raised issues as to whether claimants were truly injured as they reported because: (1) the report at the scene of the accident indicated no injuries and everyone involved in the collision refused medical attention; (2) claimants began undergoing treatment following the alleged collision after claimants indicated no injuries at the scene of the accident; and (3) the incident involved a "phantom" vehicle that could not be identified.

Plaintiff requires injured persons to submit to Examinations Under Oath ("EUOs") pursuant to *11 N.Y.C.R.R. §6501.1*, which list the requirements for minimum benefit insurance policies for personal injuries. Plaintiff argues that the claimants breached a condition precedent for insurance coverage by not appearing for the scheduled EUO appointments, and they are ineligible to receive No-fault reimbursements for their claims. In further support of the motion, plaintiff claim that notices of the EUOs were mailed to the known addresses for the claimants, Ms. Lucas and Mr. Perez, as well as Mr. Perez's attorney. (*See, NYSCEF Doc. Nos. 59-64, 67-69*). Lastly, Plaintiff contends that the EUOs were timely scheduled and both Ashley Lucas and Isaiah Perez failed to appear for their respective appointments on two separate occasions. As a result, the plaintiff asserts that State Farm can deny the claimant's insurance claims.

On November 6, 2018, plaintiff submits they received the Application for Motor Vehicle No-Faults Benefits, which is also known as the NF-2 form, for Ms. Lucas. (*See, NYSCEF Doc. No. 57*). Thereafter, by letter dated November 21, 2018, State Farm requested that Ms. Lucas was to appear for an EUO to be held on December 13, 2018, at 10:00 a.m. at State Farm's attorneys' office, Goldberg, Miller, & Rubin ("GMR") located at 60 E. 42nd St., Suite 520, New York, New York 10165. Subsequently, Ms. Lucas informed GMR she would retain counsel and requested an adjournment of the EUO¹. A second letter, dated December 12, 2018, was sent to Ms. Lucas to appear for an EUO scheduled to be held on January 10, 2019, at 2:00pm at GMR's office. Ms. Lucas failed to appear on January 10, 2019. Then, a third letter, dated January 11, 2019, was sent to Ms. Lucas to appear for an EUO scheduled to be held on January 22, 2019, at 12:00pm at GMR's office. Ms. Lucas failed to appear again on January 22, 2019.

In addition, plaintiff contends that on November 6, 2018, State Farm received the NF-2 form for Mr. Perez. (*See, NYSCEF Doc. No. 65*). Thereafter, by letter dated, November 21, 2019, State Farm requested Mr. Perez to appear for an EUO to be held on December 12, 2018, at 2:00 pm to be held at GMR's office. Subsequently, Mr. Perez's counsel, Goldin & Rivin, PLLC ("Rivin counsel") requested that the EUO be re-scheduled. Then, a second letter, dated November 26, 2018, was sent to Mr. Perez to appear for an EUO scheduled on December 20, 2018, at 2:00pm to be held at GMR's office. On December 20, 2018, Rivin counsel appeared and received a phone call from Mr. Perez stating he would not be attending the EUO. State Farm sent a third letter dated December 21, 2018, to Mr. Perez to appear for an EUO scheduled for December 31, 2018, at 10:00 am to be held at GMR's office. On December 31, 2018, Rivin counsel appeared, however Mr. Perez failed to appear for the EUO.

Defendant's Affirmation in Opposition

In opposition, defendants, CITIMEDICAL I, PLLC, LONGEVITY MEDICAL SUPPLY, INC., PDA NY CHIROPRACTIC, P.C., and RIGHTWAY PHARMACY, INC (hereinafter collectively "The Defendants"), argue that plaintiff failed to satisfy the standards for summary judgment by failing to eliminate all factual issues and therefore, the motion must be denied. The defendants argue that the plaintiff failed to demonstrate compliance with the No-Fault Regulations,

¹ When Ms. Lucas requested an adjournment of the first EUO to obtain counsel, State Farm informed Ms. Lucas to forward a copy of said EUO notices to her attorney.

including by failing to submit verification request to claimants within fifteen days of receipt of a claim pursuant to *11 NYCRR §65-3.5*. The defendants also argue plaintiff's summary judgment motion is premature because there has not been adequate time for discovery and no depositions have been conducted. The defendants assert that plaintiff refused to provide discovery concerning its handling of the claimants' file.

Additionally, defendants argue plaintiff failed to prove the merits of the EUO no-show defense since plaintiff failed to submit sufficient competent and admissible evidence, based on personal knowledge that the EUO notices were emailed to the claimants and that they failed to appear for the EUO. Defendants further argue that plaintiff has not demonstrated proof that the letters were ever actually mailed or that they were mailed to the correct address, therefore the motion should be dismissed.

Plaintiff's Reply

In reply, plaintiff argues that the defendant's opposition papers do not contain the requisite certification of counsel pursuant to *22 NYCRR § 202.8-b*. Additionally, plaintiff contends that the opposition fails to offer an affidavit of an individual with personal knowledge of the facts, and the attorney affirmation is insufficient to raise a triable issue of fact in opposition to a motion for summary judgment. Furthermore, plaintiff asserts the EUO requests and denials were timely issued pursuant to *11 NYCRR §65-3.5(b)*, and State Farm timely requested the EUO to held within thirty days of receipt of the claims, which the claimants failed to appear. Lastly, plaintiff argues discovery is unnecessary and the answering defendants agreed on February 22, 2022, to waive any and all discovery in this matter, including examinations before trial ("EBTs") of all parties, therefore the motion should be granted.

Discussion

After a review of the motion papers, the exhibits and the arguments presented, the Court finds that the plaintiff established its *prima facie* burden that it is entitled to a judgment as a matter of law. *Winegrad, et al., v. New York University Medical Center*, 64 N.Y.2d 851 (1985). It is well established that an appearance at a properly scheduled examination under oath (hereinafter referred to as an "EUO") is a condition precedent to an insurer's liability to pay no-fault benefits. See *11 NYCRR § 65-1.1*; *Five Boro Psychological Servs., P.C. v. Progressive Northeastern Ins.*, 27 Misc.3d 141(A) (App. Term 2d Dept. 2010). The failure to appear for an EUO that was requested in a timely fashion by the insurer is a breach of a condition precedent to coverage and voids the policy *ab initio*. See, *Hertz Vehicles, LLC v. Alluri*, 171 A.D.3d 432 (1st Dep't 2019). The coverage defense applies to any claim and is not determined on a bill-by-bill basis. See, *PV Holding Corp. v. AB Quality Health Supply Corp.*, 189 A.D.3d 645, 646 [1st Dept. 2020]).

Here, the plaintiff submitted the affidavit of Richa Sinha, the claim specialist for State Farm, the affidavit of Zaire Scott, the paralegal for GMR, counsel for plaintiff, and the affidavit of Korina Serrano, the paralegal for GMR as Exhibits D, H, and I, respectively, to the motion. See, *NYSCEF Doc. Nos. 56, 60, and 61*. Richa Sinha attests, *inter alia*, to the dates and times that State Farm informed their counsel of the EUOs that were scheduled, and rescheduled for Ms. Lucas and Mr. Perez. Richa Sinha attested to the bills related to the subject accident that were denied because of the claimants' failure to appear to the scheduled EUOs. Zaire Scott attests, *inter alia*, to generating the letters requesting Mr. Lucas and Ms. Perez to appear for the EUOs with respect to their claim regarding the subject accident that occurred on October 3, 2018, and that those letters were not returned to the law office as undeliverable. Korina Serrano also attests, *inter alia*, to generating the letters requesting Mr. Lucas and Ms. Perez to appear for the EUOs, and that those letters were not returned to the law office as undeliverable.

The Court finds that the defendants provided nothing on this record to rebut the presumption of the mailing or receipt. *Quality Psychological Services, P.C. v Hartford Ins. Co.*, 38 Misc.3d 1210(A) (Kings County 2013). Moreover, there is nothing in the Court’s record to suggest that the scheduled EUOs were not justified, nor held at a place and time that was not reasonably convenient to the assignor. *See Eagle Surgical Supply Inc. v Progressive Cas. Inc.*, 21 Misc.3d 49 (App Term 2nd Dept. 2008). Here, plaintiff demonstrated that claimants, Ashley Lucas and Isaiah Perez each breached a condition precedent to coverage by failing to appear for properly noticed letters scheduling the EUOs on two separate occasions. *See, Herts Vehicles, LLC v. Alluri, supra*. Additionally, documentary evidence shows that plaintiff sent the EUO scheduling letters to the claimants within 15 business days of receiving the prescribed verification forms. *See 11 NYCRR 65-3.5(b)*; *see also, Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 A.D.3d 617 (1st Dep’t 2018). Here, the EUOs were timely requested and claimants’ failure to appear at that EUO voided the policy *ab initio* as to all claims. Accordingly, the Court finds that the plaintiff is entitled to summary judgment on the additional ground that the claimants, Ashley Lucas and Isaiah Perez, failed to appear to two scheduled EUOs. *See, Hertz Vehs. LLC v. Significant Care, PT, P.C.*, 157 A.D.3d 600 (1st Dep’t 2018).

Accordingly, it is hereby

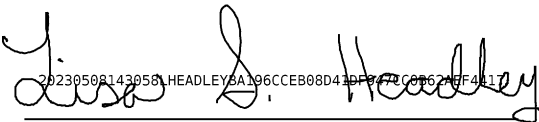
ORDERED that the branch of State Farm Fire & Casualty Company’s motion pursuant to *CPLR §3212* seeking summary judgment in its favor as to defendants CITIMEDICAL I, PLLC, LONGEVITY MEDICAL SUPPLY, INC., PDA NY CHIROPRACTIC, P.C., and RIGHTWAY PHARMACY, INC (hereinafter collectively “The Defendants”) as a matter of law based on the fact that the claimants, ASHLEY LUCAS and ISIAIAH PEREZ violated the No-Fault Regulation and applicable policy of insurance by repeatedly failing to submit to Examinations Under Oath is **GRANTED**; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that the case shall continue against the remaining defendants; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon the defendants with notice of entry.

This constitutes the Decision and Order of the Court.

<p style="text-align: center;"><u>5/8/2023</u> DATE</p>	 <small>20230508143058 HEADLEY SA 06CCEB08D43E877C06527FF4017</small> LISA S. HEADLEY, J.S.C.														
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