

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

2023 NY Slip Op 33220(U)

September 14, 2023

Supreme Court, New York County

Docket Number: Index No. 154167/2020

Judge: Leslie A. Stroth

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

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

INDEX NO. 154167/2020

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

MOTION DATE 05/16/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

ABETREE CHIROPRACTIC, P.C., ALL CITY FAMILY
HEALTHCARE CENTER, INC., ANANTHAKUMAR
THILLAINATHAN, M.D., ROCKAWAYS ASC
DEVELOPMENT, LLC D/B/A ASC OF ROCKAWAY BEACH,
ATLAS RADIOLOGY, P.C., BROOKLYN DOC MEDICAL,
P.C., COMPLETE NEUROPSYCHOLOGY, P.C., DELPHI
CHIROPRACTIC, P.C., DEV HEALTHCARE, P.C., HEALING
SERVICES, INC., INTEGRAL ASSIST MEDICAL,
P.C., HERSCHEL KOTKES, M.D., P.C., LENCO
DIAGNOSTIC LABORATORIES, INC., MEDPLANET, INC., M
& M SUPPLIES GROUP, INC., NORTH SHORE
UNIVERSITY HOSPITAL, NYRX PHARMACY,
INC., NYEEQASC, LLC, PERFORMANCE CHIROPRACTIC,
P.C., PROTECHMED, INC., QUEENS EMERGENCY
MEDICAL ASSOCIATES, PLLC, STEPHEN A.
MATRANGOLO, D.C., P.C., SMOOTH TOUCH
ACUPUNCTURE, P.C., SEDATION VACATION
PERIOPERATIVE MEDICINE, PLLC, STARLIGHT P.T.,
P.C., THOMPSON MEDICAL, P.C., UNICAST, INC., SHAWN
ALIDA

**DECISION + ORDER ON
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74, 75, 76, 77, 78,
79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96

were read on this motion to/for

JUDGMENT - SUMMARY

By notice of motion in this no-fault insurance declaratory judgment action, plaintiff moves for an
order granting it summary judgment against remaining answering defendants: Abetree Chiropractic, P.C.,
Ananthakumar Thillainathan, M.D., Medplanet, Inc., NYRX Pharmacy, Inc., and Thompson Medical,

P.C. (collectively, answering defendants)¹. Medplanet and NYRX (NYRX) oppose (collectively, opposing defendants).

Plaintiff contends that it is entitled to a judgment declaring that it need not pay any claims submitted by answering defendants for any medical services they provided to claimant Shawn Alida (claimant), as plaintiff duly requested that claimants appear for examinations under oath (EUOs) and claimants failed to appear, thereby vitiating coverage. Plaintiff also has a founded belief that claimants made misrepresentations regarding his residence and the primary garage location of the insured vehicle.

Opposing defendants each submit an affirmation in opposition in which they contend that plaintiff failed to establish its prima facie burden as it did not establish that its EUO requests were timely made or that it timely denied claimant's claims. Opposing defendants argue that the proof submitted in support of plaintiff's motion contains inconsistencies regarding claimant's purported non-appearances, barring summary judgment. NYRX further argues that plaintiff fails to sufficiently state the basis of its requests for EUOs.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). If the movant can so demonstrate, the burden shifts to the opposing party to proffer admissible evidence establishing a triable issue of fact. *See* CPLR3212 (b); *see also Zuckerman v City of New York*, 49 NY2d 557 (1980); *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 (2000). The court reviewing the motion must view the evidence in the light most

¹ Plaintiff withdrew the motion as against Herschel Kotkes, M.D., P.C.; Protech Med, Inc.; and Unicast.

favorable to the party opposing the motion, including resolving all reasonable inferences in that party's favor. *See Udoh v Inwood Gardens, Inc*, 70 AD3d 563 (1st Dept 2010).

Pursuant to 11 NYCRR 65-3.5 (b) and (d), an insurer has the right to seek additional verification, including an EUO, if, it believes that such verification is necessary to establish proof of the claim. Attendance at a timely and properly scheduled EUO is a condition precedent to coverage, and a claimant's failure to appear vitiates coverage. *Kamara Supplies v GEICO Gen. Ins. Co.*, 192 AD3d 588,590 (1st Dept 2021). “[T]o meet its prima facie burden for summary judgment where it has denied a claim for no-fault benefits based on a patient's failure to appear for an [EUO], the insurer must establish that it requested [EUOs] in accordance with the procedures and time frames set forth in the no fault implementing regulations and that the patient did not appear.” *American Tr. Ins. Co. v Martinez*, 202 AD3d 526, 526 (1st Dept 2022).

Plaintiff proved that it timely and properly sent the EUO letters to claimant Shaven Alida through the affirmation of plaintiff's counsel, Kyeko M. Stewart, Esq. (NYSCEF doc. no. 75), copies of the subject EUO scheduling letters, and proof of mailing of same (*see NYSEF* doc. no. 80). Attorney Stewart further affirms that his firm sent these letters by certified mail to claimant, via his counsel, and that claimant failed to appear for the scheduled EUOs on October 7, 2019 and November 1, 2019. *See* NYSCEF doc. no. 75. Attorney Stewart has personal knowledge of his office's business practices and was personally present at his office on the days that claimant failed to appear for his EUO. Plaintiff further submits an affidavit of merit by Denise Avallon, Claim Specialist, plaintiff's claim's adjuster assigned to claimant's matter.

In turn, opposing counsels' affirmations, coming from individuals without personal knowledge, have no probative value. In any event, counsels' affirmations create no material issue of fact for trial. *See GTF Marketing Inc. v Colonial Aluminum Sales. Inc.*, 66 NY2d 965, 968 (1985) (“As we have previously

noted, an affidavit or affirmation of an attorney without personal knowledge of the facts cannot 'supply the evidentiary showing necessary to successfully resist the motion.'") (citation omitted).

As plaintiff submits affidavits from people with personal knowledge of the mailing of the EUO letters and of claimants' non-appearance at the EUOs, it satisfies its burden of proving that the letters were mailed and that the claimants failed to appear. See *Hertz Corp v Active Care Med. Supply Corp.*, 124 AD3d 411,411 (1st Dept 2015). Opposing defendants fail to raise a triable issue of fact. Moreover, as claimants did not appear at their timely-scheduled EUOs, coverage is vitiated, and plaintiff was not required to deny the claims within the statutory timeframe. See *PV Holding Corp. v Hank Ross Med., P.C.*, 188 AD3d 429,430 (1st Dept 2020). Therefore, plaintiff is entitled to summary judgment on its declaratory judgment claims against answering defendants.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment against Abetree Chiropractic, P.C., Ananthakumar Thillainathan, M.D., Medplanet, Inc., NYRX Pharmacy, Inc., and Thompson Medical, P.C. is granted; and it is further

ORDERED that, within 30 days of the date of this order, plaintiff is directed to submit a proposed order and judgment in accordance with this decision via NYSCEF with a courtesy copy e-mailed to riwohl@nycourts.gov and sfc-part12-clerk@nycourts.gov.

The foregoing constitutes the decision and order of the Court.


LESLIE A. STROTH, J.S.C.

9/14/2023
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED
<input checked="" type="checkbox"/>	GRANTED
<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input checked="" type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION:

CHECK IF APPROPRIATE: