

<b>Hertz Corp. v V.S. Care Acupuncture, P.C.</b>
2013 NY Slip Op 30895(U)
April 19, 2013
Sup Ct, New York County
Docket Number: 112137/10
Judge: Joan A. Madden
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**HON. JOAN A. MADDEN**

PRESENT: J.S.C.  
*Justice*

PART 11

Index Number : 112137/2010  
HERTZ CORPORATION  
vs.  
V.S. CARE ACUPUNCTURE, P.C.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision, order and judgment.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

### UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 19, 2013

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
THE HERTZ CORPORATION,

INDEX NO. 112137/10

Plaintiff,

-against-

V.S. CARE ACUPUNCTURE, P.C., ALL BORO  
PSYCHOLOGICAL SERVICES, P.C., V&T MEDICAL, P.C.,  
PUGSLEY CHIROPRACTIC, PLLC, CITY MEDICAL  
DIAGNOSTICS, P.C., NAGIY MEDICAL SERVICES, P.C.,  
a/k/a NAQIY MEDICAL SERVICES P.C., DUMONT  
MEDICAL DIAGNOSTIC, P.C., ORTHO-MED SURGICAL  
SUPPLIES, INC., COMPREHENSION PT, P.C., and  
MICHAEL WATSON,

Defendants.  
-----X

JOAN A. MADDEN, J.: - - - - -

In this action for declaratory relief as to no-fault insurance coverage, plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment against defendant All Boro Psychological Services, P.C. (hereinafter "All Boro"), declaring that no coverage exists for its claims, and dismissing its counterclaim for attorney's fees. Defendant All Boro opposes the motion.<sup>1</sup>

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212 [b]; Winegrad

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<sup>1</sup>Defendant All Boro is the only defendant to appear and answer in this action. Plaintiff previously moved for a default judgment against all the other defendants, they all defaulted on the motion and on February 9, 2012, this court issued an order granting plaintiff's motion.

[\* 3]

v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp., 70 AD3d 508, 510 (1<sup>st</sup> Dept 2010). Once such showing is made, the opposing party must “show facts sufficient to require a trial of any issue of fact.” CPLR 3212 (b); see Zuckerman v. City of New York, *supra* at 562.

Plaintiff has established prima facie entitled to judgment as a matter of law. Plaintiff submits an affirmation; an affidavit of its claims representative, Karen Layne; the pleadings; the police accident report; the transcript of defendant Michael Watson’s examination under oath; plaintiff’s May 13, 2010 letter to All Boro scheduling an examination under oath (EUO) for May 27, 2010 and an affidavit of service as to that letter; plaintiff’s June 2, 2010 letter to All Boro scheduling an EUO for June 15, 2010 and an affidavit of service as to that letter; and plaintiff’s notice dated June 17, 2010, denying All Boro’s claim for \$1,061.63, based on All Boro’s failure to appear for the EUOs on May 27, 2010 and June 15, 2010.

The affidavits of service establish that the notices of the EUOs were mailed to All Boro. The affirmation from attorney Harlen R. Schreiber establishes that All Boro failed to appear. The EUOs were to be held at his office, and he states that on May 27, 2010 and June 15, 2010, he “waited at the scheduled location until 1:00 pm,” and no representative of All Boro appeared and All Boro did not contact his office.

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 breach voids the policy ab initio. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1<sup>st</sup> Dept), *lv app den* 17 NY3d 705 (2011); Stephen Fogel Psychological, P.C. v. Progressive Casualty

[\* 4]

Insurance Co, 35 NY3d 720 (2<sup>nd</sup> Dept 2006). Since it is undisputed that defendant All Boro failed to appear for the two scheduled EUOs, plaintiff had a right to deny All Boro's claim based on breach of a condition precedent to coverage. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra. Plaintiff therefore has met its burden on the motion and the burden shifts to defendant All Boro to raise a triable issue of material fact.

In opposing the motion, defendant All Boro does not deny receipt of plaintiff's letters requesting the EUOs, and does not deny that it failed to appear for the two scheduled EUOs. Rather, defendant All Boro argues that plaintiff is required, as part of its prima facie case, to submit All Boro's bill so it can show that the denial was issued within 30 days of receipt of the bill. All Boro, however, acknowledges that in Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra, the First Department Appellate Division holds that a timely denial is not required, and this court is bound by that authority. See also Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co, supra.

Defendant All Boro's argument that plaintiff must prove that it willfully refused to attend the EUOs is without merit. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra. Defendant's objections to the form and content of plaintiff's EUO request letters, and the transcript and content of Watson's examination, are likewise without merit. See id. Plaintiff submits that it was not required to state its reason for the EUO, and cites as authority, a decision of the New York State Department of Insurance, that "[n]either N.Y. Comp. Codes R. & Reg. tit. 11 § 65-3.5(e) or other provision of No-Fault Regulation 68 requires an insurer's notice scheduling an EUO to specify the reason(s) why the insurer is requiring the EUO." State of New York Ins. Dept Op (Dec 22, 2006).

[\* 5]

Defendant also objects that the affidavit of plaintiff's claims examiner Karen Layne lacks a certificate of conformity, but the absence of a certificate of conformity as required under CPLR 2309© is a "mere irregularity and not a fatal defect." Matapos Tech Ltd v. Compania Andina de Comercio Ltda, 68 AD3d 672, 673 (1<sup>st</sup> Dept 2009); see also Hall v. Elrac, Inc, 79 AD3d 427 (1<sup>st</sup> Dept 2010). Defendant All Boro's remaining arguments are without merit.

Thus, since defendant All Boro has failed to raise an issue of material fact, plaintiff is entitled to judgment as a matter of law.

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that defendant All Boro's counterclaim for attorney's fees is dismissed; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff The Hertz Corporation owes no duty to defendant All Boro Psychological Services, P.C. to pay No-Fault claims with respect to the February 9, 2010 collision involving defendant Michael Watson as the occupant of the insured vehicle, which is referenced as claim number 02-2010-03747; and it is further

ORDER AND ADJUDGED that any arbitrations brought by defendant All Boro Psychological Services, P.C. relating to the February 9, 2010 collision are permanently stayed.

DATED: April 19 2013

ENTER:



J.S.C.