

**Kemper Independence Ins. Co. v Clearview of
Brooklyn Med., P.C.**

2013 NY Slip Op 30906(U)

April 23, 2013

Sup Ct, New York County

Docket Number: 100249/11

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 100249/2011
KEMPER INDEPENDENCE INSURANCE
vs.
CLEARVIEW OF BROOKLYN MEDICAL
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). _____

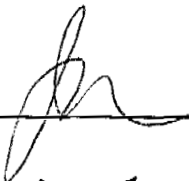
Replying Affidavits _____ | No(s). _____

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 23, 2013

 _____, 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
KEMPER INDEPENDENCE INSURANCE COMPANY,

INDEX NO.100249/11

Plaintiff,

-against-

CLEARVIEW OF BROOKLYN MEDICAL, P.C., FEMA
MEDICAL SUPPLY, INC., GRS CHIROPRACTIC, P.C.,
LIFE TREE ACUPUNCTURE, P.C., MDJ MEDICAL, P.C.,
OPTIMAL WELL BEING CHIROPRACTIC, P.C., V & T
MEDICAL, P.C., VICTORY REHAB PT, P.C., TRAVIS
CODRINGTON, KANDIA MICHEL, ROBERT AARON,
and RONY ISSAC,

Defendants.
-----X

JOAN A. MADDEN, J.:

In this action for declaratory relief as to no-fault insurance coverage, defendants GRS Chiropractic, P.C., Life Tree Acupuncture, P.C., MDJ Medical P.C. and Victory Rehab PT, P.C. (the “moving defendants”) are moving for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against them.¹ Plaintiff opposes the motion and cross-moves for summary judgment against the same defendants, declaring that there is no coverage for their claims.

¹By order dated April 12, 2012, this court granted plaintiff’s previous motion for a default judgment against defendants Clearview of Brooklyn Medical, P.C., FEMA Medical Supply, Optimal Well Being Chiropractic, P.C., V&T Medical P.C. The order also denied the motion with respect to the instant moving defendants. It is unclear what the status of the action is as to the individual defendants, Travis Codrington, Kandia Michel, Robert Aaron and Rony Isaac. Plaintiff states that counsel for the moving defendants initially answered for Kandia Michel, Rony Isaac and Robert Aaron, but withdrew their representation on the record before this court.

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 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 (1st 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.

Defendants’ motion is denied, as they have failed to satisfy the evidentiary requirements of CPLR 3212, which requires an affidavit and competent proof. Defendants submit only an attorneys affirmation, the pleadings, and this court’s April 12, 2012 order, which, inter alia, denied plaintiff’s prior motion for a default judgment against the same four defendants. Moreover, defendants’ arguments in support of the motion are addressed to the sufficiency of the allegations in the complaint. Those arguments are appropriate for a CPLR 3211 pre-answer motion to dismiss, but not a CPLR 3212 summary judgment motion.

Turning to plaintiff’s cross-motion for summary judgment, plaintiff seeks a declaration that there is no coverage for the moving defendants’ claims for non-fault benefits, on two separate and alternative grounds: 1) Robert Aaron and the moving defendants failed to appear for examinations under oath (EUOs), which was a breach of condition precedent to coverage under the no-fault regulations; and 2) plaintiff maintains a founded belief that the collision and any subsequent treatment were not related to a covered event under the policy.

In support of the motion, plaintiff submits affirmations; an affidavit of its claims representative, Denise Winat; the pleadings; the police accident report; the transcripts of the examinations under oath of defendants Travis Codrington, Kandia Michel and Rony Isaac; plaintiff's May 24, 2010 letters to the moving defendants scheduling EUOs for June 7, 2010 and affidavits of service as to each letter; plaintiff's June 14, 2010 letters to the moving defendants scheduling EUOs for June 28, 2010 and affidavits of service as to each letter; and plaintiff's notices denying the moving defendants' claims, based on their failure to appear for the EUOs on June 7, 2010 and June 28, 2010.

The affidavits of service establish that the notices of the EUOs were mailed to the moving defendants and the affirmation from attorney Harlen R. Schreiber establishes that they failed to appear. 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 (1st Dept), lv app den 17 NY3d 705 (2011); Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co, 35 NY3d 720 (2nd Dept 2006). Since it is undisputed that the moving defendants failed to appear for the two scheduled EUOs, plaintiff had a right to deny their claims 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 of establishing prima facie entitlement to judgment as a matter of law and the burden shifts to defendants to raise a triable issue of material fact.

In opposing the motion, the moving defendants fail to raise a material issue as to their failure to appear for the EUOs. Notably, the moving defendants neither deny receipt of

plaintiff's letters requesting the EUOs, nor deny that they failed to appear for the two scheduled EUOs. Contrary to the moving defendants' assertion, the affidavits of service by regular mail are sufficient to establish that the plaintiffs' letters requesting the EUOs were sent to the moving defendants. As noted above, the moving defendants do not deny receipt of the EUO requests. Moreover, since the moving defendants submit no evidentiary proof that they responded in any way to the EUO requests when they received them in 2010, defendants will not now be heard to object that no reasonable basis existed for the EUO requests. See Flatlands Medical, PC v. State Farm Mutual Automobile Insurance Co, 38 Misc3d 135(A) (App Term 2013); Viviane Etienne Medical Care, PC v. State Farm Mutual Automobile Insurance Co, 35 Misc3d 127(A) (App Term 2012); Crescent Radiology, PLLC v. American Transit Insurance Co, 31 Misc3d 134 (App Term 2011). While the moving defendants also object that plaintiff has not established that it timely denied the claims in accordance with the no-fault regulations, a timely denial is not required. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, *supra*; Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co, *supra*.

To the extent defendants' objections address the alternative ground for plaintiff's motion, i.e. plaintiff's founded belief that the collision and any subsequent treatment were not related to a covered event under the policy, the court need not consider those objections. The court makes no determination as to that alternative ground, and has only determined that the moving defendants breached a condition precedent to coverage by not appearing for the EUOs. The balance of the moving defendants' objections are without merit.

Accordingly, it is

ORDERED that defendants' motion is denied and plaintiff's cross-motion is granted; and

* 6]
it is further


ORDERED ADJUDGED AND DECLARED that plaintiff Kemper Independence Insurance Company owes no duty to pay No-Fault claims to defendants GRS Chiropractic, P.C., Life Tree Acupuncture, P.C., MDJ Medical P.C. and Victory Rehab PT, P.C., with respect to the December 19, 2009 collision under policy number VF 873793 and claim number 331A6477490; and it is further

ORDERED that the action is severed and shall continue as against the remaining defendants, if any; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on May 30, 2013 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: April 23, 2013

ENTER:



J.S.C.