

**DTG Operation, Inc. v KJC Chiropractic, P.C.**

2014 NY Slip Op 30184(U)

January 2, 2014

Sup Ct, New York County

Docket Number: 104446/11

Judge: Joan A. Madden

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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. JOAN A. MADDEN  
J.S.C. Justice

PART 11

Index Number : 104446/2011  
DTG OPERATIONS INC D/B/A  
vs.  
KJC CHIROPRACTIC 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). \_\_\_\_\_

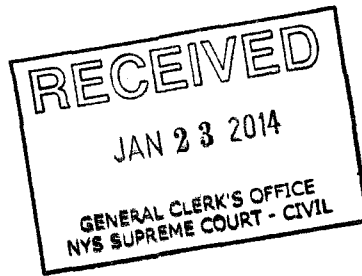
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

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

### 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).



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

Dated: January 2, 2014

[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  
DTG OPERATION, INC., d/b/a DOLLAR RENT-A-CAR, INDEX NO. 104446/11

Plaintiff,  
-against-

KJC CHIROPRACTIC, P.C., NOVA ACUPUNCTURE, P.C.,  
OMEGA DIAGNOSTIC IMAGING, P.C., ART OF HEALING  
MEDICINE, P.C., ABC PHYSICAL THERAPY, P.C., RECOVERY  
PT REHAB, P.C., STAR MEDICAL & DIAGNOSTIC, PLLC,  
BARON LEA, INC., JUNIOR SIDOINE, JEAN ROOSEVELT  
and JEAN PINOCHET,

Defendants.

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

**UNFILED JUDGMENT**

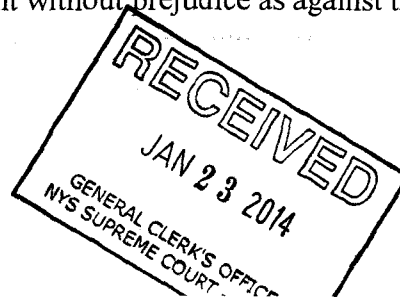
**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

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 defendants KJC Chiropractic, P.C., Nova Acupuncture, P.C., Art of Healing Medicine, P.C., ABC Physical Therapy, P.C., and Recovery PT Rehab, P.C. (hereinafter the "answering defendants"). Those defendants oppose 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>The only appearing defendants are KJC Chiropractic, P.C., Nova Acupuncture, P.C., Art of Healing Medicine, P.C., ABC Physical Therapy, P.C. and Recovery PT Rehab, P.C. In an order dated February 9, 2013, this court granted plaintiff's prior motion for a default judgment against the non-appearing defendants, Omega Diagnostic Imaging, P.C., Star Medical and Diagnostic, PLLC, Baron Lea, Inc. and Junior Sidoine. Plaintiff's counsel advises that the two remaining defendants, Jean Roosevelt and Jean Pinochet "could not be located for service of process." The Court will therefore dismiss the complaint without prejudice as against those defendants.



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 entitlement to judgment as a matter of law. Plaintiff submits affirmations from Jason Eson and Joseph R. Federici; an affidavit from its claims representative, Kara Wilkins; the pleadings; photographs; the police accident report; the vehicle rental agreement; plaintiff’s letters scheduling examinations under oath (EUOs) and affidavits of service as to those letters; and plaintiff’s Denial of Claim Forms stating that no-fault benefits were denied based on the injured parties’ failure to appear for EUOs.<sup>2</sup>

The affidavits of service establish that the notices of the EUOs were mailed to the injured parties, defendants Sidoine, Roosevelt and Pinochet, as well as the attorney representing Sidoine and Roosevelt. The affirmation from attorney Joseph R. Federici establishes that none of the injured parties appeared for any of the scheduled EUOs. The EUOs were to be held at Federici’s office, and he states that on each of the days on which an EUO was scheduled, he “waited” in his office for the injured parties to appear, but they failed to do so and “did not call seeking an adjournment.”

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<sup>2</sup>The claims submitted on behalf of Sidoine, Roosevelt and Pinochet were denied based on their failure to appear for EUOs, and Pinochet’s claims were also denied for failure to appear for independent medical examinations (IMEs).

Based on the foregoing, plaintiff has made a prima facie showing that the notices of the EUOs were mailed to the injured parties and/or their attorney, and the injured parties failed to appear on each of the scheduled dates. 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 Insurance Co, 35 NY3d 720 (2<sup>nd</sup> Dept 2006). Since it is undisputed that defendants Sidoine, Roosevelt and Pinochet failed to appear for the scheduled EUOs, plaintiff had a right to deny the claims of defendant medical providers, 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 defendants to raise a triable issue of material fact.

In opposing the motion, the answering defendants do not dispute that Sidoine, Roosevelt and Pinochet failed to appear for the EUOs on the scheduled dates, and that Sidoine, Roosevelt and Pinochet, and the attorney for Sidoine and Roosevelt, never objected to the EUO requests. Rather, the answering defendants argue that: 1) discovery is outstanding; 2) plaintiff has not demonstrated that it “properly requested” the EUOs, as there is “no proof” that the EUO letters were sent to the correct addresses; 3) plaintiff is precluded from asserting that the underlying accident was “staged” since it did not deny the claims on that basis; and 4) plaintiff’s assertions that the accident was staged or the claims not causally related, are based on hearsay.

The answering defendants object that summary judgment is premature since discovery is outstanding. The absence of discovery, however, does not require denial of plaintiff’s motion, as

the answering defendants fail to show that facts essential to oppose the motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1<sup>st</sup> Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d 418 (1<sup>st</sup> Dept 2009); Bank of America, N.A. v. Tatham, *supra*.

The answering defendants also fail to raise an issue of material fact as to whether the EUO letters were mailed to the correct addresses. Defendants submit no competent proof showing or suggesting that any of the addresses to which the letters were mailed were incorrect. Notably, with respect to Sidoine and Roosevelt, the affidavits of service show that the EUO letters were not only mailed to Sidoine and Roosevelt, but also to their attorney, Perchekly & Associates. The record shows that the attorney responded by requesting a change in the "time slots" for EUOs scheduled for September 10, 2010. The record also shows that plaintiff granted such request, but neither Sidoine nor Roosevelt appeared.

As noted above, the answering defendants submit no evidentiary proof that Sidoine, Roosevelt or Pinochet, or the attorney for Sidoine and Roosevelt, objected to plaintiff's EUO requests when they received them in 2010. For that reason, the answering defendants will not now be heard to object that no reasonable basis existed for such 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).

The court has considered the balance of the answering defendants' arguments, and finds

that they are likewise without merit. Thus, in the absence of a material issue of fact, plaintiff is entitled to judgment as a matter of law against defendants KJC Chiropractic, P.C., Nova Acupuncture, P.C., Art of Healing Medicine, P.C., ABC Physical Therapy, P.C., and Recovery PT Rehab, P.C.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendants KJC Chiropractic, P.C., Nova Acupuncture, P.C., Art of Healing Medicine, P.C., ABC Physical Therapy, P.C., and Recovery PT Rehab, P.C. is granted; and it is further


ORDERED ADJUDGED AND DECLARED that plaintiff DTG Operations, Inc. d/b/a Dollar Rent-A-Car, owes no duty to defendants KJC Chiropractic, P.C., Nova Acupuncture, P.C., Art of Healing Medicine, P.C., ABC Physical Therapy, P.C. and Recovery PT Rehab, P.C. to provide No-Fault coverage or benefits for any claims arising out of the motor vehicle accident that allegedly occurred on May 30, 2010; and it is further

ORDERED AND ADJUDGED any arbitrations brought by defendants KJC Chiropractic, P.C., Nova Acupuncture, P.C., Art of Healing Medicine, P.C., ABC Physical Therapy, P.C. and Recovery PT Rehab, P.C., relating to the May 30, 2010 collision, are permanently stayed; and it is further

ORDERED that the complaint is dismissed without prejudice as against defendants Jean Roosevelt and Jean Pinochet.

DATED: January 2, 2014

ENTER:

  
\_\_\_\_\_  
J.S.C.

**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).