

**Unitrin Auto & Home Ins. Co. v Advances Med.
Diagnostics, P.C.**

2014 NY Slip Op 31912(U)

July 11, 2014

Supreme Court, New York County

Docket Number: 106156/11

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 : 106156/2011
UNITRIN AUTO & HOME INS. CO.
VS.
ADVANCED MEDICAL DIAGNOSTICS,
SEQUENCE NUMBER : 003
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.*

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: July 11, 2014

_____, 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
UNITRIN AUTO & HOME INSURANCE COMPANY,

INDEX NO. 106156/11

Plaintiff,

-against-

ADVANCED MEDICAL DIAGNOSTICS, P.C.,
ADVANCED ORTHOPAEDICS, PLLC, ALFA MEDICAL
SUPPLIES, INC., ALL COUNTY LLC, JUNCTION
EXPRESS RADIOLOGY, P.C., BLR CHIROPRACTIC, P.C.,
DIAGNOSTIC PLUS MEDICAL, P.C, FOREST HILLS
MEDICAL, P.C., GROW UP PT, P.C., JLS CHIROPRACTIC,
P.C., MIKHAIL I. KANTIUS, M.D., SEBASTIAN LATTUGA,
M.D., DIWAN LAXIMIDHAR, M.D., LEX PSYCHOLOGICAL
SERVICES, P.C., METROPOLITAN POST-TRAUMATIC
MEDICAL CARE, P.C., NATIONAL RX CORP., OPTIMAL
WELL BEING CHIROPRACTIC, P.C., PAIN MANAGEMENT
CENTER OF NEW JERSEY, PRO HEALTH ACUPUNCTURE,
P.C., PUGSLEY CHIROPRACTIC, PLLC, QUALITY SERVICE
SUPPLIES, INC., QUEENS MEDICAL & DIAGNOSTIC, P.C.,
QUEENS SURGI-CENTER, P.C., SURENDRANATH K.
REDDY, M.D., P.C., SANS PAREIL SURGICAL PLLC, SAS
MEDICAL, P.C., SUCCESS REHAB PT, P.C., SUPERIOR
MEDICAL REHAB, P.C., URBAN WELL ACUPUNCTURE,
P.C., V & T MEDICAL, P.C., VILLAGE MEDICAL SUPPLY,
INC., VISTA DIAGNOSTIC IMAGING, P.C., WARREN
MEDICAL, P.C., XERON CLINICAL LABORATORIES, INC.,
ANDREA CASTILLO, MARIA CASTILLO, TERESA
CASTRO, BRIGIDA GUZMAN, ISABEL GUZMAN,
and ROSEMARY GUZMAN,

Defendants.

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

UNFILED JUDGMENT

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and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room

141B).-----X

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 Alfa Medical
Supplies, Inc. ("Alfa"), Village Medical Supply, Inc. ("Village"), Warren Medical, P.C.

("Warren"), and Success Rehab PT, P.C. ("Success") (collectively the "answering defendants").¹

The answering defendants oppose the motion.

A party moving for summary judgment 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.

¹By order dated May 12, 2012, this court granted plaintiff's motion (motion seq. no. 001) for a default judgment against defendants ADVANCED MEDICAL DIAGNOSTICS, P.C, ALL COUNTY LLC, BLR CHIROPRACTIC, P.C., DIAGNOSTIC PLUS MEDICAL, P.C, FOREST HILLS MEDICAL, P.C., GROW UP PT, P.C., JLS CHIROPRACTIC, P.C., MIKHAIL I. KANTIUS, M.D., DIWAN LAXIMIDHAR, M.D., LEX PSYCHOLOGICAL SERVICES, P.C., METROPOLITAN POST-TRAUMATIC MEDICAL CARE, P.C., OPTIMAL WELL BEING CHIROPRACTIC, P.C., PRO HEALTH ACUPUNCTURE, P.C., PUGSLEY CHIROPRACTIC, PLLC, QUALITY SERVICE SUPPLIES, INC., QUEENS SURGI-CENTER, P.C., SURENDRANATH K. REDDY, M.D., P.C., URBAN WELL ACUPUNCTURE, P.C., V & T MEDICAL, P.C., VISTA DIAGNOSTIC IMAGING, P.C., XERON CLINICAL LABORATORIES, INC., ANDREA CASTILLO, MARIA CASTILLO, TERESA CASTRO, BRIGIDA GUZMAN, ISABEL GUZMAN, and ROSEMARY GUZMAN.

By order dated May 8, 2013, this court granted plaintiff's motion (motion seq. no. 002) to strike the answer of defendants Advanced Orthopaedics, PLLC and Sebastian Lattuga, M.D., and granted a default judgment against said defendants.

As previously noted, the action settled with defendants JUNCTION EXPRESS RADIOLOGY, P.C., QUEENS MEDICAL & DIAGNOSTIC, P.C., SANS PAREIL SURGICAL PLLC, SAS MEDICAL, P.C., SUPERIOR MEDICAL REHAB, P.C. and NATIONAL RX CORP.

By order dated December 16, 2013, this court granted plaintiff's motion (motion seq. no. 004) for an additional 120 days to serve defendant Pain Management Center of New Jersey.

Plaintiff has established prima facie entitled to judgment as a matter of law against defendants Alfa, Village, Warren and Success. In support of the motion, plaintiff submits affirmations of attorneys Jason Eson and Harlan Schreiber; an affidavit of Denise Winant, plaintiff's claims representative; the pleadings; the police accident report; applications for no-fault benefits submitted by defendants Maria Castillo, Isabel Guzman, Andrea Castillo, Rosemary Guzman and Brigida Guzman (collectively "claimants" or the "claimant defendants"; letters from the law firm of Rubin, Fiorella & Friedman, LLP addressed to the claimants scheduling examinations under oath ("EUOs"), and certificates of mailing as to those letters; the transcripts of the EUOs of Isabel Guzman, Maria Castillo, Andrea Castillo, Brigida Guzman and Teresa Castro; Verification of Treatment Forms completed by defendant Warren; letters from the law firm of Rubin, Fiorella & Friedman, LLP addressed to defendants Alfa, Warren, Village and Success, scheduling EUOs, and certificates of mailing as to those letters; plaintiff's Denial of Claim Forms denying Village's claims, as assignees of Maria Castillo, based on several grounds including Village's failure to appear for EUOs scheduled for September 13 and October 8, 2010; plaintiff's Denial of Claim Forms denying Success's claims, as assignee of Maria Castillo, based on several grounds including Success's failure to appear for EUOs on September 13 and October 10, 2010; plaintiff's Denial of Claim Forms denying Alfa's claims, as assignees of Maria Castillo, based on several grounds including Alfa's failure to appear for EUOs on September 7 and October 6, 2010; Maria Castillo's Assignment of Benefits Forms assigning her no-fault benefits to Alfa; plaintiff's Denial of Claim Forms denying Warren's claims, as assignee of Maria Castillo, on several grounds including Warren's failure to appear to EUOs on September 13 and October 8, 2010; plaintiff's Denial of Claim Forms denying Village's claims, as assignee

of Andrea Castillo, on several grounds including Village's failure to appear for EUOs on September 13 and October 8, 2010; plaintiff's Denial of Claim From denying Success's claims, as assignee of Andrea Castillo, on several grounds including Success's failure to appear for EUOs on September 13 and October 8, 2010; plaintiff's Denial of Claim Forms denying Alfa's claims, as assignee of Andrea Castillo, on several grounds including Alfa's failure to appear for EUOs on September 7 and October 6, 2010; Andrea Castillo's Assignment of Benefits Forms assigning her no-fault benefits to Alfa; and plaintiff's Denial of Claim Forms denying Warren's claims, as assignee of Andrea Castillo, on several grounds including Warren's failure to appear for EUOs on September 13 and October 8, 2010.

The foregoing affidavits and documents are sufficient to establish that the EUO notices were mailed to Alfa, Village, Warren and Success, scheduling EUOs on two different dates, and that none of them appeared either scheduled date. 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 Insurance Department Regulation 11 NYCRR §65-1.1; IDS Property Casualty Insurance Co v. Stracar Medical Services, PC, 116 AD3d 1005 (2nd Dept 2014); Interboro Insurance Co v. Clennon, 113 AD3d 596 (2nd Dept 2014); Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept), lv app den 17 NY3d 705 (2011); Olmeur Medical, P.C. v. Nationwide General Insurance Co, 41 Misc3d 143(A) (App Term 2nd Dept 2013); Arco Medical New York, PC v. Lancer Insurance Co, 37 Misc3d 90 (App Term 2nd Dept 2012). Since it is undisputed that Alfa, Village, Warren and Success did not appear for the scheduled EUOs, plaintiff has a right to deny their claims, based on breach of a condition precedent to coverage. See IDS Property Casualty Insurance Co v.

Stracar Medical Services, PC, supra; Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra. Plaintiff, therefore, has met its burden on the motion and the burden shifts to the answering defendants Alfa, Village, Warren and Success to raise a triable issue of material fact.

In opposing the motion, the answering defendants do not dispute that they failed to appear for the EUOs on the two scheduled dates, and that they never objected to the EUO requests. Rather, defendants argue that: 1) plaintiff has not established that the EUO letters were mailed or timely mailed, or that defendants failed to appear for the EUOs, as attorney Schreiber's affirmation is conclusory and not based on personal knowledge; 2) the statements in Denise Winant's affidavit as to the reasons for scheduling the EUOs are not credible; 3) the police report is inadmissible; 3) the EUO letters are improper requests for "pre-litigation discovery"; 4) and plaintiff has failed to prove that defendants' non-appearance at the EUOs was willful.

Contrary to the defendants' assertion, the affirmation of attorney Schreiber detailing the procedures for preparing and mailing the EUO letters, as well as the certificates of mailing, are sufficient to show that the EUO letters were mailed to the answering defendants. Moreover, Schreiber specifically states he personally waited for each of the answering defendants to appear at his office on the dates scheduled for the EUOs, and that none of them appeared. While the answering defendants object that plaintiff has not established that it timely denied the claims, a timely denial is not required. See id. Moreover, plaintiff is not required to make a showing of willful non-compliance with its requests for EUOs. See id; Arco Medical New York, PC v. Lancer Insurance Co, supra. Defendants' objections as to the content of the EUO letters are without merit. Notably, defendants neither deny receipt of the EUO letters, nor assert that the

[* 7]

letters were incorrectly addressed. Moreover, since the answering defendants submit no evidentiary proof that they responded in any way to the EUO notices when they received them in 2010, they 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 Misc 135 (A) (App Term 2013); Viviane Etienne Medical Care, PC v. State Farm Mutual Automobile Insurance Co, 35 Misc3d 127(A) (App Term 2011).

The court has considered the balance of the answering defendants' arguments, and finds they are likewise without merit. Thus, in the absence of an issue of material fact, plaintiff is entitled to summary judgment against defendants Alfa Medical Supplies, Inc., Village Medical Supply, Inc., Warren Medical, P.C., and Success Rehab PT, P.C.

Accordingly, it is

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

ORDERED, ADJUDGED AND DECLARED that plaintiff Unitrin Auto & Home Insurance Company, owes no duty to defendants Alfa Medical Supplies, Inc., Village Medical Supply, Inc., Warren Medical, P.C., and Success Rehab PT, P.C., to pay No-Fault claims brought seeking to recover No-Fault benefits, relating to the vehicular collision that allegedly occurred on January 16, 2010; and it is further

ORDERED, ADJUDGED AND DECLARED that the defendants Alfa Medical Supplies, Inc., Village Medical Supply, Inc., Warren Medical, P.C., and Success Rehab PT, P.C. have no rights to recover No-Fault claims with respect to the January 16, 2010 alleged collision; and it is further

ORDERED, ADJUDGED AND DECLARED that defendants Alfa Medical Supplies, Inc., Village Medical Supply, Inc., Warren Medical, P.C., and Success Rehab PT, P.C., have no standing to recover No-Fault claims with respect to the January 16, 2010 alleged collision; and it is further

ORDERED AND ADJUDGED that all arbitrations or court actions involving defendants Alfa Medical Supplies, Inc., Village Medical Supply, Inc., Warren Medical, P.C., and Success Rehab PT, P.C., and relating to the January 16, 2010 alleged collision are permanently stayed; and it is further

ORDERED that since the court's computer records do not indicate that plaintiff has filed an affidavit of service as to the only remaining defendant, Pain Management Center of New Jersey, the action is dismissed without prejudice as against such defendant.

DATED: July // , 2014

ENTER:

UNFILED JUDGMENT
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 J.S.C.