

**American Tr. Ins. Co. v Fagan**

2014 NY Slip Op 32248(U)

August 20, 2014

Supreme Court, New York County

Docket Number: 154193/12

Judge: Joan A. Madden

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

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AMERICAN TRANSIT INSURANCE COMPANY,

INDEX NO. 154193/12

Plaintiff,

-against-

JOSHUA FAGAN, CARE CHIROPRACTIC OF NY, P.C.,  
FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER  
SOCIAL WORK SERVICES, PLLC, FLATBUSH PRIMARY  
MEDICAL CARE, P.C., GENERAL MEDICAL SERVICES, P.C.,  
GOLDEN STAR MEDICAL DIAGNOSTICS, P.C., GOLDSTAR  
EQUIPMENT, INC., HOPES PHYSICAL THERAPY, P.C.,  
LAURA MILACH, MT, REHAB CHOICE PT, P.C., SASAN  
FAMILY CHIROPRACTIC, P.C, SKY ACUPUNCTURE, P.C.,  
STEVEN W. WINTER, MD, P.C., VELOCITY CHIROPRACTIC,  
P.C., XVV, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for declaratory relief as to no-fault insurance coverage, plaintiff moves for an order pursuant to CPLR 3215 granting a default judgment against defendants Joshua Fagan, Care Chiropractic of NY, P.C., Five Boro Psychological and Licensed Master Social Work Services, PLLC, Flatbush Primary Medical Care, P.C., General Medical Services, P.C., Golden Star Medical Diagnostics, P.C., Goldstar Equipment, Inc., Hopes Physical Therapy, P.C., Rehab Choice PT, P.C., Sasan Family Chiropractic, P.C., Velocity Chiropractic, P.C., and XVV, Inc., declaring that such defendants are not entitled to no-fault coverage or benefits for the motor vehicle accident that occurred on September 30, 2011, involving defendant Joshua Fagan and American Transit Insurance Company policy #BX A104848 and claim #651389-03, based on defendant Joshua Fagan's failure to appear for examinations under oath (EUOs). None of the

defaulting defendants opposes the motion. Plaintiff also moves for an order pursuant to CPLR 3212 granting summary judgment against the only appearing defendant, Sky Acupuncture, P.C., (Sky), and Sky opposes the motion.<sup>1</sup>

The portion of plaintiff's motion for a default judgment against the non-appearing defendants, Joshua Fagan, Care Chiropractic of NY, P.C., Five Boro Psychological and Licensed Master Social Work Services, PLLC, Flatbush Primary Medical Care, P.C., General Medical Services, P.C., Golden Star Medical Diagnostics, P.C., Goldstar Equipment, Inc., Hopes Physical Therapy, P.C., Rehab Choice PT, P.C., Sasan Family Chiropractic, P.C., Sky Acupuncture, P.C., and Velocity Chiropractic, P.C., and XVV, Inc., is granted in the absence of opposition.

As to plaintiff's motion for summary judgment against appearing defendant Sky, 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 (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 seeks a declaration that defendant Sky is not entitled to no-fault coverage or benefits, based on defendant Joshua Fagan's failure to appear for EUOs, which was a breach of

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<sup>1</sup>Plaintiff states that it has discontinued the action against the two remaining defendants Laura Milach, MT and Steven W. Winter, MD, P.C.

condition precedent to coverage under the no-fault regulations. In support of the motion, plaintiff submits an affidavit of its No-Fault Examiner Chevan Douglas; an affidavit of its Mail Room Supervisor, Luis Campbell; affidavits of an employee of the office of Independent Physical Exam Referrals, Inc., Lynn Hershman; affidavits of Dr. Michael Russ and Dr. John Iozzio; the pleadings; the affidavits of service; plaintiff's letters to defendant Joshua Fagan scheduling EUOs for December 7, 2011 and December 21, 2011; and plaintiff's notices dated January 4, 2012 denying defendant Fagan's claim based on his failure to appear for the EUOs on December 7, 2011 and December 21, 2011.

The foregoing documents establish that the notices of the EUOs were mailed to defendant Fagan and he failed to appear on both December 7 and 21, 2011. The failure to attend a 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 defendant Fagan failed to appear for the two scheduled EUOs, plaintiff had a right to deny the claims of defendant medical providers, based on a 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 defendant Sky to raise an issue of material fact.

In opposing the motion, defendant Sky argues that plaintiff fails to establish: 1) the mailing of the notices scheduling the EUOs; 2) that defendant Joshua Fagan failed to appear for

the scheduled EUOs; and 3) timely mailing of the denials of the claims at issue. Defendant's arguments are without merit. Plaintiff submits an affidavit from Luis Campbell, its mail room supervisor, detailing plaintiff's mailing procedures, which "were in place at the time the denials, additional verification requests and correspondences at issue were mailed." Plaintiff also submits two affidavits from Lynn Hershman, who is employed by Independent Physical Exam Referrals, Inc., stating that on November 17, 2011, she served Joshua Fagan by mail with notices for medical examinations with Dr. Michael Russ and Dr. John Iozzio scheduled for December 7, 2011, and "[a]fter receiving notice of the claimant's [Joshua Fagan's] non-appearance on December 7, 2011," she served by mail "follow-up" notices for rescheduled examinations with Drs. Russ and Iozzio on December 21, 2011. Plaintiff also submits an affidavit from Dr. Michael Russ and Dr. John Iozzio, the physicians retained to perform the EUOs, stating that Joshua Fagan did not appear on December 7, 2011 or December 21, 2011. While defendant Sky additionally objects 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.

Thus, in the absence of a material issue of fact, plaintiff is entitled to summary judgment against defendant Sky.

Accordingly, it is

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


ORDERED, ADJUDGED AND DECLARED that defendants Joshua Fagan, Care Chiropractic of NY, P.C., Five Boro Psychological and Licensed Master Social Work Services,

PLLC, Flatbush Primary Medical Care, P.C., General Medical Services, P.C., Golden Star  
 Medical Diagnostics, P.C., Goldstar Equipment, Inc., Hopes Physical Therapy, P.C., Rehab  
 Choice PT, P.C., Sasan Family Chiropractic, P.C., Velocity Chiropractic, P.C., and XVV, Inc.,  
 are not entitled to no-fault coverage or benefits for the motor vehicle accident that occurred on  
 September 30, 2011, involving defendant Joshua Fagan and American Transit Insurance  
 Company policy #BX A104848 and claim #651389-03; and it is further

ORDERED that the action has been discontinued as against the remaining defendants  
 Laura Milach, MT, and Steven W. Winter, MD, P.C.

DATED: August 20, 2014

ENTER:

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