

<b>Repwest Ins. Co. v McFadden</b>
2016 NY Slip Op 30801(U)
April 29, 2016
Supreme Court, New York County
Docket Number: 151110/2014
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
REPWEST INSURANCE COMPANY,

Plaintiff,

Index No. 151110/2014

-against-

**DECISION/ORDER**

MYLES MCFADDEN, TAMARA MARKLAND,  
COUNTRYWOODS PHYSICAL THERAPY P.C.,  
ADVANCED CHIROPRACTIC OF NEW YORK P.C.,  
V & T MEDICAL P.C., POWER SUPPLY INC.,  
QUEST SUPPLY INC., SHORE MEDICAL DIAGNOSTIC  
P.C., LIFE TREE ACUPUNCTURE P.C., MDJ  
MEDICAL P.C., GRS CHIROPRACTIC P.C., and ACTIVE  
CARE MEDICAL SUPPLY CORPORATION,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action against defendants seeking a declaratory judgment that there is no no-fault coverage as to the defendants relating to an alleged motor vehicle accident that took place on September 18, 2010. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment against defendants MDJ Medical, P.C., Countrywoods Physical Therapy, P.C., Life Tree Acupuncture, P.C. and GRS Chiropractic, P.C. (the "Answering Defendants") and requests that the court permanently stay all proceedings and arbitrations brought by the Answering Defendants. For the reasons set forth below, plaintiff's

motion is denied.

The relevant facts are as follows. Defendant-assignors Myles McFadden and Tamara Markland (“assignor defendants”) were allegedly involved in a motor vehicle accident on or about September 18, 2010 (the “Accident”) while riding in a vehicle insured by plaintiff. Thereafter, assignor defendants sought treatment for injuries they allegedly sustained during the Accident and assigned their right to collect no-fault benefits to their treating medical providers. The medical provider defendants then submitted multiple bills to plaintiff seeking reimbursement of no-fault benefits from plaintiff. Plaintiff has refused to pay some of these claims on the ground that an investigation of the Accident revealed that it was intentionally staged for the purpose of submitting fraudulent insurance claims, although plaintiff had already paid some claims when the investigation revealed that the Accident was staged.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). To obtain summary judgment, a plaintiff must present “evidentiary proof in admissible form.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Hearsay evidence is inadmissible and cannot establish a movant’s *prima facie* entitlement to summary judgment. *See Coleman v. Maclas*, 61 A.D.3d 569 (1<sup>st</sup> Dept 2009). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman*, 49 N.Y.2d at 562. Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

In the present case, plaintiff has failed to establish its *prima facie* entitlement to judgment as a matter of law on its cause of action for a declaratory judgment because it has failed to submit admissible evidence showing that the Accident herein at issue was deliberately caused to fraudulently obtain insurance benefits. Plaintiff has submitted the affidavit of Joe Oliver (“Oliver”), a detective with the New York City Police Department, stating that he interviewed Latwaun McPhail (“McPhail”), who was the driver of the other vehicle involved in the Accident and who told Oliver that the Accident was staged by a man known as Kareem, or “Reem.” Plaintiff has also submitted a summary made by Oliver following his interview with McPhail. McPhail’s statements as expressed in the Oliver affidavit and summary are inadmissible hearsay and thus cannot be considered on a motion for summary judgment. Plaintiff has also submitted the police report from the Accident, which does not show that the accident was staged. Therefore, plaintiff has submitted no admissible evidence that the Accident was staged.

Plaintiff’s argument that it has made a *prima facie* showing through its submission of McPhail’s statements as expressed in the Oliver affidavit and summary that it had a “founded belief” that the Accident was staged, even if true, is not sufficient to establish plaintiff’s entitlement to summary judgment. Contrary to plaintiff’s contention, the court may not award summary judgment on an action for a declaratory judgment that there is no no-fault coverage on the ground that the insurer had a founded belief that an accident was fraudulent. It is well settled that an insurer may assert a lack-of-coverage defense based on the “fact or founded belief that the alleged injury did not arise out of an insured incident” despite its failure to timely deny a claim. *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 198 (1997). However, in a case similar to the instant action, the Civil Court held that an insurer’s founded belief is not

sufficient “to obtain judgment on its own” that it is not obligated to pay claims arising out of a fraudulent collision. *Universal Open MRI of the Bronx, P.C. v. State Farm Mut. Auto Ins.*, 12 Misc.3d 1151(A) (Civ Ct, Kings County 2006). “To win on its summary judgment motion, [the insurer] must make a *prima facie* ‘lack of coverage’ showing,” and therefore must submit admissible evidence that the accident was intentionally caused. *See id.* *See also State Farm Mut. Auto Ins. Co. v. Laguerre*, 305 A.D.2d 490, 491 (2<sup>nd</sup> Dept 2003) (holding that the plaintiff established its *prima facie* right to summary judgment for a declaratory judgment where it established the fact, not its founded belief, that the accident was deliberately and fraudulently caused).

Plaintiff’s argument that McPhail’s statements are admissible as statements against interest is also without merit. A statement that would otherwise be inadmissible as hearsay is only admissible as a statement against the declarant’s penal or pecuniary interest where (1) the declarant is unavailable to testify as a witness, (2) when the statement was made the declarant was aware that it was adverse to his or her interest, (3) “the declarant has competent knowledge of the facts underlying the statement” and (4) “supporting circumstances independent of the statement itself attest to its trustworthiness and reliability.” *People v. Soto*, 26 N.Y.3d 455, 460-61 (2015). In the present case, plaintiff has not established a proper foundation for the admissibility of McPhail’s statements as plaintiff has not provided evidence satisfying any of the aforementioned four requirements.

As plaintiff has not established its *prima facie* entitlement to a declaratory judgment that there is no no-fault coverage as to the Answering Defendants, plaintiff has also failed to establish its *prima facie* entitlement to a permanent stay of all proceedings and arbitrations brought by the

Answering Defendants. See *Matter of Allstate Ins. Co. v. Massre*, 14 A.D.3d 610 (2<sup>nd</sup> Dept 2005) (granting a permanent stay where there was “credible evidence...that the collision was intentional”).

Accordingly, plaintiff’s motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 4/29/16

Enter: \_\_\_\_\_

*CSK*  
J.S.C.  
**CYNTHIA S. KERN**  
J.S.C.