

<b>Nationwide Affinity Ins. Co. of Am. v Evans</b>
2018 NY Slip Op 30577(U)
March 30, 2018
Supreme Court, New York County
Docket Number: 159667/2016
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

NATIONWIDE AFFINITY INSURANCE COMPANY  
OF AMERICA,

Plaintiff,

-against-

Index No: 159667/2016  
**DECISION/ORDER**  
Motion sequence 002

STEPHEN EVANS, HAKIM ALLEN, KHALILAH ALLEN,  
SALLURY DE HOYAS, ALMATCARE MEDICAL  
SUPPLY INC., BLUELIGHT ACUPUNCTURE P.C.,  
A. BALDONADO MEDICAL P.C.,  
AD MEDICAL SUPPLIES INC., A.L.E. CHIROPRACTIC, P.C.,  
AMBULATORY SURGICAL CENTER OF ENGLEWOOD,  
AUTO RX, BORIS RIPA MEDICAL P.C.,  
DR. ELIEZER L. OFFENBACHER M.D. PLLC,  
GALINA GROYSMAN, D.C., INTERVENTIONAL PAIN  
CONSULTANTS OF NORTH JERSEY, LLC, PROSPER  
ACUPUNCTURE, P.C., US HEALTH PRODUCTS INC.,  
MANHATTAN'S HANDS OF HOPE P.T., P.C.,  
MAXIM TYORKIN, XVV, INC.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's  
CPLR 3212 motion for summary judgment.

**Papers**

**NYSCEF Documents Numbered**

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Defendants AD Medical Supplies Inc., U.S. Health Products, Inc., Maxim Tyorkin, and XVV, Inc.'s Opposition .....	137
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*Law Offices of Marina Josovich, P.C.*, Brooklyn (Marina Josovich of counsel), for defendants  
AD Medical Supplies Inc., U.S. Health Products, Inc., Maxim Tyorkin, and XVV, Inc.

*Kopelevich & Feldsherova, P.C.*, Brooklyn (David Landfair of counsel), for defendants Boris  
Ripa Medical, P.C. and Galina Groysman, D.C.

*Law Office of Jan E. Kowalsi*, Brooklyn (Christopher Bignell of counsel), for defendant Stephen  
Evans.

Gerald Lebovits, J.

Plaintiff, Nationwide Affinity Insurance Company of America (Nationwide), brings this declaratory-judgment action seeking judicial declarations that defendant Stephen Evans and other defendant medical providers perpetuated a scheme to defraud and fraudulently procure a policy of insurance and the filing of claims. Plaintiff alleges that Evans and his father, Arkie Evans, procured a policy in January 2016 for multiple vehicles; the policy lists a Binghamton, New York, address. Plaintiff alleges that Evans resided in Brooklyn, New York, not Binghamton, New York. Plaintiff also argues that various defendants — Hakim Allen, Khalilah Allen, and Sallury De Hoyas — breached a condition precedent to coverage by failing to appear for examinations under oath (EUOs).

Plaintiff now moves for summary judgment under multiple grounds: (1) granting summary judgment against defendant Evans, the driver of the vehicle involved in the April 22, 2016, incident, because he allegedly made an intentional, material misrepresentation in procuring the insurance policy with plaintiff Nationwide; (2) granting summary judgment against health care providers — defendants AD Medical Supplies Inc., U.S. Health Products, Inc., Maxim Tyorkin, and XVV, Inc., Boris Ripa Medical, P.C. and Galina Groysman, D.C. (the medical providers) — based on defendant Evans' intentional, material misrepresentations in procuring the insurance policy; (3) granting summary judgment for plaintiff because defendant Hakim Allen, Khalilah Allen, and Sallury De Hoyas — passengers in the vehicle — allegedly breached a condition precedent to coverage by failing to appear for duly scheduled EUOs; and (4) granting summary judgment against the medical providers because defendants Hakim Allen, Khalilah Allen, and De Hoyas allegedly breached a condition precedent to coverage by failing to appear for duly scheduled EUOs.

The medical providers oppose plaintiff's motion on numerous grounds. The court notes that the medical providers submitted claims for medical services rendered to defendant Evans. They did not submit claims relating to services rendered to defendants Hakim Allen, Khalilah Allen, and De Hoyas.

### **I. The First and Second Grounds for Summary Judgment**

Plaintiff's motion on the first and second ground is denied. Plaintiff fails to prove its entitlement to summary judgment. Plaintiff has not proven that defendant Evans made an intentional, material representation in procuring the policy.

Plaintiff relies on Insurance Law § 3105 (b) and *AA Acupuncture Serv., P.C. v Safeco Ins. Co. of Am.* (25 Misc 3d 30, 30 [App Term, 1st Dept 2009]). Insurance Law 3105 (b) (1) provides that “[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make sure contact.” In *AA Acupuncture Serv., P.C.*, the Appellate Term granted Safeco Insurance Company's summary-judgment motion and dismissed the case. (25 Misc 3d at 31.) The court held that the insurance company's proof “was sufficient to establish prima facie that the insured intentionally misrepresented her address in order to obtain insurance at reduced

premiums, and that the misrepresentation was material since defendant would not have issued the policy under the same terms had it known that the insured resided in Brooklyn.” (*Id.* at 32, citing *Matter of Ins. Co. of N. Am v Kaplan*, 274 AD2d 30, 31-32 [2d Dept 2000].) The insurance company’s proof was that the insured listed a Connecticut address that was a commercial store located in a strip mall but that the insured resided in Brooklyn, New York. (*Id.* at 31.)

Plaintiff provides various affidavits and Evans’ EUO to show that Evans made an intentional, material representation in procuring the policy.

A summary of Evans’ EUO testimony is as follows: (1) at the time of his EUO, July 2016, Evans lived in Binghamton, New York, at 5 Proctor Street; (2) Evans does not know who owns the Binghamton residence, but he knows that his father rents the home; (3) as of July 2016, Evans says that he has lived at the Binghamton, New York, address with his father for two years; (4) that before living in Binghamton, New York, he resided at 2325 New Lots Avenue in Brooklyn, New York; (5) that he stays in Brooklyn, New York, with his grandmother about three times a week; (6) that he was “in the middle of changing” his address on his driver’s license; (7) that he was unsure what address is listed on his driver’s license; (8) that he works for a company called AMB which is located in New York, New York; (9) that he stays at his grandmother’s home in Brooklyn on the days he works; (10) that he does not know the names of any of the roads he takes to go to Binghamton, New York, or any side streets or any businesses or restaurants in the area; (11) that he has never worked in Binghamton, New York; (12) that he does not know what address he listed on his tax returns; and (13) that since the incident, he travels by bus from Binghamton, New York, to Brooklyn, New York, to receive medical treatment. (Exhibit J.)

The affidavit of Romina Fischman-Smith contains double hearsay. (Exhibit L. at 9.) She states that she relies on claim notes. She states that investigator Diane Leshinski went to the Binghamton, New York, address listed on Evans’ policy and that she spoke to the owner of the residence. (*Id.*) The owner told Leshinski that he had been residing at the address since 2015. (*Id.*) The owner told Leshinski that he, the owner, does not know the individuals named on the policy and that none of the insured vehicles were garaged at his residence. (*Id.*) Fischman-Smith also states that investigator Brian Cook went to the Brooklyn, New York, address on New Lots Avenue. (*Id.*) Cook spoke with someone in the management office who told Cook that Arkie Evans (Evans’ father) resided at the address. (*Id.*)

Robert Maschmeyer, plaintiff’s Underwriting Manager, states that Evans and Arkie Evans misrepresented that the subject vehicle was principally garaged in Binghamton, New York rather than Brooklyn, New York. (Exhibit M at 4.) Maschmeyer states that plaintiff “would not have written the subject policy of insurance.” (*Id.*) He also states that plaintiff would have written a policy “under different terms and contained a higher premium. Additionally, had [it] become aware of this false information prior to this loss, [it] would have cancelled the policy in accordance with New York law.” (*Id.*)

Plaintiff’s evidence does not prove that Evans made an intentional, material representation in procuring the policy. Evans testified at his EUO that he has lived at the Binghamton, New York, address with his father from 2014 onward. Plaintiff alleges that Evans’

testimony is unbelievable and incredible. But the court cannot assess credibility on a summary-judgment motion. And, in any event, plaintiff's evidence is in inadmissible form, as it contains double hearsay. Thus, plaintiff's motion on the first and second ground is denied.

**II. The Third Ground for Summary Judgment**

Plaintiff's motion on the third ground is granted as unopposed.

Although some medical providers oppose the motion, they have no standing. They did not submit any claims to plaintiff for services rendered to Hakim Allen, Khalilah Allen, and De Hoyas.

Plaintiff establishes its prima facie entitlement to summary judgment. A party's failure to appear for two scheduled EUOs constitutes a material breach of the insurance policy; therefore, the insurer may deny coverage. (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] ["A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage."], *lv denied* 17 NY3d 705 [2011]; *accord Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 469 [1st Dept 2016] ["The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage."]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2d Dept 2006] [holding that an insurer may retroactively deny claims on the basis of assignor's failure to appear for additional verification requested by insurer].)

On a summary-judgment motion, the moving party must establish that it timely and properly mailed the notices for EUOs to defendants and that the defendants failed to appear. (*Bath Ortho Supply, Inc. v New York Central Mut. Fire Ins. Co.*, 2012 NY Slip Op 50271[U], \*1 [App Term 1st Dept 2002], citing *Unitrin*, 82 AD3d at 560; *Fogel*, 35 AD3d at 721; *see Repwest Ins Co. v Advantage Radiology, P.C.*, 42 Misc 3d 1210 [A], \*\*2-4, 2014 NY Slip Op 50016 [U], \*\*2-4, 2014 WL 127915, at \*\*2-4 [Sup Ct NY County 2014] ["In support of its motion, plaintiff . . . proffers . . . the [EUO] letters . . . the affidavits of service for all such letters, and an affidavit from Joseph R. Federici, Esq. stating that on each scheduled EUO date, he waited for the Defendants . . . [who] failed to attend the scheduled EUOs."].)

Plaintiff proved that it timely and properly sent the EUO letters to defendants Hakim Allen, Khalilah Allen, and De Hoyas. Allan Hollander, Esq., explains how plaintiff generates and mails the EUO letters. (Exhibit S.) Plaintiff provides the EUOs letters as exhibits to its summary-judgment motion. (Exhibits V, X, AA, CC, EE, GG.) Plaintiff sent these letters by certified mail return-receipt requested and by first-class mail.

Plaintiff also proved that the following defendants failed to appear for two EUOs: (1) defendant Hakim Allen failed to appear for EUOs on June 22 and July 28, 2016 (Exhibits W, Y); (2) defendant Khalilah Allen failed to appear on June 24 and July 29, 2016 (Exhibits BB, DD); and (3) defendant De Hoyas failed to appear on June 24 and July 29, 2016 (Exhibit FF, HH). Plaintiff provides affirmations from the attorneys who would have conducted the EUOs and who

waited for these defendants to appear on the above-mentioned dates. (Exhibits W, Y, Z, BB, DD, FF, and HH.) Plaintiff also provides the transcripts in which the attorneys made statements on the record about the non-appearance of these defendants to appear for EUOs on each respective date. (*Id.*)

Also, plaintiff proved that it properly denied defendants' claims. (Exhibit T.) Plaintiff proved that it generated and mailed the denials, NF-10s, to defendants. (Exhibits O, P.) Each of the denials provides that various defendants were carbon copied on these denials. (Exhibit T.)

Plaintiff also explained the reasons for requesting the EUOs. (Exhibit O.)

Defendants Hakim Allen, Khalilah Allen, and De Hoyas' failure to appear for two duly scheduled EUOs constitutes a breach of a condition precedent to coverage. A declaratory judgment is granted. This aspect of plaintiff's motion is granted. Plaintiff shall settle order.

### III. The Fourth Ground for summary Judgment

It is undisputed that above-mentioned medical providers submitted claims for defendant Evans. They did not submit claims relating to services rendered to defendants Hakim Allen, Khalilah Allen, and De Hoyas. Therefore, that aspect of plaintiff's motion — the fourth ground against the medical providers because defendants Hakim Allen, Khalilah Allen, and De Hoyas breached a condition precedent to coverage by failing to appear for duly scheduled EUOs — is denied. No basis exists to grant summary judgment when the medical providers submitted claims for services rendered to Evans, not Hakim Allen, Khalilah Allen, and De Hoyas.

Accordingly, it is hereby

ORDERED that plaintiff's summary-judgment motion is granted in part and denied in part. A declaratory judgment is granted in that defendants Hakim Allen, Khalilah Allen, and De Hoyas' failure to appear for two duly scheduled EUOs constitutes a breach of a condition precedent to coverage, and plaintiff's summary-judgment motion is granted as unopposed, and plaintiff shall settle order. The motion is otherwise denied; and it is further

ORDERED that the parties appear for a preliminary conference on May 30, 2018, at 11 a.m., in Part 7, room 345, at 60 Centre Street; and it is further

ORDERED that plaintiff's counsel must serve a copy of this decision and order on defendants.

Dated: March 30, 2018

  
J.S.C.  
HON. GERALD LEBOVITS  
J.S.C.