

Nationwide Affinity Ins. Co. of Am. v FJL Med. Servs., P.C.
2018 NY Slip Op 33843(U)
December 20, 2018
Supreme Court, Onondaga County
Docket Number: 2017EF2166
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on December 18, 2018.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

**NATIONWIDE AFFINITY INSURANCE COMPANY
OF AMERICA, NATIONWIDE GENERAL INSURANCE
COMPANY, NATIONWIDE INSURANCE COMPANY
OF AMERICA, NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, NATIONWIDE MUTUAL
INSURANCE COMPANY, NATIONWIDE ASSURANCE
COMPANY, NATIONWIDE PROPERTY & CASUALTY,
TITAN INDEMNITY COMPANY, VICTORIA FIRE &
CASUALTY COMPANY, VICTORIA AUTOMOBILE
INSURANCE COMPANY and any and all of their
subsidiaries, affiliates and/or parent companies,**

**DECISION AND ORDER
ON MOTION**

**Index No.: 2017EF2166
RJI No.: 33-17-2261**

Plaintiffs,

v.

FJL MEDICAL SERVICES , P.C.,

Defendant.

APPEARANCES: ALLAN S. HOLLANDER, ESQ., OF HOLLANDER LEGAL GROUP, PC
For Plaintiffs

OLEG RYBAK, ESQ., OF THE RYBAK GROUP, PLLC
For Defendant

The plaintiff has moved to renew its previous motion for summary judgment. *See, CPLR § 2221(e)*. In this Court's Decision and Order dated May 3, 2018, the Court denied the motion, finding that defendant established that facts essential to justify opposition to the motion may exist and could not then be stated. *See, CPLR § 3212(f)*. This Court noted that defendant served

demands for discovery and inspection and that plaintiff failed to respond to said demands and that inasmuch as plaintiff was required to object to the demands and failed to do so, they were obligated to produce the information sought. *See, CPLR § 3120 and 3122*. Therefore the Court concluded that the plaintiff could renew its motion after the completion of discovery.

Plaintiff now argues that discovery has been completed and that it has filed its Note of Issue in this matter, and asked the Court to essentially reconsider its original motion for summary judgment. It argues that inasmuch as the Court in its original Decision found that plaintiff had established its burden in the first instance, that plaintiff is now entitled to summary judgment as discovery has been completed. However, since the issuance of this Court's Decision and Order in May of 2018, the Appellate Division, Fourth Department has issued a Decision in a case which is virtually identical to the case now pending before the Court. *See, Nationwide Affinity Insurance Co. Of America v. Jamaica Wellness Medical, P.C.*, 2018 WL 6007455 (4th Dept. Nov. 16, 2018).¹ There, the Fourth Department found that this Court improperly relied on First Department precedent, holding that the failure to appear at a duly requested EUO constitutes a breach of a condition precedent to coverage and therefore fits squarely within the no coverage exception to the preclusion remedy (*see, Unitrim Advantage Insurance Co. v. Bay Shore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept. 2011]), and noted "[w]e conclude that the requirement that an insured or assignee submit to an EUO is not a condition precedent to the existence of coverage itself, whether submission to a reasonably requested EUO represents an event that

¹ All of the papers submitted by both the plaintiff and the defendant on this motion are virtually identical to those submitted in the *Nationwide v. PFJ Medical Care, P.C.*, Index No.: 2017EF1843 and the submission in these two cases are virtually identical to those submitted by both parties in the *Jamaica Wellness* matter. Defendant's papers in opposition to the motion to renew contains a party affidavit which was not provided in opposition to the original motion.

“must occur before [the insured] is obligated to perform a promise made pursuant to an existing [policy], i.e. rendering payment of benefits... In some the failure to appear at a reasonably requested EUO constitutes a breach of an existing policy condition which is distinguishable from lack of coverage in the first instance...” *Nationwide Affinity v. Jamaica Wellness, supra*. The Court further found that “the assertions in the affidavit of Nationwide’s claim specialist that Nationwide issued timely denial forms to defendant for nonappearance at the EUO’s are conclusory and unsupported by any such denial forms; therefore Nationwide did not establish as a matter of law that it issued timely and proper denials.” *Id.*

In response to that Decision, plaintiff filed reply papers in this matter, again virtually identical to both the previous *Jamaica Wellness* and the also pending *PFJ* case (*see, Nationwide Affinity Ins. Co. Of America v. PFJ Medical Care, P.C.*, [Index No. 2017EF1843]), with one difference being plaintiff’s acknowledgment of the new Fourth Department decision. As a result, plaintiff’s counsel attached a large stack of documents to his affidavit, which included denial of claim forms and affidavits from Matthew McLendon, an Operations Manager of Auto Injury Solutions, Inc. (AIS), the authorized agent for receiving bills and/or correspondence, providing items requested to verify a claim presented by or on behalf of medical providers seeking payment from plaintiff. He details the AIS mail handling process and discusses AIS’s practice with respect to the mailing of denial of claim forms. However, there is no assertion by McLendon that he has personal knowledge of the issuance of the denial of claim forms or that he is able to lay a foundation for the Court to consider the denial of claim forms pursuant to CPLR section 4518 and the basis for his knowledge that these facts were in fact served on defendant. A proper

foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures. *See, Citibank, NA v. Cabrera*, 142 AD3d 952 (2d Dept. 2016); *see also, HSBC Mortgage Services, Inc. v Royal*, 142 AD3d 952 (2d Dept. 2016).

The plaintiff's submission on its renewed motion for summary judgment are insufficient. The function of a reply affidavit is to address arguments raised in opposition to the position taken by the movant and not to permit the movant to introduce new arguments. *See, Seefelt v. Johnson*, 13 AD3d 1203 (4th Dept. 2004). Reply papers are not considered in evaluating whether a plaintiff has met its initial burden. *See, Wonderling v. CSX Transportation*, 43 AD3d 1244 (4th Dept. 2006). Although plaintiff's counsel contended that all of the documentation with respect to the denial of claims form was provided to the Court in its original motion, a review of the volumes of documents submitted by the plaintiff demonstrates that the only denial of claim form provided are attached to counsel's affirmation. The law is well settled that an attorney's affirmation is without evidentiary value on a motion for summary judgment where the attorney himself has no personal knowledge of the facts. *See, Deronde Products, Inc. v. Steve General Contractor, Inc.*, 302 AD2d 989 (4th Dept. 2003). The affidavit of Linda Arnold, as referenced in the *Jamaica Wellness* Decision, and provided here, does not attach and lay a foundation for the denial forms. *See, CPLR § 4508*. She instead states in a conclusory fashion, as she did in the *Jamaica Wellness* case, that "due to defendant... [s] failure to appear at [the subject] EUO's, [plaintiff] timely and properly denied defendant... [s] claims within thirty days of [defendant's] last nonappearance at its noticed EUO" and that "all of the denials were sent to [defendant] on a

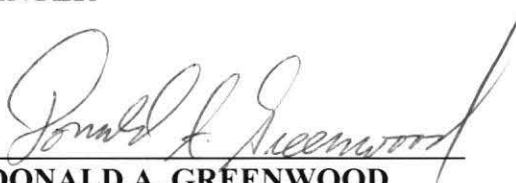
statutory NF-10 denial of claim form, and all of the denials advised [defendant] that the reason the claims were being denied was based upon the nonappearance of [defendant] at noticed EUO's."

NOW, therefore, for the foregoing reasons, it is

ORDERED, that plaintiff's motion for summary judgment is denied.

ENTER

Dated: December 20, 2018
Syracuse, New York


DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion for leave to renew, dated September 28, 2018.
2. Affirmation of Katherine Lalor, Esq. in support of plaintiffs' motion, dated September 28, 2018, and attached exhibits.
3. Affirmation of Oleg Rybak, Esq. in opposition to plaintiff's motion, dated October 30, 2018.
4. Affidavit of Francis J. Lacina in opposition to the motion, dated November 1, 2018, and attached exhibits.
5. Reply Affirmation of Brian E. Kaufman, Esq., dated December 10, 2018, and attached exhibits.