

**21st Century Ins./21st Century Advantage Ins.
Co./21st Century Natl. Ins. Co. v Baptisye**

2019 NY Slip Op 30781(U)

March 29, 2019

Supreme Court, New York County

Docket Number: 156199/2013

Judge: Tanya R. Kennedy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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21ST CENTURY INSURANCE/21ST CENTURY
ADVANTAGE INSURANCE COMPANY/21ST CENTURY
NATIONAL INSURANCE COMPANY,

Plaintiff,

-against-

Index No.: 156199/2013
Motion Sequence #002

MARIE BAPTISYE et al.,

Defendants.

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Tanya R. Kennedy, J.S.C.:

In this declaratory judgment action, Plaintiff insurer moves for summary judgment, pursuant to CPLR 3212, against the answering Defendants, DOCTOR GOLDSHTEYN CHIROPRACTIC, P.C., MIND & BODY ACUPUNCTURE P.C., ONE TO ONE REHAB PT, P.C., REMEDIAL MEDICAL CARE P.C., SKILLMAN MEDICAL DIAGNOSTIC, P.C., SHARP VIEW DIAGNOSTIC IMAGING, P.C., and EASY CARE ACUPUNCTURE P.C., for a declaration that: (a) Defendants Ralph Magny (Magny), Daphne Rympel (Rympel), and Hans Deetjen (Deetjen) breached a material condition precedent to coverage by refusing and failing to appear for an Examination Under Oath (EUO) and that Plaintiff is not obligated to pay, honor, or reimburse any of the answering Defendants for any claims that were submitted for any No-Fault reimbursement on behalf of Magny, Rympel, and Deetjen; and (b) the incident of April 7, 2011, Policy No.: 0020602619, Claim No.:1018387340, is staged and not a covered event, such that Plaintiff is not required to pay any sums arising out of the alleged incident.¹

¹ This action was discontinued against Defendant Kathleen Patrick on October 6, 2015 (Exhibit 6). On July 25, 2016, the Court (Coin, J.S.C.) entered an Order and Judgment granting a default judgment against the following corporate Defendants who failed to answer the complaint: All Boro Psychological Services, P.C., American Asian

BACKGROUND

Plaintiff insurer issued a motor vehicle insurance policy, under policy number 0020602619 (the Policy), effective March 22, 2011, to Magny, which covered a 1995 Plymouth Neon Highline 4P (complaint, ¶¶92-93; Exhibit 2, ¶5). On April 7, 2019, sixteen days following the policy inception date of March 22, 2011, the 1995 Plymouth Neon Highline 4P, which Magny operated, was allegedly involved in a collision at the intersection of Avenue W and 86th Street, Brooklyn, New York at 11:50 p.m. with a vehicle that was operated by Defendant Stanislaw Zhitkov (Zhitkov) (complaint ¶¶ 93-94, 98-99). Defendants Rympel and Deetjen were passengers in the 1995 Plymouth Neon Highline 4P vehicle at the time of the collision (*id.*, ¶99).

Magny, Rympel, and Deetjen all filed claims for no-fault benefits under the policy issued to Magny [policy number 0020602619], which was assigned claim number 1018387340 (NF-2 application for No-Fault benefits, exhibit 12). Plaintiff submitted an affidavit from Investigative Analyst, Sandra Keane (Keane), which avers that Plaintiff's investigation of the claim

Acupuncture PLLC, Ave P Rehab & Medical Plaza, P.C., Avenue U Medical Care P.C., Bedford Medical Care, P.C., Dovphil Anesthesiology Group, PLLC, E&W Acupuncture P.C., East-West Top Medical, P.C., Five Boro Psychological and Licensed Master Social PLLC, Great Health Care Chiropractic PC, Great Medical Services P.C., Guy J. Villano, DC, Infinity Health Products LTD, Little Neck Radiology, P.C., Magic Touch Physical Therapy P.C., Mobile Medical and Diagnostic LLC, Mobility Experts Medical P.C., Modern Chiropractic P.C., New Age Chiropractic, P.C., New Century Medical Diagnostic P.C., New HP Chiropractic, P.C., New Way Medical Supply Corp., New York Vein Center, LLC, North East Empire Medical P.C., Omega Medical Diagnostics, P.C., Park Slope Medical 7 Surgical Supply Inc, Power Supply Inc., Prima Medical Supply, Inc., Professional Health Imaging, P.C., Promed, Orthocare Supply, Inc., Psychological YME P.C., Quality Diagnostic Imaging P.C., Quest Supply Inc, RB Chiropractic Care P.C., SAS Medical P.C., Sassan Family Chiropractic P.C., Southend Chiropractic, P.C., St. Marks Chiropractic P.C., St. Cyril PT, P.C., Superior Health Chiropractic P.C., Synergy First Medical, PLLC, Uptown Chiropractic, P.C., Synergy First Medical, PLLC, Uptown Chiropractic, P.C., Verrazano Acupuncture, P.C., VNP Acupuncture P.C. and YKLIK, Inc. (Exhibit 7). The Court (Coin, J.S.C.) also issued a supplemental order and judgment on November 9, 2017 granting Plaintiff a default judgment against the following individual Defendants: Marie Baptiyse, Marc Bauvas, Sherly Brice, Noel Bryve, Hans J. Deetjen, Marc Antoine Ferdinand, Stephen Ferdinand, Marie Francois, Noberta Francois, Sherley Gaston, Rasheen Gaston, Alfonso Hunt, Ralph Magny, Lovely Nazaire, Laurette A. Nicholas, Jose M. Plasencia, Daphne Rympel, Jean Louis Wisner, Angel Yungaicela, Leddora Zhitkov and Stanislaw Zhitkov (*id.*). This Court has omitted the A/K/A name designations for the individual Defendants.

determined that the April 7, 2011 incident was staged. The investigation considered the following factors: that Magny, Rympel, and Deetjen were unrelated occupants who received treatment at the same multi-specialty facility; the loss occurred late at night when few persons were present; the incident occurred sixteen days after the policy's inception and involved an older vehicle; the existence of common addresses, phone numbers and emails; and the claim was linked to multiple staged losses and at least four declaratory judgment actions (Keane affidavit, exhibit 2; exhibit 12; exhibits 17-20).

Plaintiff sought additional verification in the form of an EUO of Magny, Rympel, and Deetjen to determine the veracity of their claims and submitted the supporting affidavit of paralegal Stacey Peluso (Peluso affidavit, exhibit 14). Peluso averred that she was familiar with Plaintiff's practice and procedures regarding scheduling, drafting and mailing EUO notices during the relevant period and that she mailed an EUO notice letter to each individual and to counsel by first class mail and by certified mail, return receipt requested (*id.*, ¶¶2, 7, 9, 12; Exhibit 9).

Magny, Rympel, and Deetjen all failed to appear for the first scheduled EUO. Peluso mailed a second EUO notice letter to Magny and counsel by first class mail and by certified mail, return receipt requested and mailed a second and third EUO notice letter to Rympel, Deetjen, and counsel by first class mail and by certified mail, return receipt requested (*id.*, ¶¶8, 10-11, 14-15; EUO notice letters, exhibit 9; letters of representation for Magny, Rympel, and Deetjen, exhibit 13). However, neither individual responded to the additional notices nor appeared for their respective EUOs (EUO transcript statements on the record, exhibit 9; Mirabella affirmation, exhibit 10; Dankowski affidavit, exhibit 11).

Plaintiff now moves for summary judgment, maintaining that an appearance at an EUO is a condition precedent to coverage and that the failure to appear constitutes a breach of the policy, which vitiates coverage. Plaintiff further maintains that it is entitled to summary judgment because the admissible evidence presented establishes that the incident was intentional and that the alleged injury does not arise out of an insured accident.

Defendants Sharp View Diagnostic Imaging, P.C. (Sharp View) and Easy Care Acupuncture, P.C. (Easy Care) both argue in opposition that Plaintiff failed to establish that the April 7 incident was staged and that the EUOs were not properly noticed (Landfair affirmation, ¶¶10-12; Mace affirmation, ¶¶2-5, 13-14). Both Defendants also argue that the Plaintiff's denials are untimely and Defendant Easy Care further challenges the qualifications of Plaintiff's investigator (Keane) and paralegal (Peluso) (Landfair affirmation, ¶¶18-21, 32-35; Mace affirmation, ¶11).²

In its reply, Plaintiff maintains that it need not demonstrate timeliness to establish its defense of an EUO no-show and that the failure to appear is a violation of coverage, which vitiates the policy (Feigen affirmation, ¶3). Plaintiff also argues, *inter alia*, that Peluso's affidavit submitted demonstrates the timely and proper mailing of the EUO letters and denials (*id.*). Further, Plaintiff maintains that the investigator (Keane) demonstrated her qualifications and personal knowledge regarding the investigation of April 7 incident and that neither Sharp View nor Easy Care offered any rebuttal regarding proof of a staged loss (*id.*, ¶¶5-7).

² The Court rejected the opposing affirmation submitted by Defendants Doctor Goldshteyn Chiropractic, P.C., Mind & Body Acupuncture, P.C., One to One Rehab PT, P.C., Remedial Medical Care, P.C. and Skillman Medical

DISCUSSION

A party seeking summary judgment must establish a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The appearance of an eligible injured person at an EUO is a condition precedent to coverage and the failure to appear vitiates coverage (*see Hertz Vehs., LLC v Best Touch PT, P.C.*, 162 AD3d 617, 618 [1st Dept 2018]). Sharp View and Easy Care correctly contend that an insurer may deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued since the right to conduct a EUO constitutes a condition precedent to coverage (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2018]; *Neomy Medical P.C. v American Transit Co.*, 31 Misc 3d 1208[a] [Civil Ct., Kings County, Levine J., 2011]). Plaintiff presented evidence that Peluso “created, generated and mailed the EUO notices” in accordance with Plaintiff’s practice and procedures (Peluso affidavit, ¶ 2). As such, Plaintiff established its prima facie entitlement to summary judgment (*see Hertz Vehs., LLC v Best Touch, PT, P.C., supra* at 618).

Neither Sharp View nor Easy Care has submitted an affidavit from a party with personal knowledge controverting Plaintiff’s proof. Therefore, the Court grants that branch of Plaintiff’s summary judgment motion for a declaration that Magny, Reympel, and Deetjen breached a material condition of the insurance policy by failing to appear for an EUO and that Plaintiff is not

Diagnosics, P.C. filed on January 31, 2018 as untimely (NYSCEF Doc. Nos. 189 and 190).

obligated to pay, honor, or reimburse any of the answering Defendants for any claims that were submitted for any No-Fault reimbursement on their behalf.

Plaintiff also established that the April 7 incident was not a covered event, but rather a staged and intentional act through presenting admissible evidence that Magny, Rympel, and Deetjen were unrelated occupants who received treatment at the same multi-specialty facility; that the loss occurred late at night when few persons were present; that the incident occurred within sixteen days from the policy's inception and involved an older vehicle; the existence of common addresses, phone numbers and emails; and that the claim was linked to multiple staged losses and at least four declaratory judgment actions.

The Court notes that neither Sharp View nor Easy Care submitted an affidavit from a party with personal knowledge to rebut Plaintiff's proof. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]).

Sharp View and Easy Care correctly contend that an insurer "[m]ay assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]). "A collision caused in the furtherance of an insurance fraud is not a covered accident under a policy of insurance" (*Matter of Eagle Ins. Co. v Davis*, 22 AD3d 846, 847 [2d Dept 2005]; see also *Matter of Metro Med. Diagnostics v Eagle Ins. Co.*, 293 AD2d 751, 752 [2d Dept 2002]).

Here, Plaintiff established that the incident was staged, which is not covered by no-fault

insurance and, thus, is entitled to summary judgment regardless of the timeliness of its denial (*see Metro Med. Diagnostics v Eagle Ins. Co., supra* at 752). Therefore, the Court grants the remaining branch of the Plaintiff's motion for summary judgment for a declaration that the incident of April 7, 2011, Policy No.: 0020602619, Claim No.:1018387340, is staged and not a covered event, such that Plaintiff is not required to pay any sums arising out of the alleged incident.

ORDER

It is, therefore,

ORDERED that Plaintiff's motion for summary judgment, pursuant to CPLR 3212, is granted without written opposition as to Defendants, DOCTOR GOLDSHTEYN CHIROPRACTIC, P.C., MIND & BODY ACUPUNCTURE P.C., ONE TO ONE REHAB PT, P.C., REMEDIAL MEDICAL CARE P.C. and SKILLMAN MEDICAL DIAGNOSTIC, and granted as to Defendants, SHARP VIEW DIAGNOSTIC IMAGING, P.C. and EASY CARE ACUPUNCTURE P.C.; and it is further

ADJUDGED and DECLARED that Defendants, Ralph Magny, Daphne Rympel, and Hans Deetjen breached a material condition precedent to coverage by refusing and failing to appear for an Examination Under Oath and that Plaintiff is not obligated to pay, honor or reimburse any of the answering Defendants for any claims that were submitted for any No-Fault reimbursement on behalf of Defendants Ralph Magny, Daphne Rympel, and Hans Deetjen; and it is further

ADJUDGED and DECLARED that the incident of April 7, 2011, Policy No.: 0020602619, Claim No.:1018387340, is a staged and not a covered event, such that Plaintiff is

not required to pay any sums arising out of the alleged incident; and it is further

ADJUDGED and DECLARED that Plaintiff recover from the answering Defendants, DOCTOR GOLDSHTEYN CHIROPRACTIC, P.C., MIND & BODY ACUPUNCTURE P.C., ONE TO ONE REHAB PT, P.C., REMEDIAL MEDICAL CARE P.C., SHARP VIEW DIAGNOSTIC IMAGING, P.C, SKILLMAN MEDICAL DIAGNOSTIC, P.C. and EASY CARE ACUPUNCTURE P.C., costs and disbursements, as taxed by the Clerk of the Court, upon presentation of a bill of costs.

Dated: New York, New York
March 29, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.
HON. TANYA R. KENNEDY