

Nationwide Affinity Ins. Co. of Am. v PFJ Med. Care, P.C.
2019 NY Slip Op 34017(U)
April 24, 2019
Supreme Court. Onondaga County
Docket Number: 2017EF1843
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 April 23, 2019.

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,

Plaintiffs,

v.

PFJ MEDICAL CARE, P.C.,

Defendant.

DECISION AND ORDER ON MOTIONS

Index No.: 2017EF1843
RJI No.: 33-17-1857

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,

Plaintiffs,

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

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 Defendants**

In both of these matters the collective plaintiffs (hereinafter referred to as “plaintiff”) have commenced respective declaratory judgment actions seeking a judgment pursuant to CPLR section 3001 declaring that the respective defendants breached a material condition to coverage under the subject insurance policies and No Fault regulations by refusing and failing to appear for an Examination Under Oath (EUO) and that plaintiff was under no obligation to pay on or reimburse any of the respective defendants’ claims. Plaintiff moved in each matter for summary judgment and both motions were denied by this Court pursuant to CPLR section 3212(f) without prejudice, to be re-filed after discovery was complete. In each case after discovery was completed, the plaintiff re-filed the summary judgment motion in September of 2018 which was identical to the first motion. In November of 2018, the Appellate Division, Fourth Department that issued a decision in another case with virtually identical submissions. *See, Nationwide Affinity Insurance Co. of America v. Jamaica Wellness Medical P.C.*, 167 AD3d 192 (4th Dept. 2018). There, the Fourth Department stated that the issue was whether the insurer in a No Fault benefits case may be precluded from asserting a defense based upon the failure of the insured or that person’s assignee to appear at an EUO where the insurer has not timely denied coverage. *See, id.* That court concluded that the

plaintiff failed to meet its burden of establishing that it issued timely denials and found that the assertions in the affidavit of the plaintiff's claims specialist was conclusory and not supported by any of the denial forms, and thus it did not as a matter of law establish that it issued timely and proper denials. *See, id.* Based upon that decision, plaintiff's respective motions were denied by this Court.

Plaintiff now brings a motion to renew in each case with respect to the denials of those motions. *See, CPLR § 2221(e)*. The respective defendants, after failing to timely file opposition papers when these motions were previously scheduled and after requesting an adjournment of the motions and their time to oppose, have now defaulted.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." *CPLR § 2221(e)(2) and (3)*. Plaintiff argues that there was a change in the law after its original submissions and this constitutes a reasonable justification for failure to present the facts relied upon here. *See, Nationwide, supra*. Plaintiff predicates its entitlement to relief upon the law that the reasonable justification requirement is flexible and determined in the court's discretion (*see, Korman v. Bellmore Public School*, 62 AD3d 882 [2d Dept. 2009]) and that a court may grant renewal in the interest of justice if the movant has shown a reasonable justification for failure to submit such information on the earlier motion. *See, Gomez v. Needham Capital Group, Inc.*, 7 AD3d 568 (2d Dept. 2004). However, neither is relevant here. The basis of the Fourth Department's finding was that "[t]he assertions in the affidavit of Nationwide's claims specialist that Nationwide issued timely denial forms to defendant for

nonappearance at the EUO's are conclusory and unsupported by any such denial forms..."

Nationwide, supra. Based upon that determination, the court concluded that "[i]nasmuch as Nationwide 'failed to establish [its] prima facie burden to judgment as a matter of law on the issue of [its] timely and proper denial of coverage, summary judgment should have been denied regardless of the sufficiency of ... defendant's opposition.'" (*citation omitted*). *Id.* The Fourth Department merely reiterated that longstanding burden shifting rule and there has been no change in the law. Thus renewal is not warranted as the Appellate Division did not issue "a new pronouncement on the law governing this case." *Spieler v. Bloomingdale's*, 59 AD3d 267 (4th Dept. 2009).

Nor was plaintiff entitled to bring subsequent summary judgment motions based on the deficiencies in the respective papers inasmuch as the Fourth Department has consistently held that successive summary judgment motions "should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause." *Hughes v. City of Niagara Falls*, 245 AD2d 118 (4th Dept. 1997), *quoting*, *Marine Midland Bank v. Fischer*, 85 AD2d 905 (4th Dept. 1981); *see also*, *Town of Wilson v. Newfane*, 102 AD2d 1095 (4th Dept. 1993); *see also*, *Nicholls v. Diocese of Rochester*, 42 AD3d 903 (4th Dept. 2007).


NOW, therefore, for the foregoing reasons, it is

ORDERED, that plaintiff's motions to renew pursuant to CPLR section 2221(e) is denied, and it is further

ORDERED, that the attorneys are to appear for a pre-trial conference on both cases on June 3, 2019 at 10:30 a.m. to schedule a trial date.

Dated: April 24, 2019
Syracuse, New York

ENTER


DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notices of Motion, dated January 11, 2019.
2. Affidavits of Katherine Lalor, Esq., dated January 11, 2019, and all attached exhibits.