

**Liberty Mut. Ins. Co. v AK Global Supply Corp.**

2020 NY Slip Op 31305(U)

April 27, 2020

Supreme Court, New York County

Docket Number: 652392/2019

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM**

*Justice*

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LIBERTY MUTUAL INSURANCE COMPANY, LIBERTY  
MUTUAL FIRE INSURANCE COMPANY, LM INSURANCE  
CORPORATION, WAUSAU UNDERWRITERS  
INSURANCE COMPANY

**INDEX NO.** 652392/2019

**MOTION DATE** 01/22/2020

**MOTION SEQ. NO.** 001

Plaintiffs,

- v -

AK GLOBAL SUPPLY CORP.,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for JUDGMENT - SUMMARY.

The plaintiffs move pursuant to CPLR 3212 for summary judgment against the defendant, AK Global Supply Corp., seeking judicial declarations (i) that they are not obligated to pay no-fault benefits to the defendant, (ii) staying all proceedings or arbitrations commenced seeking to collect no-fault benefits from the plaintiffs and (iii) enjoining the defendant from commencing any such further actions, proceedings, or arbitrations, based upon the defendant's failure to appear for a duly scheduled Examination Under Oath (EUO). The defendant opposes the motion. The motion is granted to the extent discussed herein.

The defendant submitted 19 claims to the plaintiffs as an assignee under New York No-Fault Insurance Law § 5101 totaling \$48,296.64. The plaintiffs, upon the receipt of the claims, requested additional information from the defendant and conducted an independent investigation into questionable billing practices by the defendant. The investigation revealed that the defendant's billings for durable medical equipment often resulted in inflated prices. Specifically, the defendant improperly coded the equipment it supplied to make it appear that the defendant was entitled to reimbursement at a higher code than it was permitted to bill. Subsequently, the plaintiff requested the defendant's evidence relating to its billing practices and that it also submit to an EUO on the subject. The defendant failed to provide the requested

information or report for any EUO, and the plaintiff subsequently denied the defendant's claims. The plaintiffs now move for summary judgment seeking a declaration that they are not obligated to pay no-fault benefits to the defendant.

It is well settled that the proponent of a motion for summary judgment establishes entitlement to that relief by tendering sufficient evidence to demonstrate the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

Upon an insurance company's request, a medical provider seeking reimbursement must "submit to examinations under oath" and "provide any other pertinent information that may assist the [insurance] Company in determining the amount due and payable." 11 NYCRR 65-1.1; see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, 82 AD3d 559 (1<sup>st</sup> Dept. 2011); Levy v Chubb Ins., 240 AD2d 336 (1<sup>st</sup> Dept. 1997). Failure to comply with such requests allows for an insurance company to properly deny a provider's no-fault claims. See Allstate Insurance Co. v Pierre, 123 AD3d 618 (1<sup>st</sup> Dept. 2014).

In support of its motion for summary judgment, the plaintiffs submit, *inter alia*, the affidavit of William Mitzeliotis, an investigator for the special investigations unit for the plaintiffs, stating that the plaintiffs' investigation into the defendant's billing practices revealed billings at inflated prices, which led to the plaintiffs' request that the defendant provide information relating to its billing practices and report for an EUO, the affidavit of William Gang detailing the plaintiffs' no-fault claims correspondence, and averring that all requests and denials in this case were timely mailed, the plaintiffs' letters to the defendant attempting to schedule an EUO, a series of EUO statements showing that the defendant failed to appear, and the subsequent denial of claims forms stating that the defendant's claims were denied for failure to appear for a duly scheduled EUO. These submissions demonstrate *prima facie* that the plaintiff properly requested an EUO from the defendant, and defendant failed to appear for a duly scheduled

EUO, thus materially breaching a condition precedent to coverage such that the defendant is precluded from recovery on the 19 claims submitted to the plaintiffs. See Allstate Insurance Co. v Pierre, supra; Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, supra.

In response, the defendant contends that the plaintiffs did not meet their *prima facie* burden on the motion since their affidavits were not properly notarized, and that the EUO letters were not timely sent pursuant to NYCRR 65-3.5(b). Contrary to the defendant's contentions, the plaintiffs' affidavits are properly notarized and admissible. See Liberty Mut. Ins. Co. v Five Boro Medical Equipment, Inc., 130 AD3d 465 (1<sup>st</sup> Dept. 2015). Furthermore, the plaintiffs' submissions, specifically the affidavit of William Gang, demonstrate that the EUO letters were timely sent. See Lenox Hill Radiology, P.C. v Tri-State Consumer Ins. Co., 31 Misc 3d 13 (1<sup>st</sup> Dept. 2011). As such, the defendant fails to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

Accordingly, it is hereby,

ORDERED that the motion of the plaintiffs Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, LM Insurance Corporation, and Wausau Underwriters Insurance Company, for summary judgment pursuant to CPLR 3212 is granted to the extent that it is not required to reimburse the defendant for the 19 claims totaling \$48,296.64 submitted by the defendant; and it is further,


ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the to the defendant AK Global Supply Corp. in connection with the 19 claims totaling \$48,296.64 submitted by the defendant; and it is further,

ADJUDGED AND DECLARED that all actions, proceedings or arbitrations commenced by the defendant AK Global Supply Corp. arising from the 19 claims totaling \$48,296.64 submitted by the defendant at issue in this action are permanently stayed, and that the defendant is enjoined from commencing any such further actions, proceedings or arbitrations based upon such claims; and it is further,

ORDERED that the remainder of the motion is denied; and it is further,

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry upon the defendant within 30 days of the date of this order.

This constitutes the Decision and Order of the court.


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 NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

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