

**Unitrin Direct Ins. Co. v ACA PT & Rehab, P.C.**

2020 NY Slip Op 31315(U)

May 11, 2020

Supreme Court, New York County

Docket Number: 150948/2018

Judge: W. Franc Perry

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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. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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UNITRIN DIRECT INSURANCE COMPANY,

Plaintiff,

- v -

ACA PT & REHAB, P.C.,ADVANCED ORTHOPEDICS AND  
JOINT PRESERVATION, P.C.,APEX LABS, INC.,BRONX  
MEDICAL DIAGNOSTIC, P.C.,COMPLETE ORTHOPEDIC  
SERVICES, INC.,COMPREHENSIVE MEDICAL ASSIST,  
P.C.,CONCOURSE CHIROPRACTIC, PLLC,DM  
CHIROPRACTIC, P.C.,ELDAR KADYMOFF MEDICAL,  
P.C.,EMU SURGICAL CENTER, LLC,EMUSC,  
LLC,EQUILIBRIUM OF LIFE ACUPUNCTURE, P.C.,FULL  
SPINE CHIROPRACTIC OF NY, P.C.,GOLDSTAR  
EQUIPMENT, INC.,ISLAND AMBULATORY SURGERY  
CENTER, L.L.C., JOANNA KUSHETSKY, P.T., JULES  
FRANCOIS PARISIEN, M.D., KAZU ACUPUNCTURE,  
P.C.,LAXMIDHAR DIWAN, M.D., LENOX HILL RADIOLOGY  
AND MEDICAL IMAGING ASSOCIATES, P.C.,LR  
MEDICAL, PLLC,MEDMART OF NY CORP.,  
METROPOLITAN MEDICAL & SURGICAL, P.C.,MND  
CHIROPRACTIC, P.C.,NATURAL ACUPUNCTURE  
TOUCH, P.C.,NEW YORK ANESTHESIA, P.C.,NEW YORK  
SURGERY CENTER QUEENS, LLC,PHOENIX MEDICAL  
SERVICES, P.C.,PRECISION RADIOLOGY BY JACOB  
LICHY, M.D., P.C.,PROTECHMED, INC.,RX FOR YOU  
CORP., JOSEPH SALVA, STAR OF N.Y. CHIROPRACTIC  
DIAGNOSTIC, P.C. A/K/A STAR OF N.Y. CHIROPRACTIC  
DIAGNOSTICS, STONE CHIROPRACTIC, P.C., UTICA  
PARK CHIROPRACTIC OF NY, P.C., VISTA MEDICAL  
REHABILITATION, P.C. A/K/A VISTA MEDICAL REHAB,  
P.C.,VITAL POINTS ACUPUNCTURE  
P.C.,WESTCHESTER RADIOLOGY & IMAGING,  
P.C.,YOLANDA BERNARD ALSO KNOWN AS BERNARD  
YOLANDE, JOSHUA DAVID, TARIQ ROACH, NATHANIEL  
PENA

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 117, 118, 119, 120

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

**DECISION + ORDER ON  
MOTION**

This case arises from an October 25, 2016 automobile accident involving Defendants Joshua David, Tariq Roach, and Nathaniel Pena (“Claimants”), who were occupants of an automobile insured by Plaintiff Unitrin Direct Insurance Company.

Plaintiff commenced this action on January 31, 2018, seeking a declaratory judgment against 42 defendants, comprised of the 3 Claimants in addition to 39 Medical Provider Defendants. Plaintiff discontinued the action against Star of NY Chiropractic Diagnostic, P.C., and Bronx Medical Diagnostic, P.C. (NYSCEF Doc Nos. 49, 67.) By decision dated April 2, 2019, the court granted default judgment pursuant to CPLR 3215 against 30 Defendants. (NYSCEF Doc No. 121.)

Plaintiff now moves for summary judgment on its first cause of action against the following Defendants on the grounds that the Claimants all failed to attend duly scheduled independent medical examinations: (1) Full Spine Chiropractic of NY, P.C.; (2) Goldstar Equipment, Inc.; (3) Jules Francois Parisien, M.D.; (4) Kazu Acupuncture, P.C.; (5) Medmart of NY Corp.; (6) and Utica Park Chiropractic of NY, P.C.. (NYSCEF Doc No. 96.) The Defendants have opposed Plaintiff’s motion. (NYSCEF Doc Nos. 113, 117.)

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of

material questions of fact.” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NYS2d 557, 562 [1980].)

Pursuant to the no-fault regulations, an “eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require.” (11 NYCRR 65-1.1.) “The appearance of the insured for IMEs *at any time* is a condition precedent to the insurer’s liability on the policy.” (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 722 [2d Dept 2006] [emphasis added].) The failure to appear for an IME constitutes “a breach of a condition precedent to coverage . . . [giving the insurer] the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued.” (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [citation omitted].)

As the First Department has explained . . . for a no-fault insurer to establish its prima facie entitlement to judgment as a matter of law in a declaratory judgment action on the ground that a claimant failed to appear for an IME or Examination Under Oath (EUO), it must show that it mailed its initial request for verification to the claimant or his/her health care providers within 10 days of receipt of the NF-2 benefits claim form submitted by the claimant (*see* 11 NYCRR 65-3.5[a]), and mailed an additional request for verification, such as a request for an IME or EUO, within 15 days of receipt of the patient’s response to the initial request for verification (*see* 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v Significant Care. PT, P.C.*, 157 AD3d 600 [1st Dept 2018]; *see also* 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing followup notice within 10 days of claimant’s nonappearance]).

The demand for an IME constitutes a request for an additional verification (*see* 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient’s or provider’s initial response to the verification request (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]; *American Tr. Ins Co. v Jaga Med. Servs. P.C.*, 128 AD3d 441, 441 [1st Dept 2015]).

(*PV Holding Corp. v Anesthesia Services, LLC*, 2019 WL 6916073, \*2-3 [Sup Ct, NY County 2019 No. 158784/18], quoting *PV Holding Corp. v Hank Ross Med. P.C.*, 2019 WL 4600813, \*2-3 [Sup Ct, NY County 2019 No. 153793/17].)

Here, Plaintiff submits the following evidence regarding Claimant Tariq Roach: a November 10, 2016 NF-3 form from Defendant Utica Park Chiropractic verifying that it treated Mr. Roach and stamped as received by Plaintiff on November 17, 2016 (NYSCEF Doc No. 104), a letter dated November 29, 2016 scheduling an IME for December 20, 2016 (NYSCEF Doc No. 101), a letter dated December 23, 2016 rescheduling the IME for January 5, 2017 (NYSCEF Doc No. 102), and a letter dated January 23, 2017 rescheduling the IME for February 13, 2017 (NYSCEF Doc No. 103).

Plaintiff has proven compliance with 11 NYCRR § 65-3.5[b] because it sent the initial IME scheduling letter within 15 days of receipt of the NF-3. (*See Hertz Vehs. LLC*, 157 AD3d at 601.) However, Plaintiff fails to prove compliance with subsection [d] because the IME was not scheduled within 30-calendar-days of receipt of the NF-3. (*American Transit Ins. Co. v Longevity Medical Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015].) The 30-calendar-day window expired on December 17, 2016, while the IME was scheduled on December 20, 2016.

Next, Plaintiff submits the following evidence regarding Claimant Nathaniel Pena: a November 14, 2016 claim form from Defendant Vista Medical Rehab indicating that it treated Mr. Pena and stamped as received by Plaintiff on November 22, 2016 (NYSCEF Doc No. 108), a letter dated November 30, 2016 scheduling an IME on December 20, 2016 (NYSCEF Doc No. 105), a December 30, 2016 letter rescheduling the IME for January 19, 2017 (NYSCEF Doc No. 106), and a January 31, 2017 letter rescheduling the IME for February 16, 2017 (NYSCEF Doc No. 107).

The court notes that the claim form submitted regarding Nathaniel Pena is not a prescribed verification form like the NF-3 submitted for Tariq Roach. As such, the court is unable to determine compliance with 11 NYCRR § 65-3.5. Additionally, Plaintiff failed to comply with the 10-calendar-day rescheduling requirement provided in 11 NYCRR § 65-3.6[b] because the January 31, 2017 letter was mailed 12 days after Mr. Pena's nonappearance on January 19, 2017. (*See Hertz Vehs. LLC*, 157 AD3d at 601.)

Lastly, Plaintiff submits the following evidence regarding Claimant Joshua David: a November 23, 2016 NF-3 form from Defendant Jules Parisien verifying that he treated Mr. David and stamped as received by Plaintiff on November 28, 2016 (NYSCEF Doc No. 111), a November 29, 2016 letter scheduling an IME on December 20, 2016 (NYSCEF Doc No. 109), and a December 23, 2016 letter rescheduling the IME for January 5, 2017 (NYSCEF Doc No. 110).

The court finds that Plaintiff has proven compliance with all relevant regulations regarding Claimant Joshua David. The initial IME was scheduled within 15 days of receipt of the NF-3 and the rescheduling letter was mailed within 10 days of the nonappearance. Thus, it is hereby

ORDERED that Plaintiff's motion for summary judgment on its first cause of action is granted in part with respect to Claimant Joshua David and Plaintiff owes no duty to provide coverage for No Fault services rendered to Claimant Joshua David; and it is further

ORDERED that Plaintiff's motion for summary judgment on its first cause of action is denied with respect to Claimants Tariq Roach and Nathaniel Pena.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

<u>05/11/20</u> DATE		<u>W. FRANC PERRY, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE