

Liberty Mut. Ins. Co. v Ezra Supply Inc.

2020 NY Slip Op 32832(U)

August 27, 2020

Supreme Court, New York County

Docket Number: 654848/2018

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 654848/2018

LIBERTY MUTUAL INSURANCE COMPLANY, LIBERTY
MUTUAL FIRE INSURANCE COMPANY, THE FIRST
LIBERTY INSURANCE CORPORATION, LIBERTY
MUTUAL MID-ATLANTIC INSURANCE COMPANY, and
LIBERTY INSURANCE CORPORATIONS,

MOTION DATE 12/06/2019

MOTION SEQ. NO. 001

Plaintiffs,

**DECISION + ORDER ON
MOTION**

- v -

EZRA SUPPLY INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 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, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of the plaintiffs Liberty Mutual Insurance Company, Liberty Mutual First Insurance Company, The First Liberty Insurance Corporation, Liberty Mutual Mid-Atlantic Insurance Company and Liberty Insurance Corporation for summary judgment is granted to the extent that they are entitled to a declaratory judgment in their favor as to reimbursement for 18 claims totaling \$17,178.55 submitted by defendant Ezra Supply, Inc.; and it is further

ADJUDGED and DECLARED that the plaintiffs are not obligated to pay no-fault benefits to the defendant Ezra Supply Inc., in

connection with the 18 claims totaling \$17,178.55 submitted by the defendant; and it is further

ADJUDGED AND DECLARED that all actions, proceedings or arbitrations commenced by the defendant Ezra Supply Inc. arising from the 18 claims totaling \$17,178.55 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, with leave to renew on papers that include proof as to the mailing of the EUO scheduling letters with respect to claims 4-11 and 13-21, upon completion of discovery; and it is further

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry upon the defendant within 15 days of entry of this order; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order or counterorders through NYSCEF on or before October 6, 2020.

DECISION

In this action, plaintiffs Liberty Mutual Insurance Company, Liberty Mutual First Insurance Company, The First Liberty Insurance Corporation, Liberty Mutual Mid-Atlantic Insurance Company and Liberty Insurance Corporation are seeking

a declaration and judgment that they are not responsible for paying any of the applicable no-fault bills submitted by defendant Ezra Supply Inc., because defendant failed to comply with a condition precedent for reimbursement by not appearing at the scheduled Examinations Under Oath (EUO). Plaintiffs move, pursuant to CPLR 3212, for an order granting summary judgment on their complaint. For the reasons set forth below, plaintiffs' motion shall be granted in part and denied in part.

Background and Factual Allegations

Plaintiffs consist of various insurance companies under the Liberty Mutual Group umbrella "that have validly issued insurance policies in the State of New York." (NYSCEF Doc. No. 8, Bynum affirmation in support, ¶ 6.) Defendant is a "company providing durable medical equipment . . . to claimants/insureds . . . eligible for No-Fault benefits." (NYSCEF Doc. No. 1, Complaint, ¶ 2.)

Defendant submitted bills to plaintiffs seeking no-fault reimbursement. In relevant part, as set forth in the complaint, between January 2018 and May 2018, defendant submitted 35 bills (applicable bills) to plaintiffs seeking no-fault reimbursement. See NYSCEF Doc. No. 2. The insurance policies provided, among other things, that, at plaintiffs' request, defendant may have to appear for EUOs and provide any other information to assist plaintiffs in determining the amount due and payable. The EUOs

for the applicable bills were requested between February 26, 2018 and August 24, 2018 and scheduled for dates between March 5, 2018 and September 17, 2018.

Plaintiffs state that they requested that defendant appear at numerous EUOs to verify the submitted bills. According to plaintiffs, they had a reasonable basis for requesting defendant to appear for EUOs because an investigation of defendant's billing practices revealed inflated prices. "Specifically, the improper coding of the equipment supplied was done to make it appear that the Defendant was entitled to reimbursement at a higher code that they were permitted to bill." (Complaint, ¶ 11.) Nonetheless, assert plaintiffs, defendant failed to appear at the scheduled EUOs, failed to contact plaintiffs about rescheduling and also failed to provide verification for the submitted bills.

In its first cause of action, plaintiffs maintain that, after receiving the initial paperwork, they are entitled to demand reasonable verification of the bills. The EUOs were purportedly scheduled on different dates at a place convenient for defendant to appear. Although given an opportunity to request a change in the date or the location for the EUO, defendant failed to do so and subsequently failed to appear at numerous EUOs. As defendant failed to appear for the EUOs, defendant violated the relevant policy and insurance regulations

and also failed to satisfy a condition precedent to reimbursement. "Therefore, Plaintiff has properly denied bills to the defendant in a cumulative total of \$31,660.57." (Id., ¶ 23.)

Plaintiffs now seek a "[d]eclaration that the Defendant is not entitled to reimbursement for medical treatment billed to the Plaintiffs under the no-fault regulations and law . . . due to Defendants' failure to verify their bills as it was obligated to do to complete conditions precedent to coverage." (Complaint, ¶ 1.)

The second cause of action is seeking a declaration that defendant is "barred from commencing litigation in any forum, in court, arbitration or otherwise, seeking such reimbursement for the bills submitted during the Involved Time Period." (Id., ¶ 31.)

In their third cause of action, plaintiffs seek a permanent injunction dismissing any action brought by defendant for reimbursement of the applicable bills. "That without such declaration and Permanent Injunction, the Defendant will unduly burden the plaintiff with continued efforts to seek such reimbursement it is not entitled to receive." (Id., ¶ 37.)

Plaintiffs' Summary Judgment Motion

Plaintiffs argue that they should be granted summary judgment as no triable issues of fact remain as to whether

plaintiffs properly denied billing for services rendered by defendant in the cumulative amount of \$31,660.57. In sum, as set forth below, they claim that defendant's failure to appear for the reasonably and properly requested EUOs entitles plaintiffs to deny the claims.

Pursuant to 11 NYCRR § 65-1.1 (d), plaintiffs, as insurers, are entitled to request EUOs to verify submitted bills. According to plaintiffs, they investigated and uncovered "questionable billing for durable medical equipment for the claimant/insured by the Defendant." (Bynum affirmation, ¶ 19.) As a result, plaintiffs allege that they had a reasonable basis to believe that defendant was submitting fraudulent bills and had a reasonable basis to request that defendant appear for EUOs. Plaintiffs provide the affidavit of William Mitzeliotis (Mitzeliotis), plaintiffs' Special Investigations Unit investigator, "justi[fy]ing the need" for the EUOs. (Id., ¶ 20.) Mitzeliotis "investigated no-fault claims that indicate some form of material misrepresentation." (NYSCEF Doc. No. 18., Mitzeliotis aff, ¶ 1.) Mitzeliotis started to investigate defendant "after a claim was made regarding a motor vehicle accident that allegedly occurred on February 1, 2018." (Id., ¶ 3.) "Specifically, the improper coding of the equipment supplied was done to make it appear that the defendant was entitled to reimbursement at a higher code than they were

permitted to bill.” (Id., ¶ 4.) He continued that plaintiffs “had no choice but to request verification of each bill through an EUO verification process.” (Id.)

Mitzeliotis explained that for each applicable bill, plaintiffs requested an EUO. He stated the following, in relevant part:

“For each of the bills noted in each of the scheduling letters, the defendant failed to appear to verify the durable medical equipment received by the claimant/insured and their proper standing to collect no-fault benefits. In order to complete my investigation as to whether there was fraudulent billing issues with the defendant, or obtain the information as to why their billing differed from the testimony of the claimant/insured, the testimony of the defendant was necessary.”

Id., ¶ 6.

Despite receiving several notifications spanning several dates, defendant did not appear at all. “If the defendant had even appeared just once, it is likely that I could have completed my investigation and made a determination as to whether there was fraud involved or not.” (Id., ¶ 7.) However, as defendant allegedly did not cooperate, plaintiffs were unable to verify the applicable bills.

In support of their motion, plaintiffs submit the letters they mailed to defendant with respect to the applicable bills. The letters ask defendant to appear for the EUOs or reschedule, and also request additional documentation. (See NYSCEF Doc.

15.) However, plaintiffs have only submitted the letters documenting the EUO requests for claims 1-3, 12 and 26-35. According to plaintiffs, although defendant did reply to some EUO requests with objection letters dated March 27, 2018, May 15, 2018, June 16, 2018, July 27, 2018 and August 14, 2018, defendant still did not provide the requested information. (See NYSCEF Doc. No. 16.) Plaintiffs submit hearing transcripts from some of the dates that defendant failed to appear for the EUOs. (See NYSCEF Doc. No. 17.) They maintain that defendant's failure to appear at the EUOs prevented plaintiffs "from determining the amounts due and payable pursuant to the applicable portion of the policy under which the bill was submitted and pursuant to 11 NYCRR § 65-1.1 (d). (Bynum affirmation, ¶ 23.)

Plaintiffs allege that they properly and timely denied billing for services and products. In support of this contention, they submit the signed and notarized affidavit of William Gang (Gang), Claims Department Team Manager. Gang stated that plaintiffs "tracked the verification demands that were sent out and whether the verification was received," for each of the applicable bills. (NYSCEF Doc. No. 19, Gang, aff, ¶ 4.)

As part of his job, Gang "reviewed the dates Liberty Mutual sends out the request for verification to ensure that the

requests are timely made. All the requests that have been made a part of this motion have been timely requested by a member of my team" (Id., ¶ 6.) He further averred that he had personal knowledge of plaintiffs' office procedures with respect to the handling of no-fault claims. Gang also indicated that he was familiar with the standard mailing procedures and he described these "mailing practices and procedures" in his affidavit. (Id., ¶ 9.) According to Gang, "[t]he failure of a Liberty Mutual employee, within the mailing department, to ensure the proper addressing and mailing of such documents would subject said employee to disciplinary action." (Id.) Gang concluded that he has "also reviewed the bills in this case. All verification requests and denials were timely mailed." (Id., ¶ 14.)

Defendant's Opposition

Defendant alleges that it timely and properly submitted claims seeking payments for medically necessary equipment that it provided to people who were entitled to receive no-fault benefits. According to defendant, although plaintiffs received these claims, they remain unpaid and overdue. Defendant provides numerous reasons for why plaintiffs' motion should be denied. Starting with the technical aspects of plaintiffs' motion, defendant argues that the affirmation from Nicole M Bynum, Esq. (Bynum), plaintiffs' counsel, is inadmissible

because Bynum is one of plaintiffs' employees. Similarly, defendant avers that the affidavits of Mitzeliotis and Gang, and the affidavits of Cheryl Dazny attached to EUO letters dated February 26, 2018 and August 24, 2018, are insufficient as they are allegedly improperly notarized. Defendant further alleges that Gang's affidavit fails to adequately lay a foundation to support the documents being proffered. According to defendant, "Gang's affidavit does not address the creation and mailing of EUO scheduling letters. . . . [T]he court lacks the information required to determine if the documents proffered by Plaintiff were, in fact, created in the regular course of business."

(NYSCEF Doc. No. 24, Landfair affirmation in opposition, ¶ 21.)

As to the merits, defendant argues that plaintiffs failed to establish the EUO no-show cause of action, as plaintiffs failed to establish that defendant was properly notified of the scheduled EUOs so that it had an opportunity to attend them. Defendant states that "[p]laintiff has proffered no EUO letters for bills 4-11 and 13-25 on its chart of 35 bills and only one EUO letter for bills 1, 2, 3 and 11 on its chart." (Id., ¶ 25.) It continues that plaintiffs have the burden to demonstrate that defendant was properly notified of the EUOs. Further, plaintiffs' complaint fails to allege the specific dates of the EUOs at which defendant purportedly failed to appear. Defendant further notes that plaintiffs are supposed to make a follow up

request within 10 days of a nonappearance at an EUO. According to defendant, summary judgment must be denied as plaintiff failed to request two EUOs for the first 25 of the 35 applicable bills.

Defendant further alleges that plaintiffs failed establish that they timely mailed the EUO letters. It states, in relevant part, "[a]n EUO is only validly scheduled if the EUO scheduling letter is actually mailed within 15 business days, or at the latest 30 calendar days, after the insurer's receipt of a given bill." (Id., ¶ 27.) Similarly, defendant claims that plaintiffs failed to establish proper mailing of the EUO letters as plaintiffs did not provide a sufficient explanation of the standard office policies and procedures for drafting and mailing EUO letters. As a result, plaintiffs purportedly failed to establish that the EUO scheduling letters were actually mailed. Defendant provides various reasons for why the hearing transcripts provided by plaintiffs are insufficient to establish that defendant failed to appear for the EUOs. For instance, although a EUO "no-show" statement was made on July 9, 2018, "none of the purported EUO letters actually schedule an EUO for that date" (Id., ¶ 38.) Among other examples, although the transcript may state that plaintiffs' counsel made his statement on the record at 11:52 a.m., "[h]e does not state that he was at the EUO location at the scheduled time for each of

those EUOs, much less that he was at the location continuously from 10:00 a.m. until the time he made the statement.” (Id., ¶ 40.)

According to defendant, plaintiffs failed to establish a reasonable basis for requesting the EUOs. Plaintiffs allegedly used “rote, form letters to request EUOs” and do not establish a reasonable basis for making these requests. (Id., ¶ 46.) Defendant also indicated that, although it objected to having to travel from Brooklyn to White Plains, plaintiffs ignored these objections.

Defendant also alleges that the denials issued by plaintiffs were improper as defendant was not sufficiently apprised of the denial. It argues that plaintiffs failed to establish that they requested two EUOs for six of the denials on record. Defendant further claims that plaintiff failed to establish that the denials were timely. As a result, according to defendant, by failing to demonstrate that its denials were timely and proper, plaintiffs failed to establish an entitlement to a declaration that defendant has no rights under this insurance policy.

Discussion

I. Summary Judgment

“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). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case 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) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." Ruiz v Griffin, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. EUO Requests

Upon request from an insurance company, the "eligible injured person or that person's assignee or representative," shall, in relevant part, "as may reasonably be required submit to examinations under oath by any person named by the Company," and "provide any other pertinent information that may assist the

Company in determining the amount due and payable." 11 NYCRR § 65-1.1 (d). Courts have found that an insurance company may properly deny no-fault benefits based on this failure appear at requested EUOs. See e.g. Kemper Independence Ins. Co. v Cornerstone Chiropractic, P.C., 158 AD3d 468, 468 (1st Dept 2020) ("Plaintiff is entitled to summary judgment [declaring that defendants have no right to collect no-fault benefits] on the additional ground that defendants failed to appear at two scheduled EUOs"); see also Allstate Ins. Co. v Pierre, 123 AD3d 618, 618 (1st Dept 2014) ("Plaintiff established that defendants are not entitled to no-fault benefits because their assignors failed to appear at scheduled [EUOs]").

A presumption of mailing "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed." Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679, 680 (2nd Dept 2001). In addition, "a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." American Tr. Ins. Co. v Lucas, 111 AD3d 423, 424 (1st Dept 2011) (internal quotation marks and citation omitted).

Plaintiffs seek a declaration and judgment that they are not responsible for paying any of the applicable no-fault bills

submitted by defendant because defendant failed to appear at the requested EUOs. In support of its motion, plaintiffs have submitted copies of the EUO scheduling letters and their corresponding affidavits of service for claims 1-3, 12 and 26-35. Defendant's objection letters, as submitted in the record, admit receipt of the EUO scheduling letters for claims 22-25. (See NYSCEF Doc. 16 at 5.)

Plaintiffs also submit affidavits and documentation alleging that they properly requested EUOs and that defendant failed to appear. For example, Gang stated that he reviewed the bills in this case and that all verification requests and denials were timely mailed. Mitzeliotis provided a reasonable basis for seeking the EUOs, citing questionable billing practices. Plaintiffs submit denial of claim forms for every claim, indicating that EUOs were scheduled and that defendant did not appear.

"The failure of a party eligible for no-fault benefits to appear for a properly-noticed Examination under Oath (EUO) constitutes a breach of a condition precedent, vitiating coverage." Hertz Vehicles, LLC v Alluri, 171 AD3d 432, 432 (1st Dept 2019). Plaintiffs' submissions established, prima facie, that defendant breached a condition precedent for claims 1-3, 12 and 26-35 by failing to appear for properly noticed EUOs. Accordingly, plaintiffs met their burden to establish that

defendant is precluded from recovering no-fault benefits for claims 1-3, 12 and 26-35 (18 claims totaling \$17,178.55). Nonetheless, as mentioned, for the remainder of the claims, which are claims 4-11 and 13-21, plaintiffs do not provide copies of the corresponding EUO scheduling letters and their affidavits of service. While Gang provided a detailed explanation of the standard office policies for drafting and mailing EUO letters, he does not indicate the specific dates the EUO requests were mailed out and what dates were requested in those letters. Mitzeliotis states that "[f]or each of the bills noted in each of the scheduling letters, the defendant failed to appear to verify the durable medical equipment received by the claimant/insured and their proper standing to collect no-fault benefits." Mitzeliotis, ¶ 6. However, the scheduling letters for bills/claims 4-11 and 13-21 are not provided in the record. Therefore, on this motion, plaintiffs have failed to meet their burden to show that they properly notified defendant of the scheduled EUOs with respect to claims 4-11 and 13-21 so that it could respond and attend.

In opposition to plaintiffs' motion, defendant claims that plaintiffs failed to timely send the EUO letters. Pursuant to 11 NYCRR § 65-3.5 (b), "any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms." Courts have found that an affidavit from the person assigned to the claim, as corroborated by the denial of claim forms, is sufficient to show compliance with 11 NYCRR § 65-3.5 (b). For example, the Court in Hertz Vehs. LLC v

Significant Care, PT, P.C. (157 AD3d 600, 601 [1st Dept 2018]) (internal citations omitted), held the following, in relevant part:

"The affidavit of the Hertz claims handler personally assigned to this claim, as corroborated by the NF-10 denial of claim form stated that the date Pavlova's bill was received by the insurer was July 18, 2014. Hertz therefore established its compliance with 11 NYCRR § 65-3.5 (b) by generating the first EUO scheduling letter within 15 days of receipt of the provider's bill, and compliance with 11 NYCRR § 65-3.6 (b), by generating the second EUO scheduling letter less than 10 days after the first nonappearance on August 7, 2014."

Here, plaintiffs' submissions, including the affidavit of Gang and the denial of claim forms, similarly indicate that plaintiffs have complied with the requirements of 11 NYCRR § 65-3.6 (b) by requesting the EUOs for the 18 claims at issue within the appropriate time frame. By way of example, a denial of claim form dated on September 25, 2018 indicates that defendant submitted a claim for \$1,150.00 for a treatment date of May 28, 2018. The date of the bill was July 2, 2018 and the date the bill received by the insurer was July 10, 2018. (NYSCEF Doc. No. 20 at 96.) Plaintiffs' counsel mailed out the first EUO scheduling letter on July 23, 2018. (See NYSCEF Doc. No. 15.) When defendant failed to appear for the scheduled EUO on August 20, 2018, counsel mailed out a second EUO scheduling request on August 24, 2018. The denial of claim form indicated that this claim was denied on September 25, 2018 because the

fees were not in accordance with fee schedules and because "you, the Provider/Assignee, failed to appear for Examination Under Oath scheduled for 8/20/2018 & 9/17/18 and the delay letters were issued 7/23/2018 & 8/24/2018." (Id. at 20.)

Defendant alleges that the EUO requests were invalid as plaintiffs failed to mail two EUOs for each applicable bill. Nonetheless, "such a fact, even if true, would not excuse the failure of plaintiff's assignor to appear for the duly scheduled EUOs since the record does not contain any evidence showing that the mailing of the EUO scheduling letters to plaintiff's assignor by first class mail had been insufficient." (Id.)

Defendant further claims that the EUO requests were invalid for using "rote, form letters." However, courts have held "that an insurer d[oes] not need to set forth the objective reasons for the requested EUOs as part of its prima facie showing of entitlement to judgment as a matter of law." Parisien v Metlife Auto & Home, 2020 NY Misc LEXIS 3470, *2, (App Term 2d Dept 2020) (internal quotation marks and citations omitted).

Defendant further claims that, although plaintiff proffers a no-show statement for July 9, 2018, none of the EUO letters schedule an EUO for that date. However, the record indicates otherwise. The hearing transcript indicates that counsel marked a letter, dated June 15, 2018 and requesting an EUO for July 9, 2018, into evidence. (NYSCEF Doc. No. 17 at 17.) Such

correspondence correlates to an objection letter written by defendant stating the following, "[p]lease be advised that this office represents Ezra Supply Inc. with respect to the EUO request received from you on the above-referenced claims in your second request letter dated June 15, 2018." (NYSCEF Doc. No. 16.) Moreover, contrary to defendant's contentions, plaintiffs' certified transcripts are also sufficient to document that defendant failed to appear for the scheduled EUOs. See MML Med. Care, P.C. v Praetorian Ins. Co., 46 Misc 3d 127(A), 2014 NY Slip Op 51792(U), (App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014) ("defendant also submitted certified transcripts of the scheduled EUOs, which demonstrated that plaintiff's assignor had failed to appear").

There is also no merit to defendant's argument that the EUO requests were unreasonable by requiring defendant to travel from Brooklyn to White Plains. Pursuant to 11 NYCRR § 65-3.5 (e), "[a]ll examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility properly equipped for the performance of the medical examination." As set forth in Arco Med. NY, P.C. v Lancer Ins. Co. (37 Misc 3d 90, 93 [App Term, 2d Dept, 2d, 11th & 13th Dists 2012]) (citation omitted) ("there is nothing in the no-fault regulations prohibiting an insurer from

scheduling an EUO outside the county in which the applicant is located"). Moreover, despite numerous requests, dates and times, defendant failed to appear even once for an EUO. Similarly, there is no merit to defendant's contentions that plaintiffs did not sufficiently apprise defendant of the reason for the denial of claim. After reviewing the record, it appears that there is a timely denial of claim form submitted with every claim provided in the complaint and that plaintiffs "sufficiently apprise[d] the provider as to the reason for denial." Unitrin Advantage Ins. Co. v All of NY, Inc., 158 AD3d 449, 450 (1st Dept 2018). As set forth in the example above, each of the denials includes the reason for the denial, along with the dates that defendant failed to appear at the scheduled EUOs.

Citing, Samuel & Weininger v Belovin & Franzblau (5 AD3d 466 [2d Dept 2004]), defendant claims that an attorney who is an employee of a party is prohibited from submitting an affirmation. As a result, according to defendant, Bynum's affirmation is inadmissible. However, the Court in Samuel & Weininger v Belovin & Franzblau held that, "[b]ecause the attorney is also an associate of the plaintiff law firm which is a party to the action, the submission of an affirmation instead of an affidavit was improper." Id. at 466. Here, as Bynum's law firm is not a party to the action, her affirmation is

proper. There is similarly no merit to defendant's arguments regarding the insufficiency of the other affidavits submitted by plaintiffs.

In conclusion, and in summary, only for claims 1-3, 12 and 22-35, have plaintiffs satisfied their "prima facie burden on summary judgment of establishing that [they] requested [EUOs] in accordance with the procedures and time-frames set forth in the no-fault implementing regulations, and that defendants' assignors did not appear." Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 (1st Dept 2011). In opposition, defendant fails to raise a triable issue of fact. For the remainder of the claims, which are claims 4-11 and 13-21, plaintiffs have failed to show that defendant was properly notified of the scheduled EUOs so that it could respond and attend. Plaintiffs' motion for summary judgment, therefore, must be denied with respect to these claims, but such denial is without prejudice and with leave to renew upon completion of discovery.

8/27/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE