

**Nationwide Affinity Ins. Co. of Am. v Tavarez**

2021 NY Slip Op 30629(U)

March 3, 2021

Supreme Court, New York County

Docket Number: 157230/2019

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART IAS MOTION 37EFM**

*Justice*

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NATIONWIDE AFFINITY INSURANCE COMPANY OF  
AMERICA,

Plaintiff,

INDEX NO. 157230/2019

MOTION DATE 09/16/2020

MOTION SEQ. NO. 002

- v -

FREDDY TAVAREZ, CROSSTOWN MEDICAL, P.C., DAHU  
ACUPUNCTURE, P.C., DAVID ISRAEL, DM  
CHIROPRACTIC, P.C., GBD PHYSICAL THERAPY,  
P.C., ISOKINETIC PHYSICAL THERAPY, PLLC, JAM  
PHARMACY CORP., LONGEVITY MEDICAL SUPPLY  
INC., MEDAID RADIOLOGY, LLC, METRO PAIN  
SPECIALIST, PC, MFS SUPPLY CORP., MMC FACULTY  
PRACTICE, MONTEFIORE MEDICAL CENTER, NILE  
REHAB PHYSICAL THERAPY, P.C., PREFERRED  
MEDICAL, P.C., QI LONGFELLO ACUPUNCTURE,  
P.C., RIDGEWOOD DIAGNOSTIC LABORATORY,  
LLC, SCARBOROUGH CHIROPRACTIC, P.C.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 170, 171

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

Upon the foregoing documents, it is

Upon the foregoing documents, plaintiff's instant motion, pursuant to CPLR 3212, for summary judgment as against medical provider defendants JAM Pharmacy Corp.; Longevity Medical Supply, Inc.; Metro Pain Specialist, P.C.; and Preferred Medical P.C. is granted for the reasons stated hereinbelow.

Background

On December 6, 2018, Freddy Tavarez ("the claimant-defendant") was allegedly injured in a motor vehicle accident and received treatment from the medical provider defendants, namely, Crosstown Medical, P.C.; Dahu Acupuncture, P.C.; David Israel, DM Chiropractic, P.C.; GDB Physical Therapy, P.C.; Isokinetic Physical Therapy, PLLC; Jam Pharmacy Corp.; Longevity Medical Supply Inc.; Medaid Radiology, LLC; Metro Pain Specialist, PC.; MFS Supply Corp.; MMC Faculty Practice; Montefiore Medical Center; Nile Rehab Physical Therapy, P.C.; Preferred Medical, P.C.; QI Longfello Acupuncture, P.C.; Ridgewood Diagnostic Laboratory, LLC; and Scarborough Chiropractic, P.C. The claimant-defendant assigned his rights for

reimbursement to the medical provider defendants, who then submitted claims to plaintiff, Nationwide Affinity Insurance Company of America. (NYSCEF Doc. 2.)

Plaintiff asserts that “suspicious circumstances surrounding the accident revealed by [plaintiff’s] preliminary investigation, and the excessive treatment [the claimant-defendant] received” inclined plaintiff to schedule an Examination Under Oath (“EUO”) to further verify the facts of the subject alleged accident (NYSCEF Doc. 135, at 9). On February 28, March 28, and April 9, 2019, the claimant-defendant apparently failed to appear for his scheduled and rescheduled EUO (NYSCEF Doc. 2). Thus, plaintiff disclaimed all coverage (NYSCEF Doc. 2). Plaintiff claims that it both requested the subject EUOs and denied any and all claims timely (NYSCEF Doc. 135, at 9-12).

On July 14, 2019, plaintiff commenced the instant action against all defendants, seeking a judgment declaring that all defendants are not eligible for No-Fault reimbursement from plaintiff, as the claimant-defendant breached a condition of plaintiff’s subject insurance policy by failing to appear for his scheduled and rescheduled EUO. (NYSCEF Doc. 2.)

On October 30, 2019, plaintiff moved (Seq. No. 001), pursuant to CPLR 3215, for a declaratory judgment on default as against the claimant-defendant and the following medical provider defendants: Crosstown Medical, P.C.; Dahu Acupuncture, P.C.; David Israel, DM Chiropractic, P.C.; GDB Physical Therapy, P.C.; Isokinetic Physical Therapy, PLLC; Longevity Medical Supply Inc.; Medaid Radiology, LLC; Metro Pain Specialist, PC.; MFS Supply Corp.; MMC Faculty Practice; Montefiore Medical Center; Nile Rehab Physical Therapy, P.C.; QI Longfello Acupuncture, P.C.; Ridgewood Diagnostic Laboratory, LLC; and Scarborough Chiropractic, P.C. (NYSCEF Doc. 67.) Pursuant to a December 17, 2019 stipulation, plaintiff withdrew its motion for a default judgment (Seq. No. 001) as against medical provider defendants Longevity Medical Supply, Inc. and Metro Pain Specialists P.C., only (NYSCEF Doc. 123).

On January 8, 2020, this Court granted plaintiff’s motion for a declaratory judgment on default (Seq. No. 001) as against the claimant-defendant and the following medical provider defendants: Crosstown Medical, P.C.; Dahu Acupuncture, P.C.; David Israel, DM Chiropractic, P.C.; GDB Physical Therapy, P.C.; Isokinetic Physical Therapy, PLLC; Medaid Radiology, LLC; MMC Faculty Practice; Montefiore Medical Center; Nile Rehab Physical Therapy, P.C.; QI Longfello Acupuncture, P.C.; Ridgewood Diagnostic Laboratory, LLC; and Scarborough Chiropractic, P.C., only. This Court also directed medical provider defendants Preferred Medical PC and JAM Pharmacy Corp. (the answering, non-withdrawn defendants) to appear for a preliminary conference on Tuesday, February 11, 2020. (NYSCEF Doc. 124.)

Plaintiff now moves (Seq. No. 002), pursuant to CPLR 3212, for summary judgment as against medical provider defendants JAM Pharmacy Corp.; Longevity Medical Supply, Inc.; Metro Pain Specialist, P.C.; and Preferred Medical P.C., only, as a matter of law, as the claimant-defendant “violated the No-Fault Regulation” and the subject insurance policy by failing repeatedly to appear for his scheduled and rescheduled EUO (NYSCEF Doc. 134); see New York & Presbyt. Hosp. v Country-Wide Ins. Co., 17 NY3d 586, 592 (2011), (the subject medical provider defendants “stood in the shoes” of the claimant-defendant and, thus, “acquired no greater rights than he had”). Plaintiff also cites to Unitrin Advantage Ins. Co. v Bayshore Physical Therapy,

PLLC, 82 AD3d 559 (1<sup>st</sup> Dept. 2011), asserting that “the failure to comply with a condition precedent to coverage voids coverage regardless of the timeliness of the denial of coverage” (though plaintiff claims that it both requested the subject EUOs and denied the subject claim(s) timely) (NYSCEF Doc. 35, at 20).

The subject medical provider defendants oppose plaintiff’s instant motion for summary judgment against them, asserting, among various points, that (1) the instant motion is premature, as discovery remains outstanding; (2) plaintiff issued the subject EUO requests and denial of claim(s) untimely; and (3) plaintiff used various addresses to send notices to the claimant-defendant (NYSCEF Doc. 166 and 170).

### Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1<sup>st</sup> Dept. 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

This Court finds that plaintiff has made out a prima facie case for summary judgment as against the subject medical provider defendants and that defendants have failed to meet their burden to establish that a material issue of fact exists in the instant matter.

Plaintiff’s instant motion is not premature, and defendants have failed to demonstrate that they require the subject discovery to oppose it. The court in Flores v City of New York, 66 AD3d 599, 600 (1<sup>st</sup> Dept. 2009), held as follows: “The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion.”

Additionally, as plaintiff asserts, plaintiff offered the claimant-defendant three opportunities to appear for the subject EUO (NYSCEF Doc. 169). See Big Apple Med. Supply, Inc. v Titan & Nationwide, 2019 NY Slip Op 52067(U) (App Term, 2d Dept. 2019).

As for defendants’ argument that plaintiff did not adequately notify the claimant-defendant because plaintiff used various addresses for him, as plaintiff asserts, (1) the claimant-defendant has not alleged that he did not receive the subject EUO scheduling letters; (2) plaintiff also mailed the subject EUO notices to the claimant-defendant’s counsel; and (3) plaintiff used an address that the claimant-defendant himself provided on his subject Application for No-Fault Benefits (NYSCEF Doc. 169).

This Court has considered defendants’ other arguments and finds them to be unavailing and/or non-dispositive.

Thus, plaintiff is entitled to summary judgment (Seq. No. 002) as against medical provider defendants JAM Pharmacy Corp.; Longevity Medical Supply, Inc.; Metro Pain Specialist, P.C.; and Preferred Medical P.C.

Conclusion

Thus, for the reasons stated herein, the instant motion, pursuant to CPLR 3212, by plaintiff, Nationwide Affinity Insurance Company of America, for summary judgment as against medical provider defendants JAM Pharmacy Corp.; Longevity Medical Supply, Inc.; Metro Pain Specialist, P.C.; and Preferred Medical P.C. is hereby granted. Accordingly, the Clerk is hereby directed to enter judgment declaring that the immediately aforementioned medical provider defendants are not eligible for No-Fault reimbursement from plaintiff, as the claimant-defendant, Freddy Tavarez, breached a condition of plaintiff's subject insurance policy by failing to appear for his scheduled and rescheduled Examination Under Oath.

The compliance conference currently scheduled for 3/16/2021 is hereby cancelled as moot.

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3/3/2021  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE