

**Country-Wide Ins. Co. v Morales**

2021 NY Slip Op 31197(U)

April 12, 2021

Supreme Court, New York County

Docket Number: 650567/2020

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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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650567/2020

MOTION DATE 01/26/2021

MOTION SEQ. NO. 002

- v -

MARCO MORALES, ANDREW J. DOWD, M.D., PDA NY CHIROPRACTIC, PC, HEALTHWISE MEDICAL SERVICES, P.C., BLISS DRUGS, CMA PSYCHOLOGY, PC, M EL SAYED PHYSICAL THERAPY, PC, MFS SUPPLY CORP, STEPHENS ACUPUNCTURE, P.C., DEO MEDICAL SERVICES, P.C., CENTRAL DRUGS, INC., NYRX PHARMACY INC., MEDAID RADIOLOGY LLC, DAVID ISRAEL, MD, A TO Z SUPPLIES GROUP INC, DOS MANOS CHIROPRACTIC PC, JORDAN CHIROPRACTIC, P.C.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion (Seq. No. 002) by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment against medical provider defendants Healthwise Medical Services, P.C. and NYRX Pharmacy Inc. P.C. and to dismiss all Counter-Claims made against plaintiff, is granted.

Background

On or prior to October 22, 2018, plaintiff, Country-Wide Insurance Company, issued an insurance policy (number RT 7120214 18) that remained in effect from October 22, 2018 to April 19, 2019. On March 18, 2019, the claimant-defendant, Marco Morales, was allegedly injured in a motor vehicle accident and, as a purported eligible injured party under the subject insurance policy, submitted a claim (number 000343598-002) to plaintiff. The claimant-defendant sought medical supplies and/or treatment from the medical provider defendants, namely, Andrew J. Dowd, M.D.; PDA NY Chiropractic, PC; Healthwise Medical Services, P.C.; Bliss Drugs; CMA Psychology, PC; M El Sayed Physical Therapy, PC; MFS Supply Corp; Stephens Acupuncture, P.C.; DEO Medical Services, P.C.; Central Drugs, Inc.; NYRX Pharmacy Inc.; Medaid Radiology LLC; David Israel, MD; A to Z Supplies Group Inc; Dos Manos Chiropractic PC; and Jordan Chiropractic, P.C. The claimant-defendant assigned his

right to collect No-Fault benefits to the medical provider defendants, who, in their respective capacities as the claimant-defendant's assignees under the subject insurance policy, submitted claims for reimbursement to plaintiff. On June 3, June 24, and July 12, 2019, the claimant-defendant failed to appear, or failed to appear in time (he was over an hour late), for a scheduled and rescheduled Examination Under Oath ("EUO"), thereby breaching a condition of the subject insurance policy. Thus, plaintiff disclaimed coverage. (NYSCEF Doc. 1.)

On January 24, 2020, plaintiff commenced the instant action, seeking a judgment against defendants (1) declaring that plaintiff owes no duty to pay No-Fault claims arising out of the subject alleged accident to defendants; (2) permanently staying all No-Fault lawsuits and arbitrations arising from the No-Fault claims that defendants submitted to plaintiff arising out of the subject alleged accident; and (3) awarding costs, disbursements, and attorney's fees to plaintiff (NYSCEF Doc. 1, at 14).

On March 10, 2020, medical provider defendant NYRX Pharmacy Inc. answered the complaint with various denials, twenty Affirmative Defenses, and a Counter-Claim (NYSCEF Doc. 17). On March 13, 2020, plaintiff withdrew its prior rejection of that answer, accepting it as timely (NYSCEF Doc. 22).

On May 27, 2020, medical provider defendant Healthwise Medical Services, P.C. answered the complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 23).

Plaintiff then moved, pursuant to CPLR 3215, for a default judgment against the claimant-defendant and medical provider defendants Andrew J. Dowd, M.D.; PDA NY Chiropractic, PC; Bliss Drugs; CMA Psychology, PC; M El Sayed Physical Therapy, PC; MFS Supply Corp; Stephens Acupuncture, P.C.; DEO Medical Services, P.C.; Central Drugs, Inc. Medaid Radiology LLC; David Israel, MD; A to Z Supplies Group Inc; Dos Manos Chiropractic PC; and Jordan Chiropractic, P.C. (NYSCEF Doc. 25).

By Decision and Order dated March 30, 2021, this Court granted that motion (Seq. No. 001) for a default judgment as against the claimant-defendant and medical provider defendants Andrew J. Dowd, M.D.; PDA NY Chiropractic, PC; Bliss Drugs; CMA Psychology, PC; M El Sayed Physical Therapy, PC; MFS Supply Corp.; Stephens Acupuncture, P.C.; DEO Medical Services, P.C.; Central Drugs, Inc.; Medaid Radiology LLC; David Israel, MD; A to Z Supplies Group Inc.; Dos Manos Chiropractic PC; and Jordan Chiropractic, P.C. (NYSCEF Doc. 83).

Plaintiff now moves (Seq. NO. 002), pursuant to CPLR 3212, for summary judgment against medical provider defendants Healthwise Medical Services, P.C. ("Healthwise") and NYRX Pharmacy Inc. P.C. ("NYRX") and to dismiss all Counter-Claims made against plaintiff (NYSCEF Doc. 45).

In opposition, NYRX asserts, inter alia, the following: (1) plaintiff acknowledges that the claimant-defendant appeared late for an EUO on June 24, 2019, and plaintiff was unprepared to proceed; and (2) plaintiff failed to submit the subject denial of NYRX's bill (NYSCEF Doc. 64).

In opposition, Healthwise asserts, inter alia, the following: (1) plaintiff failed to submit the subject denial within thirty days of receipt of the subject proof of claim; (2) the instant motion is premature, as there has not been sufficient time for discovery; and (3) plaintiff has failed to establish the merits of the “EUO No-Show Defense” (NYSCEF Doc. 65).

In reply, plaintiff asserts, inter alia, the following: (1) when the claimant-defendant failed to appear for the subject EUOs, plaintiff had the right to deny claims retroactively, regardless of whether plaintiff issued the subject denials timely; and (2) neither defendant has alleged that the claimant-defendant did not receive the subject EUO notices (NYSCEF Doc. 81).

### 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”).

Plaintiff has made out a prima facie case for summary judgment against Healthwise and NYRX, including by submitting affidavits of fact by individuals with personal knowledge detailing plaintiff’s attempts to notify the claimant-defendant about the scheduled and rescheduled EUO and by submitting proof that the claimant-defendant failed to appear at least twice and appeared more than an hour late the other time. Healthwise and NYRX have submitted essentially boilerplate arguments that plaintiff has failed to provide sufficient detail of its efforts at notifying the claimant-defendant and documenting the claimant-defendant’s failure to appear.

A common-sense view of plaintiff’s statements demonstrates that they are more than sufficient. The judicial system of the State of New York could not survive if it had to conduct trials every time issues arose as to who worked in plaintiff’s mailroom on a given day and what route he or she took through the office to place the appropriate mailings in an outbox to the United States Postal Service. Nor can anyone expect plaintiff to record the entrance doorway of the doctor’s office on the days in question and to use facial recognition software to determine who entered the offices at the appointed times. For all that appears, Healthwise and NYRX, for their part, apparently have failed to reach out to their own customer/patient, the claimant-defendant, to determine whether or not he received the notices of the scheduled and rescheduled EUO and claims to have appeared for an EUO, or has simply thumbed his nose at the notices. Enough is enough.

### Conclusion

Thus, for the reasons stated hereinabove, the instant motion (Seq. No. 002) by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment against medical provider defendants Healthwise Medical Services, P.C. and NYRX Pharmacy Inc. P.C. is hereby granted, and all Counter-Claims made against plaintiff are hereby dismissed. Accordingly, the

Clerk is hereby directed to enter judgment (1) declaring that plaintiff owes no duty to pay No-Fault claims arising out of the alleged March 18, 2019 accident to Healthwise and/or NYRX; (2) permanently staying all No-Fault lawsuits and arbitrations arising from the No-Fault claims that Healthwise and/or NYRX submitted to plaintiff arising out of the alleged March 18, 2019 accident; and (3) awarding costs and disbursements to plaintiff.



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4/12/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE