

**State Farm Mut. Auto. Ins. Co. v Advantage Med
Innovations, Inc.**

2021 NY Slip Op 31344(U)

April 21, 2021

Supreme Court, New York County

Docket Number: 157328/2019

Judge: Richard G. Latin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD G. LATIN PART IAS MOTION 46
Justice
INDEX NO. 157328/2019
MOTION DATE 03/30/2021
MOTION SEQ. NO. 002

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

- v -

ADVANTAGE MED INNOVATIONS, INC.,AKE SERVICES, INC.,ALL CITY FAMILY HEALTHCARE CENTER, INC.,ALLMED MERCHANDISE AND TRADING, INC.,APT PHYSICAL THERAPY, P.C.,ATLAS PHYSICAL THERAPY, INC.,P.C.,DR. CONRAD CEAN, M.D., CENTURION ANESTHESIA OF NEW JERSEY, INC.,DYNAMIC SURGERY CENTER, GENTLE TOUCH CHIROPRACTIC CARE, PLLC,GOTHAM SUPPLY GROUP, INC.,HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C.,HEAL-RITE, P.T., P.C.,HEALTH PLUS SURGERY CENTER, L.L.C., JIN CARE PHYSICAL THERAPY, P.C.,LEE ACUPUNCTURE, P.C.,LIGHT TOUCH ACUPUNCTURE, P.C.,M & D ELITE PHARMACY, LLC,MW ACUPUNCTURE, P.C.,NEW AGE MEDICAL, P.C.,NEW IMAGE CHIROPRACTIC, P.C.,ORTHOCARETECH, INC.,PARK AVENUE ORTHOPAEDICS, P.C.,PATRIOT CHIROPRACTIC, P.C.,PREMIER ANESTHESIA ASSOCIATES, P.A., PROTECHMED, INC.,PSYCHOLOGY HELP, P.C.,RL CHIROPRACTIC DIAGNOSTIC, P.C.,SEDATION VACATION PERIOPERATIVE MEDICINE, P.L.L.C., TITAN PHARMACY A/K/A TITAN PHARMACY LEVRON, INC.,UNICAST, INC.,ANTHONY VIGORITO, D.C., CHEYENNE GRIFFIN, SHREICK HOFFMAN, OMAR OSBORNE

DECISION + ORDER ON MOTION

Defendants.

X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, plaintiff's unopposed motion for summary judgment pursuant to CPLR 3212 against defendants All Med Merchandise and Trading, Inc., Haar Orthopedics & Sports Medicine, P.C., Park Avenue Orthopedics, P.C., and Anthony Vigorito, D.C. is determined as follows:

In this action, plaintiff State Farm Mutual Insurance Company seeks certain declaratory relief, including but not limited to, a declaration that plaintiff has no duty to provide coverage or make a payment of claims for no-fault benefits made by or on assignment of Peter S. Rosario, the insured party, Cheyenne Griffin, the driver, and Shreick Hoffman and Omar Osborne, passengers in the vehicle. The no-fault claims sought to be nullified arise out of a two-vehicle collision that occurred on October 28, 2018 at approximately 9:00 p.m. on Pennsylvania Avenue and Stanley Avenue in Brooklyn, New York.

The claimants asserted that they are covered under an automobile policy issued by the plaintiff to Peter S. Rosario, the insured, who was not physically in the vehicle at the time of the loss. It is alleged that the insured vehicle was making a right turn when another vehicle collided with it. The driver of the other vehicle stated that the insured vehicle collided into her vehicle when making a right turn. Plaintiff claims the policy is void based upon material and false misrepresentations made by Cheyenne Griffin (“Griffin”), Shreick Hoffman (“Hoffman”) and Omar Osborne, to wit that the automobile accident was intentional.

Now, plaintiff moves pursuant to CPLR 3212 for, inter alia, summary judgment against answering defendants All Med Merchandise and Trading, Inc., Haar Orthopaedics and Sports Medicine, P.C., Park Avenue Orthopaedics, P.C., and Anthony Vigorito, D.C. on the basis that the loss was an intentional act, that Griffin, Hoffman and Osborne’s injuries did not arise from the incident, that Hoffman failed to appear for his examination under oath, and that Griffin and Osborne failed to return subscribed copies of their examination under oath transcripts.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when a movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

“[A]n intentional and staged collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance” (*see Nationwide Gen. Ins. Co. v Bates*, 130 AD3d 795 [2d Dept 2015]). A no-fault insurer “is not required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence” (*see V.S. Med. Servs., PC v Allstate Ins. Co.*, 25 Misc.3d 39, 889 N.Y.S.2d 360 [App Term 2009]). Rather, a no-fault insurer must demonstrate the facts elicited during an investigation which make up the founded belief that the alleged injury does not arise out of an insured incident (*see V.S. Med. Servs., P.C. v Allstate Ins. Co.*, 11 Misc.3d 334, 339-40, 811 NYS2d 886, 891 [Civ Ct 2006]).

In support of the motion, plaintiff submits, inter alia, the examination under oath transcripts of Cheyenne Griffin and Omar Osborne, as well as an affidavit of merit from Timothy Dacey, claims specialist for plaintiff State Farm Mutual Insurance Company.

On February 21, 2019, Griffin testified that she had a learner’s permit, and had intentions of getting a driver’s license later in the year. She further stated that she was friends with Hoffman for about ten years and lived with him for a period of time. Additionally, she averred that she met Peter Rosario a couple of years ago through a mutual friend. Griffin testified that the day prior to the date of accident, Peter Rosario gave her permission to use his car for a few hours on the following day. Griffin further testified that on the date of the accident, she took the train and an Uber to New Jersey to pick up the vehicle from a friend named Joey. She stated that the arrangement was for her to return the car at 2:00 in the afternoon on October 29, 2018, to her house where Peter would pick it up. She further stated that she had never previously borrowed Peter’s vehicle. Griffin testified that she was using the car to go out to eat with Osborne and Hoffman and to shop at Target. Griffin stated that they went to Target at approximately 8:35 p.m., where they walked in and walked out since it was too busy, and then went to Red Lobster at 8:45 and left there as well since it was too crowded. She further averred that they were headed back to Queens when the accident occurred on the corner of Stanley and Pennsylvania Avenue. She stated that the light at the intersection was green, she proceeded through the intersection and was almost fully through the intersection, when another vehicle pulled out of a parking space and forcefully hit her vehicle’s right bumper.^{2 of 5}

Griffin stated that as a result of the impact, her left wrist and left shoulder hit the door. She testified that the first time she felt pain on the night of the accident was to her left side and back. With respect to Hoffman, she stated that he complained of pain in his right knee. Griffin averred that the vehicle she was driving had a cracked front axle, front bumper, and the car was unable to be driven. Griffin stated that she refused medical attention from the ambulance, however the driver of the other vehicle was treated for injuries. She further testified that the police did not issue her a summons or ticket for driving with a learner's permit. She stated that even though he testified earlier that the car was not drivable, someone by the name of Barry, who Griffin was dating at the time, was able to drive the vehicle slowly into Queens and dropped her and Hoffman off, while Osborne stayed in the vehicle. Griffin stated that Barry was going to drop the car off to Peter in New Jersey, but the car was too dangerous to drive. She was unsure as to the whereabouts of the car after she put Barry in touch with Peter. Moreover, she attested that herself, Hoffman, Peter, and Osborne were never in a prior accident.

As to her treatment, she stated that she treated at Soft Touch Chiropractic approximately three times a week and has had MRIs and x-rays taken of her back and both shoulders.

On February 21, 2019, Omar Osborne also testified. He stated that he knew Peter Rosario two days prior to the accident. Osborne identified "Peter" as Hoffman. Osborne was unsure if Peter had his own vehicle. He was asked if he knew on the date of the accident whose vehicle he was in and answered, "My friend Sunny, that girl. She was the driver." Osborne identified "Sunny" as Griffin. Additionally, Osborne was asked if he knew Hoffman and stated that he did not know him. He testified that on the date of the accident, he was going to Sunny's friend's house, but did not make it there. He also stated that the occupants of the vehicle were Sunny and Peter. Osborne averred that had the accident not occurred, the vehicle he was in would have gone straight. Additionally, he stated that the accident did not occur in the intersection. However, he testified that at the time of the accident, he was on his cellphone and did not see the accident occur. He further averred that immediately after the accident, he complained of pain to his right shoulder and Peter complained of pain to his back and shoulders. Osborne stated that he personally called 911.

Osborne stated that sometime after the police arrived, he believed Sunny took a cab to the hospital, and he left the scene in an Uber. With respect to his injuries, Osborne stated that he went for therapy a week after the accident. He testified that Sunny and Peter were present at the same clinic at the same time for their initial visit. Moreover, Osborne went to various facilities for x-rays, acupuncture, and MRIs. Osborne was questioned whether or not he was ever previously involved in any other accident, and he stated that this was his first car accident of any kind. When Osborne was asked how he found his attorney, he stated that the lawyer contacted him, picked him up and told him that he had a lawyer. He guesses that the therapy people gave them his contact information.

Plaintiff also submits the affidavit of claims specialist Timothy Dacey. He testified that the police report states that the insured vehicle was making a right turn when another vehicle collided with it. Moreover, he stated that the driver of the other vehicle claimed that the insured vehicle collided with it when making a right turn. Additionally, only the driver of the other vehicle alleged injuries at the scene. However, he testified that the claimants began receiving tens of thousands of dollars' worth of treatment from various medical providers.

Dacey further averred that the claim's legitimacy was questioned since the insured was not in the vehicle at the time of the accident and that the insured's policy was cancelled one month after the accident due to non-payment. Additionally, the fact that the insured obtained new insurance with GEICO and was subsequently involved in two additional losses, one on November 11, 2018 and the other on November 25, 2018 involving a friend driving the insured's vehicle. Lastly, the fact that none of the claimants alleged injuries at the scene of the accident and thereafter began undergoing significant treatment with a large number of medical providers, also contributed to the plaintiff questioning the legitimacy of the claimants' representations.

Here, the plaintiff met its prima facie burden establishing that there is a founded belief that the collision was intentionally caused, that the loss was not a covered event, and that the claimants' injuries did not arise from an insured incident as evident from inconsistencies in the transcripts. Thus, it is incumbent on the defendants to raise a triable issue of fact, which they failed to do.

Additionally, plaintiff asserts that Hoffman failed to appear for his examination under oath, and Griffin and Osborne failed to subscribe their examination under oath transcripts, violating a condition precedent to no-fault coverage.

The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage (*see* 11 NYCRR 65-1.1; *see also Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]). 11 NYCRR 65-3.5 details the verification procedures to be followed after the insurer receives the completed application for no-fault benefits (N-F2). The injured party or that party's assignee, medical service provider, must then submit written proof of claim or it will be precluded from offering any defenses at trial (*see Mt. Sinai Hosp. v Chubb Group Ins. Cos.*, 43 AD3d 889-90 [2d Dept 2007]). However, an insurer may toll the 30-day period by properly requesting verification within 15 days from the receipt of the proof of claim form or bill (11 NYCRR 65.15(d)). The insurance regulations provide for IMEs (and EUOs) as part of an insurer's "entitlement to additional verification" following receipt of a provider's statutory claim forms (11 NYCRR 65-3.5(d)).

Plaintiff herein received a claim form on behalf of Hoffman from defendant Lee Acupuncture P.C. on December 21, 2018 for treatment from December 11, 2018. The EUO was first requested on January 11, 2019, fifteen business days after the bill was received, making the EUO request timely (*see* 11 NYCRR 65-3.5(b)).

Additionally, plaintiff submitted sufficient proof of mailing correspondence to Shreck Hoffman and his counsel, Bogoraz Law Group, regarding the scheduling of examinations under oath (EUO) on four separate occasions. Plaintiff initially sent correspondence to Shreck Hoffman on January 11, 2019 via regular mail and certified mail return receipt requested requiring him to submit to an EUO on January 28, 2019. Thereafter, on February 4, 2019, plaintiff sent correspondence via regular mail and certified mail return receipt requested to Hoffman and Hoffman's counsel on February 4, 2019 stating that Hoffman failed to appear for his EUO on January 28, 2019. The EUO was rescheduled to February 18, 2019. An amended letter was also sent on February 6, 2019 correcting the EUO date to February 21, 2019. Lastly, on February 25, 2019 correspondence was sent via regular mail and certified mail return receipt requested to Hoffman and Hoffman's counsel confirming their request to reschedule the EUO to March 11, 2019, and he similarly failed to appear,

violating a condition precedent to no-fault coverage.

As to Griffin and Osborne who submitted to their EUO's, although they appeared, they failed to subscribe and return their EUO transcripts.

The claimants' failure to subscribe and return the transcripts of their examinations under oath violated a condition precedent to coverage and warranted denial of the claims (see *Kemper Independence Ins. Co., v Cornerstone Chiropractic, P.C., et al.*, 185 AD3d 468 [1st Dept 2020]).

As to Griffin and Osborne, on March 25, 2019, plaintiff sent Griffin and Osborne's counsel via certified mail return receipt requested an original and a copy of their transcripts to execute and return within two weeks. Again, on April 25, 2019, plaintiff sent Griffin's counsel and Osborne's counsel via certified mail return receipt requested a reminder letter to execute the transcript and advising that if the transcript was not returned, their client reserves the right to deny coverage pursuant to the 4th amendment to 11 NYCRR 65-3.8(b). Since both Griffin and Osborne failed to return their transcripts, they are in violation of a condition precedent to coverage and warrants a denial of their claims.

Accordingly, it is

ORDERED that, plaintiff's summary judgment motion is granted against All Med Merchandise and Trading, Inc., Haar Orthopaedics & Sports Medicine, P.C., Park Avenue Orthopaedics, P.C. and Anthony Vigorito, D.C.

Plaintiff shall serve a copy of this order upon defendants within thirty (30) days of the date of this order, together with notice of entry.

This constitutes the decision and order of this Court.

4/21/2021
DATE


RICHARD G. LATIN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	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