

**State Farm Mut. Auto. Ins. Co. v TS Acupuncture,
P.C.**

2022 NY Slip Op 31089(U)

April 5, 2022

Supreme Court, New York County

Docket Number: Index No. 151405/2020

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Plaintiff,

- v -

TS ACUPUNCTURE, P.C., METRO PAIN SPECIALISTS
PROFESSIONAL CORPORATION, BARAKAT PT, P.C.,
PAK HONG SIK MD. MEDICAL CARE, P.C. A/K/A PAK,
HONG MD, ADVANCED COMPREHENSIVE
LABORATORY, LLC, ASPIRE CHIROPRACTIC, P.C., NYC
AXIS CHIROPRACTIC, P.C., JOURNEY ACUPUNCTURE,
P.C., WAY TO REHAB PT, P.C., NEXRAY MEDICAL
IMAGING, P.C., I AM SUPPLIES, INC., MZY
ACUPUNCTURE, P.C., TOP CHOICE PHARMACY CORP.,
FINE MOTOR PHYSICAL THERAPY, P.C., EUGENE
EVANS

Defendant.

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INDEX NO. 151405/2020
MOTION DATE _____
MOTION SEQ. NO. 002

**DECISION, ORDER AND
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 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.

This action arises out of a personal automobile insurance policy (the **Policy**) issued by plaintiff State Farm Mutual Automobile Insurance Company (**State Farm**) to non-party Toni Odom (Complaint, ¶¶ 17, 19 [NYSCEF Doc. No. 1]). The Policy covered any occupants of the vehicle for any medical expenses necessary or causally related arising out of the use or operation of the insured vehicle as a result of an accidental collision (*id.*, ¶ 19). Defendant Eugene Evans and non-parties Davon Johnson and Kristina Bamfield filed a claim under the Policy for serious bodily injuries resulting from a motor vehicle accident on August 31, 2019 (the **Accident**) (*id.*, ¶¶ 17-18). State Farm received notice of these claims and assigned one claim number to all claims relating to that accident (*id.*, ¶ 18). Mr. Evans received treatments from defendants TS Acupuncture, P.C., Metro Pain Specialists Professional Corporation, Barakat PT, P.C., Pak Hong

Sik MD Medical Care, P.C. a/k/a Pak, Hong MD, Advanced Comprehensive Laboratory, LLC, Aspire Chiropractic, P.C., NYC Axis Chiropractic, P.C., Journey Acupuncture, P.C., Way to Rehab PT, P.C., Nexray Medical Imaging, P.c., I Am Supplies, Inc., MZY Acupuncture, P.C., Top Choice Pharmacy Corp., and Fine Motor Physical Therapy, P.C. (the **Medical Provider Defendants**), who have submitted over \$30,000 in bills for treatment provided to Mr. Evans (*id.*, ¶ 23). State Farm alleges that Mr. Evans was not in the vehicle at the time of the Accident, that his alleged injuries did not arise from the Accident, and that his medical bills are therefore not covered by the Policy (*id.*, ¶¶ 24-26).

Factual and Procedural Background

State Farm commenced this action by summons and complaint dated February 7, 2020. In its complaint, State Farm asserted five causes of action: First, for a declaratory judgment that Mr. Evans is not eligible under the Policy and that State Farm has no duty to pay the defendants' claims with respect to the Accident; second, for a declaratory judgment that Mr. Evans breached a condition precedent to coverage by failing to appear for duly and properly requested examinations under oath (**EUOs**) and that State Farm has no duty to pay claims with respect to the Accident; third, for a declaratory judgment that Mr. Evan's injuries did not arise from an insured event and that State Farm has no duty to pay claims with respect to the Accident; fourth, that Mr. Evan's injuries are not casually related to the Accident and that State Farm has no duty to pay; and fifth, for a permanent stay of all arbitrations, lawsuits, and claims by the defendants relating to claims arising from the Accident (Complaint, ¶¶ 36-51).

Defendants Metro Pain Specialists Professional Corporation (**Metro Pain**) and Barakat PT, P.C. (**Barakat**) filed an Answer dated June 16, 2020 (NYSCEF Doc. No. 18) and defendant Fine Motor Physical Therapy, P.C. (**Fine Motor**, hereinafter, together with Metro Pain and

Barakat, the **Answering Defendants**) filed an Answer with counterclaims dated September 15, 2020 (NYSCEF Doc. No. 35). State Farm moved for a default judgment against all other defendants, and that motion was granted by decision and order dated October 7, 2020 (NYSCEF Doc. No. 37).

State Farm now moves for summary judgment against the Answering Defendants on the ground that Mr. Evans is not an “eligible injured person” under the Policy because he was not in the insured vehicle at the time of the accident. It also argues that Mr. Evans’ failure to appear for EUOs violated the conditions precedent to coverage under the Policy. Fine Motor argues that the motion should be denied because State Farm failed to submit a statement of undisputed facts, that the documents it submits on this motion are inadmissible or lack proper foundation, that it did not timely or properly deny the Answering Defendants’ bills, and otherwise fails to meet its burden of proof. Metro Pain and Barakat argue that the motion should be denied because State Farm fails to meet its burden of proof or comply with the relevant regulations, and because the motion is premature since there has not been adequate time for discovery.

Legal Conclusions

On a motion to for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact... Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once such a showing has been made, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible forum sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

Under New York law, a person eligible to receive no-fault benefits under an insurance policy is:

“(a) the named insured and any relative who sustains personal injury arising out of the use or operation of any motor vehicle;
(b) the named insured and any relative who sustains personal injury arising out of the use or operation of any motorcycle, while not occupying a motorcycle;
(c) any other person who sustains personal injury arising out of the use or operation of the insured motor vehicle in the State of New York while not occupying another motor vehicle; or
(d) any New York State resident who sustains personal injury arising out of the use or operation of the insured motor vehicle outside of New York while not occupying another motor vehicle”

(11 NYCRR 65-1.1).

State Farm has demonstrated that Mr. Evans was not in the vehicle and is therefore ineligible for coverage under the Policy. Mr. Johnson and Ms. Bamfield both testified that they did not know Mr. Evans and that he was not in the car with them at the time of the Accident (Johnson tr, at 44-45, lines 18-9 [NYSCEF Doc. No. 51]; Bamfield tr, at 29-30, lines 21-9 [NYSCEF Doc. No. 52]). The Answering Defendants argue that these transcripts are not admissible because, although both transcripts are signed by a notary public, neither is signed by the witness and one is not signed by the transcriptionist. The signature page of Mr. Johnson’s transcript with his signature was subsequently submitted by State Farm (NYSCEF Doc. No. 78). This is sufficient to cure the deficiency with respect to Mr. Johnson’s testimony. However, even if it were not, Mr. Evans himself admitted that he was not in the vehicle at the time of the Accident. In his application for no-fault benefits (NYSCEF Doc. No. 49), Mr. Evans represented that he was not the driver or passenger of the vehicle and signed and dated the application. By his own admission, Mr. Evans was not in the vehicle. Thus, he clearly is not covered by the Policy. This admission overcomes any presumption created by the police report (NYSCEF Doc. No. 48) that he was in the vehicle. The police report lists Mr. Evans as one involved and as one

injured, but does not list him as an occupant of either vehicle. There is no evidence that Mr. Evans was in the vehicle at the time of the Accident, and he has admitted he was not. There is accordingly no material issue of fact remaining for trial. Mr. Evans is not an eligible person for no-fault benefits pursuant to 11 NYCRR 65-1.1 and State Farm has no duty to pay his claims. This Court need not reach the remaining branches of State Farm's motion and summary judgment must be granted for State Farm. The Answering Defendants' remaining contentions are unavailing or need not be addressed given the result above.

Accordingly, it is hereby:

ORDERED that plaintiff State Farm Mutual Automobile Insurance Company's motion for summary judgment against Defendants Metro Pain Specialists Professional Corporation; Barakat PT, P.C.; and Fine Motor Physical Therapy, P.C. is granted, and State Farm shall be awarded the declaratory and injunctive relief sought in the Complaint as to said defendants, together with costs and disbursements as taxed by the Clerk; and it is further

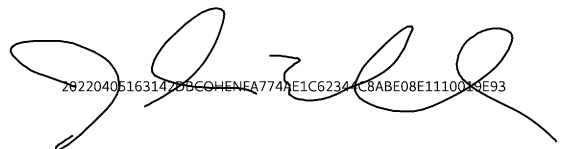
ORDERED, ADJUDGED AND DECLARED that State Farm has no duty to pay any No-Fault benefits in the form of sums, monies, damages, awards, judgments, or benefits to Defendants Metro Pain Specialists Professional Corporation, Barakat PT, P.C., or Fine Motor Physical Therapy, P.C., their agents, employees, assignees or heirs arising out of any current or future proceeding, including without limitation, arbitrations and lawsuits seeking to recover No-Fault benefits with respect to the collision that occurred on August 31, 2019, referenced in the complaint, and referenced by claim number 32-02P6-19B and policy number 1411-494-32D; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that any and all stays are hereby lifted; and it is further

ORDERED that State Farm shall serve a copy of this order with notice of entry on all parties, as well as on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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4/5/2022
DATE

HON. DAVID B. COHEN, 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