

**State Farm Fire & Cas. Co. v Manual Approach
Physical Therapy, P.C.**

2022 NY Slip Op 31473(U)

May 5, 2022

Supreme Court, New York County

Docket Number: Index No. 156986/2019

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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STATE FARM FIRE AND CASUALTY COMPANY,
Plaintiff,

INDEX NO. 156986/2019
MOTION DATE 01/05/2022
MOTION SEQ. NO. 003

- v -

MANUAL APPROACH PHYSICAL THERAPY,
P.C., PROACT PHYSICAL THERAPY P.C., UTR
CHIROPRACTIC SERVICES P.C., NEW SENSE
ACUPUNCTURE P.C., ALL COUNTY, LLC, ATB SERVICES,
INC., THE MOUNT SINAI HOSPITAL A/K/A FPA HOSPITAL
BASED NON PAR MT, CHELSEA MOBILITY INC., THE
MOUNT SINAI HOSPITAL A/K/A MOUNT SINAI HOSPITAL
QUEENS, BIRCH MEDICAL & DIAGNOSTIC,
P.C., KADHEIJAH NOEL, EASTERN MEDICAL PRACTICE,
P.C.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 96, 97

were read on this motion to/for

JUDGMENT - SUMMARY

BACKGROUND

Plaintiff commenced this action seeking a declaratory judgment that it owes no duty to pay the claims of the defendants seeking to collect No Fault benefits on behalf of Kadheijah Noel's (Noel) with respect to the March 30, 2019 collision. Plaintiff asserts that Noel made a material misrepresentation regarding her residence and the primary garage location of the insured vehicle when the policy was procured.

Defendants Chelsea Mobility, Inc (Chealsea) and Proact Physical Thereapy, PC (Proact) appeared by counsel and filed answers with counterclaims.

On or about May 25, 2021, the court (D'Auguste, J) awarded plaintiff a default judgment as against all other non-answering defendants. On December 16, 2021, the court (D'Auguste, J) awarded plaintiff a default judgment as to Eastern Medical Practice, PC.

PENDING MOTION

On December 6, 2021, plaintiff moved pursuant to CPLR §3212, seeking summary judgment in favor of plaintiff and against Proact and Chelsea, and dismissal of their counterclaims.

The motion was fully briefed and referred to this court for determination.

ALLEGED FACTS

Noel and non-party Sidney Wright (Wright) were involved in a motor vehicle collision on March 30, 2019, while occupants of a 2016 Mercedes Sedan (Insured Vehicle), driven by Wright, and insured by plaintiff in Noel's name. Thereafter, plaintiff received notice that Noel reported to have sustained serious bodily injuries as a result of the March 30, 2019 collision. The policy was issued as a New York State personal automobile policy procured by Noel. The policy application stated that the Insured's principal residence and primary garage location of the Insured Vehicle was 11 Bridge Street, Florida, New York 10921 (Policy Address).

Upon further investigation, plaintiff asserts that Noel truly resides at 567 E. 108th Street, Apartment 1D, Brooklyn, New York 11236 (Brooklyn Address), and primarily garaged the Insured Vehicle at that location, for the following reasons: the loss occurred in Brooklyn, New York, approximately six miles from the Noel's likely Brooklyn Address; "Accruint" searches revealed that the Noel likely resides at the Brooklyn, New York address; plaintiff's representative went to the Brooklyn Address and the property manager at that address told plaintiff that Noel has lived at the Brooklyn Address since 1996; plaintiff's representative went

to the Policy Address and there was no indication that Noel resided there. The address is a single-family home that has been turned into two apartments. Both apartments appeared vacant. One of the mailboxes showed a name "Guarino", and a "For Sale" sign was posted on the property; Noel is registered to vote in Brooklyn; Noel's cellular phone is registered to the Brooklyn Address; Noel stated to plaintiff, on a recorded statement, that the Policy Address belongs to her parents, but she did not provide any supporting documentation such as a lease agreement or bank statements; and the Policy was cancelled for Noel's failure to provide proof of residency. Noel appeared for an examination under oath (EUO) on June 7, 2019, wherein she testified that she currently lives in Brooklyn, lived in Brooklyn at the time of the policy procurement, and garages the vehicle primarily in Brooklyn. Noel testified that neither she nor any family members ever lived at the Policy Address. All of Noel's documentary evidence reveals the Brooklyn Address, including her tax returns, driver's license, and vehicle paperwork.

DISCUSSION

It is well settled law that the proponent of a summary judgment motion must make prima facie showing of entitlement to summary judgment as a matter of law "tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). "(A) motion for summary judgment should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists (*Bershaw v. Altman*, 100 A.D.2d 642, 643)". *Haner v. De Vito*, 152 A.D.2d 896(1989).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, supra, 49 N.Y.2d at p. 562)”.

Defendants did not respond to each of the enumerated paragraphs of material fact contained in plaintiff’s Statement of Material Facts as is required under 22 NYCRR 202.8-g. As such, defendants have admitted each of the material facts as stated by Plaintiff. 22 NYCRR 202.8-g (c).

Even if plaintiff were not entitled to summary judgment based on defendants’ failure respecting 22 NYCRR 202.8-g alone, defendant fails to come forward with “...evidentiary proof in admissible form sufficient to establish the existence of material issues of fact...” to defeat plaintiff’s motion for summary judgment on its claims that Noel made a material misrepresentation regarding her residence and the primary garage location of the insured vehicle when the policy was procured. (*Zuckerman v. City of New York*, supra, 49 N.Y.2d at p. 562)”

In opposition, Noel offers only the affirmation of counsel, and fails to deny the allegations of misrepresentation.

Accordingly, plaintiff is entitled to summary judgment against the Answering Defendants on the basis that a material misrepresentation was made to plaintiff when the policy was procured, because plaintiff would not have issued the Policy, or would have issued it at substantially different rates or terms, had it been given truthful information. The Answering Defendants’ counterclaims for attorneys fees are dismissed as moot.

CONCLUSION

Wherefor, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted; and it is further

ORDERED that plaintiff owes no duty to pay the claims of the defendants seeking to collect No Fault benefits on NOEL's behalf with respect to the March 30, 2019 collision and that that plaintiff is entitled to a judgment declaring a permanent stay of all arbitrations, lawsuits and/or claims by defendants arising from the March 30, 2019 collision referenced in the complaint; and it is further

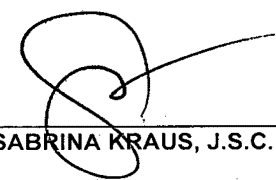
ORDERED that the counterclaims of Proact and Chelsea for attorneys fees are dismissed; and it is further

ORDERED that the clerk shall enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry 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 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);]; and it is further

ORDERED that this constitutes the decision and order of this court.

<u>5/5/2022</u> DATE	 _____ SABRINA KRAUS, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input 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