

State Farm Fire & Cas. Co. v Merle

2023 NY Slip Op 31281(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 153004/2021

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

- v -

LESIE MERLE, KATIE DIEUBON, BRITTANI WATSON,
YOLAUNDA VAUGHN, AFFINITY RX INC, ALL COUNTY,
LLC, AMSC, LLC, BENESSERE SERVICES INC, HONEST
ACUPUNCTURE P.C., INTEGRATED INTERVENTIONAL
PAIN MANAGEMENT P.C., KHAWAJA ASIM SIDDIQUE,
M.D., LITE CARE REHAB PT P.C., MACINTOSH MEDICAL,
P.C., MEDICAL MRI P.C., NOAM KURTIS MD P.C.,
PATIENT CHIROPRACTIC, P.C., and WIND PHYSICAL
THERAPY P.C.,

Defendants.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, and 153

were read on this motion for SUMMARY JUDGMENT & CROSS-MOTION TO
VACATE DEFAULT JUDGMENT.

Upon the foregoing documents, the plaintiff’s motion for summary judgment is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 92-94, 147-148, 153) and the exhibits attached thereto, in which the court concurs, as summarized herein. In this no-fault auto insurance matter, plaintiff insurer established prima facie entitlement to summary judgment by submitting the examination under oath transcript of defendant insured Lesie Merle, in which she testified that she primarily garaged the car involved in the accident in Far Rockaway, New York, rather than in Connecticut (Merle EUO tr, NYSCEF Doc. No. 109, 36-37), and the affidavit of its underwriter Christina Ardito, who establishes that such misrepresentation to plaintiff of the car’s location was material (Ardito aff., NYSCEF Doc. No.

95, ¶¶ 7-8; *Travelers Indem. Co. v Avelino*, 191 AD2d 229, 229-30 [1st Dept 1993]; *Renelique v National Liab. & Fire Ins. Co.*, 50 Misc 3d 144[A], 2016 NY Slip Op 50254[U] [App Term, 1st Dept 2016] [“No-fault benefits may be denied to an insured where an insurer submits evidence in admissible form showing that the insured had fraudulently procured the insurance policy”]). To the extent that the remaining defendants Benessere Services Inc., Integrated Interventional Pain Management P.C., and Medical MRI P.C. (the “answering defendants”) were assigned benefits by defendant Merle, and have only the rights that Merle herself had (*Long Is. Radiology v Allstate Ins. Co.*, 36 AD3d 763, 765 [2d Dept 2007]).

Plaintiff also submits the affirmation of its counsel Kevin W. O’Leary, Esq., who attests to defendant Brittani Watson’s failure to appear for an examination under oath (“EUO”) pursuant to the terms of the policy (O’Leary affirmation, NYSCEF Doc. No. 93, ¶¶ 68-87), as well as the EUO scheduling letters (NYSCEF Doc. Nos. 119, 121-124, 127, 129), the statements on the record of Watson’s failure to appear (NYSCEF Doc. Nos. 120, 126, 128, 130), and the denials of claim (NYSCEF Doc. No. 132). The failure of an injured person to appear for an [“EUO”] is a defense to any claims for benefits by that person or their assignors (*Metro Psychological Services, P.C. v Mercury Cas. Co.*, 49 Misc 3d 143[A], 2015 NY Slip Op 51644[U] [App Term, 1st Dept 2015]; *Points of Health Acupuncture, P.C. v Lancer Ins. Co.*, 28 Misc 3d 137[A], 2010 NY Slip Op 51455[U] [App Term, 2d, 11th & 13th Jud Dists 2010] [“the appearance of the plaintiff at an EUO is a condition precedent to the insurer's liability on the policy”]).

Finally, plaintiff submits the affidavit of its claim specialist Richa Sinha. Sinha attests to the results of plaintiff’s investigation into the accident giving rise to this action (Sinha aff., NYSCEF Doc. No. 94, ¶¶ 19[a-qq]). Sinha’s affidavit notes several discrepancies in the EUO transcripts of Merle and defendant Katie Dieubon which led it to conclude that the accident had

been staged. This prima facie establishes plaintiff's right to deny claims arising from the accident (*State Farm Mut. Auto. Ins. Co. v Laguerre*, 305 AD2d 490, 491 [2d Dept 2003] ["A deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident"]).

Integrated Interventional Pain Management P.C. ("Integrated"), the only remaining defendant to oppose the motion, fails to raise a triable issue of fact. Integrated submits no documentary or other record evidence in support of its motion. The opponent of a motion for summary judgment may not simply point to defects in the movant's proof (*Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]). A party must marshal and lay bare its own evidence to withstand a motion for summary judgment (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711 [2d Dept 2007]). Integrated asserts that plaintiff cannot rely on Merle's transcript because it is unsigned, however it has been more than 60 days since plaintiff sent Merle the transcript and she failed to sign and return it (letter enclosing transcript, NYSCEF Doc. No. 131; CPLR 3116[a]).

Merle's cross-motion to vacate the default judgment against her must also be denied. Merle is estopped from challenging service upon her at 13-10 Redfern Avenue, Apt. 2B, Far Rockaway, New York 11691 because she holds a New York driver's license registered at that address and provided that address in the accident report and NF-2 claim form (police accident report, NYSCEF Doc. No. 107; NF-2 claim form, NYSCEF Doc. No. 114; *Toure v Harrison*, 6 AD3d 270, 271 [1st Dept 2004]). She fails to provide a reasonable excuse to vacate the default pursuant to CPLR 5015[a][1], as conclusory and vague claims of law office failure are insufficient (*Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 963 [2d Dept 2018]). Finally, the record reflects that she appeared in court on the initial return date for the motion for default judgment and stipulated to the extension of the briefing schedule but ultimately failed to submit

any opposition (stipulation, NYSCEF Doc. No. 151). Therefore, she cannot be said to have “not personally receive[d] notice of the summons in time to defend” (CPLR 317).

Accordingly, it is

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

ORDERED that defendant Lesie Merle’s cross-motion to vacate the default judgment entered against her is denied; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to provide any coverage, reimbursements, or pay any monies, sums, or funds to any of the answering defendants herein for any and all no-fault related services for which claims and/or bills have been, or may in the future be, submitted by the answering defendants to plaintiff, by or on behalf of LESIE MERLE, KATIE DIEUBON and BRITTANI WATSON; and it is further

ADJUDGED and DECLARED that the answering defendants lack standing to seek or recover no-fault, uninsured/underinsured and property damage benefits and/or claims submitted by or on behalf of BRITTANI WATSON as she breached a condition precedent to coverage by failing to appear for an examination under oath in connection with the claim that gave rise to the above-captioned lawsuit; and it is further

ADJUDGED and DECLARED that the answering defendants lack standing to seek or receive No-Fault reimbursements for any bill submitted by or on behalf of LESIE MERLE, as she perpetrated a scheme to defraud and/or fraudulently procure a policy of insurance from plaintiff by knowingly submitting an application for insurance that contained material misrepresentations of fact and false and/or fraudulent statements; and it is further

ADJUDGED and DECLARED that the alleged motor vehicle accident of November 26, 2019, which gave rise to the above-captioned lawsuit, was not the product of a covered event as

defined by the applicable policy of insurance issued by plaintiff since the incident of November 26, 2019, was the product of a staged and/or intentional event; and it is further

ADJUDGED and DECLARED that plaintiff, by reason of no coverage and since the alleged accident of November 26, 2019 was the product of a staged and/or intentional event, is not required to pay any sums, monies, damages, awards and/or benefits to any of the appearing Defendants named herein, their agents, employees, assignors and/or heirs arising out of any current or future proceedings, all uninsured/underinsured motorists lawsuits and arbitrations, arbitrations and lawsuits seeking to recover no-fault benefits, third-party lawsuits and arbitrations, and all claims for property damage arising out of the alleged accident of November 26, 2019.

This constitutes the decision and order of the court.



<u>4/19/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>
		<input type="checkbox"/> DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			<input type="checkbox"/> OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE