

**State Farm Mut. Auto. Ins. Co. v Surgicore of Jersey
City, LLC**

2023 NY Slip Op 33590(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 161692/2018

Judge: Leslie A. Stroh

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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. LESLIE A. STROTH PART 12

Justice

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Plaintiff,

- v -

SURGICORE OF JERSEY CITY, LLC, METRO PAIN
SPECIALISTS PROFESSIONAL CORPORATION, FIVE
PALMS ACUPUNCTURE, P.C., HARBOR MEDICAL
GROUP, P.C., UBASE LIFE ACUPUNCTURE,
PLLC, PSYCHOLOGY YME, P.C., JOINT PHYSICAL
THERAPY, P.C., GENTLE TOUCH CHIROPRACTIC CARE,
PLLC, HANWOL PHYSICAL THERAPY, P.C., OSAMA
ABDELWAHED, MG CHIROPRACTIC, P.C., AXIAL
CHIROPRACTIC, P.C., ROXBURY ANESTHESIA, L.L.C.,
QUALITY ORTHOPEDICS AND COMPLETE JOINT CARE,
P.C., REBOUND ACUPUNCTURE, P.C., EIS MED
EXPRESS, INC., NEW AGE MEDICAL, P.C., STRATEGIC
MEDICAL INITIATIVES, P.C., SHASHEK CHIROPRACTIC,
P.C., GOOD HANDS CHIROPRACTIC, P.C., FRANK
SAUCHELLI, M.D., RIAZ MEDICAL, P.C., WELLMART RX,
INC., MAHMOUD ELSAYED DAWOOD DAIF, CITY
ANESTHESIA HEALTHCARE, P.C., BLESSED HANDS
CHIROPRACTIC P.C., FIVE BOROUGH SUPPLY,
INC., BETTER MEDICAL HEALTH, P.C., NEW YORK CORE
CHIROPRACTIC P.C., AZNY CHIROPRACTIC,
P.C., DANIMARK PHYSICAL THERAPY,
P.C., COMPREHENSIVE PSYCHOLOGICAL, P.C., EAST 19
MEDICAL SUPPLY CORP., VALERIY SABODASH, M.D.,
NOVA MEDICAL DIAGNOSTIC, P.C., ROBERT P. LUCA,
D.C., SHERMAN-ABRAMS LABORATORY, INC., M & D
ELITE PHARMACY, LLC, FAAN MEDICAL SERVICES,
P.C., VINCENT S. DOWLING, M.D., MEDICAL SUPPLY OF
NY CORP., NEMAAN GHUMAN, DPM, REHAB CARE
PHYSICAL THERAPY, P.C., MCDONALD AVE
CHIROPRACTIC, P.C., GAO ACUPUNCTURE, P.C., JHOLE
U BRADFORD, SHAYLIA ATIRA WALTON, STEVEN ROB,
RONALD MARCELLUS, KEITH DUMONT

Defendant.

INDEX NO. 161692/2018
MOTION DATE 07/25/2023
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217

were read on this motion to/for JUDGMENT - SUMMARY

Defendants Shaylia Atira Walton (Walton), Steven Rob (Rob), Ronald Marcellus (Marcellus), and Keith Dumont (Dumont) (collectively, claimants) were in a vehicle that was involved in a collision on June 1, 2018. The vehicle was covered by a no-fault insurance policy issued by plaintiff.

Claimants and various medical providers acting as their assignees applied for no-fault benefits, which plaintiff denied. Plaintiff denied the claims on the ground that claimants intentionally caused the collision; that the injuries of claimants did not arise from an insured incident; and that Steven Rob, Ronald Marcellus and Keith Dumont did not appear for duly scheduled and noticed examinations under oath (EUOs).

In this action, plaintiff seeks a declaratory judgment that it is not required to pay no-fault benefits to claimants or to the various medical provider defendants. This motion concerns the potential obligation of State Farm Mutual Automobile Insurance Company (plaintiff) to pay no-fault insurance benefits arising out of the June 1, 2018 incident. Plaintiff moves for summary judgment against the answering defendants East 19 Medical Supply Corp., Medical Supply of NY Corp, Wellmart RX, Inc., and Five Borough Supply Inc. (collectively, answering defendants). Plaintiff also seeks to dismiss the counter claims of defendants East 19 Medical Supply Corp, Medical Supply of NY Corp., and Wellmart RX, Inc.

Defendants East 19 Medical Supply Corp., Medical Supply of NY Corp, Wellmart RX, Inc. oppose the motion, arguing that plaintiff fails to substantiate its belief that the accident was intentional and offered no party admissions, no certified police report, and no admissible testimony of any parties in support of its allegations. They also argue that plaintiff does not establish a prima facie case that Steven Rob, Ronald Marcellus, and Keith Dumont each failed to appear for their EUOs.

Defendant East 19 Medical Supply Corp. also cross-move for an order partially dismissing this action pursuant to CPLR 3211 (a) (5) on the ground that it received a default judgment in a separate civil court action on one of the claims at issue in this action.

I. Plaintiff's Motion for Summary Judgment

A. Declaration of No Coverage Based on Allegedly Staged Accident

A no-fault insurer seeking a declaration of no coverage on default based on a conclusion that the underlying collision was staged must establish prima facie the "fact or founded belief that the alleged injury does not arise out of an insured incident." *Central Gen. Hosp. v Chubb Grp. of Ins. Cos.*, 90 NY2d 195, 199 (1997).

Here, plaintiff submits an affidavit from Leslie Whiteside, a claims investigator familiar with the case to support its conclusion that the collision was not genuine. That affidavit, in turn, relies heavily on the transcript from the examination under oath of Walton. But plaintiff fails to show that the transcript is admissible. In particular, the transcripts are not signed; and plaintiff does not attempt to establish that it ever provided them to Walton to review and sign, as required by CPLR 3116 (a). *See Ramirez v Willow Ridge Country Club*, 84 AD3d 452, 453 (1st Dept 2011) (holding that the proponent of a deposition transcript bears the burden to show compliance with CPLR 3116 (a)).

The key portions of the affidavit of Leslie Whiteside are based only on hearsay and are thus insufficient to support the entry of a summary judgment. *See Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979) (holding that to obtain summary judgment, a movant must "tender of evidentiary proof in admissible form"). The claim by Leslie Whiteside in their affidavit that there was a belief that the insured misrepresented his address is conclusory. To be sure, the affidavit does state that despite the fact that there were no injuries alleged at the scene by

anybody involved, the claimants began undergoing significant medical treatment from a large amount of medical providers.” See NYSCEF doc. no. 205 at 5. However, the affidavit neither provides any details to support this statement nor identifies the basis of this statement beyond it having been revealed by a purported investigation.

Additionally, to the extent plaintiff relies on the police report, it is uncertified and, therefore, inadmissible. Further, where, as here, there is no evidence as to the source of the information contained in a police report, whether that person was under a business duty to make it, or whether some other hearsay exception would render the statement admissible, the police report should not be considered. *Holliday v Hudson Armored Car & Courier Svc*, 301 AD2d 392 (1st Dept 2003).

On this record, therefore, plaintiff has not established prima facie a founded belief claimants were engaged in no-fault insurance fraud rather than being genuine victims of a car accident. Plaintiff’s motion for summary judgment against the answering defendants on these grounds is denied.

B. Failure to Appear for EUOs

New York No-Fault Regulation, 11 NYCRR 65-1.1 states, in pertinent part, “[n]o action shall lie against [a No-Fault insurer] unless, as a condition precedent thereto, there shall have been compliance with the terms of [the] coverage” and that “[u]pon request by the Company, the eligible injured person or that person’s assignee or representative shall ... (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.” The failure to appear for a scheduled EUO is a breach of a condition precedent under a no-fault policy, and a denial of coverage premised on such a breach voids the policy *ab initio*. See *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 (1st Dept 2011).

A no-fault insurer seeking a declaration of no coverage due to claimants' failures to appear for EUOs requested under the no-fault policy must demonstrate that the insurer complied with the procedural and timeliness requirements of 11 NYCRR 65-3.5, governing the handling of no-fault claims. *See American Transit Ins. Co. v. Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 (1st Dept 2015). To do so, the no-fault insurer must submit an affidavit of a person with personal knowledge that the mailing of the EUO letters occurred and describe the standard office practice or procedure used to ensure that items were properly addressed and mailed. *See New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 547 (2nd Dept 2006); *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 (2nd Dept 2001); *Hospital for Joint Diseases v Nationwide Mut. Ins. Co.*, 284 AD2d 374 (2nd Dept. 2001)

Despite this requirement, plaintiff failed to proffer sufficient evidence and/or testimony regarding the mailing of the EUO scheduling letters. Plaintiff relies upon the affidavit of Sharon Childs, annexed to the attorney affirmation (NYSCEF doc. no. 189) and the affirmations of Richard Salvato, Esq. (NYSCEF doc. no. 204). Sharon Childs does not state who her employer is or the location at which she works for this unnamed employer. Instead, she recites the dates which are printed on the purported EUO letters, and she asserts that she served the purported EUO letters by first class mail. However, she does not provide any detail as to how the purported EUO letters were generated, addressed, placed in envelopes, how postage was applied to the envelopes and how and when and where the letters were transferred to the custody of the United States Postal Service.

Further, plaintiff fails to proffer any contemporaneous affidavits of service to establish mailing. The purported EUO letters were apparently mailed from Robert A. Peirce & Associates in White Plains, New York. Sharon Childs does not aver to being employed at that law firm and,

therefore, cannot testify as to personal knowledge that postage was affixed to the EUO scheduling letters and the letters were actually mailed or that she has personal knowledge of the mailing procedures.

Plaintiff also submits four affirmations of Richard Salvato, Esq., who avers that he prepared and sent some of the EUO letters which Sharon Childs alleges to have also sent. Notably, Mr. Salvato's four affirmations are all dated July 29, 2022 - almost four years after the purported EUO letters were allegedly mailed. He does not aver as to how he so clearly recalls mailing the 10 separate letters on seven separate dates almost four years prior to the date he made his affirmations.

Moreover, to the extent that plaintiff argues that the Appellate Division has already ruled on this issue already and determined that the EUO requests were timely and proper, such argument is unavailing. Plaintiff appealed the denial of its unopposed motion for a default judgment against the non-answering defendants, which the Appellate Division granted without opposition and on default. Although the Appellate Division reversed the trial court order and granted plaintiff's motion for a default judgment, the findings of this Court on unopposed motions, and the appellate division decision, do not have a preclusive effect on the moving defendants here. *See Tower Ins. Co. of New York v Einhorn*, 133 AD3d 841 (2d Dept 2015); *In re: Part 60 RMBS Put-Back Litigation*, 195 AD3d 40 (1st Dept 2021).

Accordingly, plaintiff has failed to proffer sufficient evidence that that the EUO were properly mailed letters to the claimants. Plaintiff cannot establish that the claimants or their attorneys, if they had one, were properly notified of the scheduled EUOs and so provided a fair opportunity to appear. Therefore, plaintiff has failed to establish its prima facie case that Steven Rob, Ronald Marcellus, and Keith Dumont failed to apply for their duly scheduled EUO, and its motion is denied on that ground.

II. Defendants East 19 Medical Supply Corp. Cross-Motion

In addition to opposing plaintiff's motion for summary judgment, defendants East 19 Medical Supply Corp. and Medical Supply of NY Corp, separately cross-move under CPLR 3211 (a) (5) on the ground that it received a default judgment in a separate civil court action on one of the claims at issue in this action.

The moving defendants' cross-motions are based on CPLR 3211 (a) (5), which permits a party to move to dismiss a cause of action on the ground that it cannot be maintained because of res judicata. Specifically, East 19 seeks to dismiss the action as to the bill for date of service June 20, 2018, in the amount of \$1,920.77, for which it previously received a default judgment. Specifically, East 19 Medical Supply Corp. provides a copy of a civil court judgment entered in the amount of \$2,765.29 with respect to services provided to Dumont for injuries arising from an accident on June 2, 2018, under claim number 524531L29. *See* NYSCEF doc. no. 211.

Plaintiff does not oppose East 19 Medical Supply Corp.'s cross motion or otherwise address the existing default judgment entered against plaintiff on this claim. Accordingly, in light of the proof adduced by East 19 Medical Supply Corp. of an existing default judgment, plaintiff is not entitled for a declaratory judgment that it need not pay the no fault claims on the bill of service for June 20, 2018, in the amount of \$1,920.77.

III. Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that the cross-motion of defendant East 19 Medical Supply Corp. to dismiss plaintiffs claim seeking a declaratory judgment that it need not pay the no fault claims on the bill

of service for June 20, 2018 in the amount of \$1,920.77 is granted, and such claim is severed and dismissed.

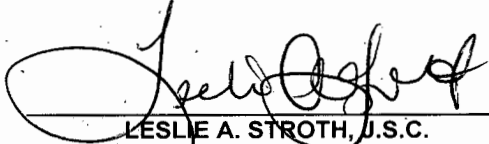
The foregoing constitutes the decision and order of the Court.

10/12/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


LESLIE A. STROTH, J.S.C.