

**State Farm Mut. Auto. Ins. Co. v Destine**

2023 NY Slip Op 34497(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 156330-2022

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

State Farm Mutual Automobile Insurance Company

INDEX NO. 156330-2022

- v -

MOT. DATE

MOT. SEQ. NO. 002

Marvin Destine, et. al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). 52-61

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). 62-74

Replying Affidavits

NYSCEF DOC No(s). 75-79

In this action, plaintiff-insurer seeks a declaration that it does not have an obligation to pay no-fault benefits in connection with a motor vehicle accident. The accident allegedly occurred on July 16, 2021 on Church Avenue in Brooklyn, New York. Plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") now moves for summary judgment against provider defendants JTK Chiropractic Care, P.C., Miklos Losonczy, MD, Ridgewood Diagnostic Laboratory, LLC and Sagy Grindberg, MD (together the "motion defendants") pursuant to CPLR § 3212. State Farm also seeks a declaration that it has no duty to pay the no-fault benefits in connection with the July 16, 2021 motor vehicle accident. The motion defendants oppose the motion. Issue has been joined as to the motion defendants and note of issue has not yet been filed. Therefore, this motion was timely brought and summary judgment relief is available.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v. Citibank Corp., 100 NY2d 72 [2003]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]).

The relevant facts are as follows. State Farm issued an automobile insurance policy to non-party policy holder, Justin Deshon Smith ("Smith"), which insured a 2000 Chevrolet Cavalier (the "insured

Dated: 12/20/23

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [X] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

vehicle"). Smith's policy covered any occupants of the insured vehicle for any "medical necessity and causally related medical expense that arose from the use or operation of the insured vehicle as the result of an accidental collision." On July 16, 2021 defendant Michael Romelus ("Romelus") was driving the insured vehicle with defendants Marvin Destine ("Destine") and Rocky Luthers ("Luthers") as passengers. Specifically, Romelus was driving down Church Avenue in Brooklyn, New York, when an adverse vehicle stopped short, causing the insured vehicle to strike the adverse vehicle from the rear. There is no police report from the scene of the accident. To date, State Farm has received multiple bills for treatments allegedly provided to Romelus, Destine and Luthers (together the "individual claimants") due to injuries suffered from the accident.

In support of its motion, plaintiff submits the sworn affidavit of Andrea Hutchinson, a Claims Specialist employed by State Farm, who states the following. Based on her employment with State Farm, Hutchinson received training and is personally familiar with the company's standard business practices for New York no-fault claims. Hutchinson states that those business practices were followed for claims associated with this action. Hutchinson also states that she has personal knowledge of the instant action based upon her review of the State Farm file. She states after it received the motorist accident report from Romelus, State Farm began an investigation into the alleged collision.

Hutchinson asserts that after investigation, State Farm questioned the legitimacy of the claim because: 1) the policy originated less than two months prior to the subject loss; 2) there was no police report filed; 3) the insured vehicle was an older model and older model vehicles are commonly used in staged collisions; 4) Smith was not in the insured vehicle at the time of the loss; 5) The insured vehicle was registered at a different address than the policy address and registration took place three days before the subject loss; 6) the insured vehicle was involved in another collision two months after the subject loss and was subject to a policy held with Liberty Mutual; 7) the Liberty Mutual policy was acquired ten days after the subject loss; 8) the MV-104 filed for this accident listed identical injuries for all claimants and did not indicate whether medical attention had been sought at the scene of the accident.

Accordingly, State Farm requested EUOs of Romelus, Destine, Luthers and Smith. Hutchinson states that on September 17, 2021 State Farm received a bill from Supramed for services provided to Destine that served as the basis for Destine's EUO. She also states that on September 9, 2021 State Farm received a bill from Bedford Medical Services, PC that served as the basis for Romelus' EUO. Neither Destine nor Romelus appeared for their EUOs. State Farm has submitted the Supramed and Bedford Medical Services, PC bills in support of this motion.

Hutchinson also claims that on September 15, 2021, State Farm received a bill from Ridgewood Diagnostic Laboratory for treatment allegedly provided to Luthers. This bill served as the basis for Luthers' EUO. Luthers appeared for his EUO on October 12, 2021. Hutchinson states that State Farm forwarded Luthers a copy of the EUO through counsel for signature, but that Luthers failed to sign and return the EUO. State Farm provided the court with a copy of Luthers' unsigned EUO transcript, the bill from Ridgewood Diagnostic Laboratory, and the EUO notice in support of the motion.

State Farm has also submitted the affirmation of Garrett Rigby, an associate with the law firm of Goldberg, Miller & Rubin, PC ("GMR"), the attorneys for State Farm. Rigby states that he is fully familiar with the ordinary business practices of GMR in taking EUOs. He asserts that GMR's ordinary business practices were employed in the instant case. He also states that he is familiar specifically with the facts and circumstances around the EUOs of Destine and Romelus based on a review of the file maintained by GMR and his own personal knowledge as the attorney assigned to take the EUOS of Destine, Romelus, Luthers and Smith.

Rigby asserts that Destine was required to appear for an EUO by letter dated September 22, 2021 which was sent to Destine's address as listed in his application for no-fault benefits. The letter stated that Destine was to appear for an EUO on October 12, 2021. At the request of Destine's counsel, the EUO was rescheduled to October 25, 2021 to be conducted via Zoom. On October 22, 2021, State

Farm received a correspondence from Destine's counsel advising that they no longer represented Destine. Rigby was present and ready to take Destine's EUO on October 25, 2021 on the Zoom meeting link that was created specifically for the purpose of the EUO. Destine did not appear. State Farm sent another letter to Destine dated October 25, 2021 rescheduling the EUO for November 12, 2021. Rigby was present and ready to take Destine's EUO on November 12, 2021 on the Zoom link created for that purpose. Once again, Destine did not appear.

Rigby also states that Romelus was requested to appear for an EUO by letter dated September 22, 2021 which was sent to Romelus' address as listed in his application for no-fault benefits. The letter stated that Romelus was to appear for an EUO on October 8, 2021. Rigby was present and ready to take Romelus' EUO on October 8, 2021 on the Zoom meeting link that was created specifically for the purpose of the EUO. Romelus did not appear. State Farm sent another letter to Romelus dated October 13, 2021 rescheduling the EUO for October 29, 2021. Rigby was present and ready to take Romelus' EUO on October 29, 2021 on the Zoom link created for that purpose. Once again, Romelus did not appear. State Farm submitted copies of the EUO scheduling letters that were sent to Romelus and the EUO scheduling letters that were sent to Destine.

Finally, State Farm submitted the affirmation of Harlan Schreiber, a partner at GMR. Schreiber states that he is fully familiar with the facts and circumstances surrounding the scheduling of the EUO of Romelus. However, he goes on to discuss the EUO of Luthers. He states that Luthers' EUO was taken on October 12, 2021. On October 15, 2021, GMR forwarded a copy of the EUO transcript, via email, to Luther's attorney and asked that Luthers review and subscribe to the same. The email also stated that failure to subscribe to the transcript could result in denial of coverage. An email receipt confirmed that the email was received and read by Luthers' attorney on October 18, 2021 at 10:20am, but Luthers never returned a signed copy of the transcript. On November 19, 2021, GMR sent a follow up email to the attorney renewing the request for Luthers to sign and return a copy of the transcript. An email receipt demonstrated that the email was read on November 22, 2021 at 10:58am. To date, Luthers has not signed and returned a copy of his EUO transcript. State Farm submitted copies of the emails that it sent to Luthers' attorney with the receipts that they were read.

### Parties' arguments

State Farm claims that it is entitled to summary judgment and a declaration that it has no duty to pay any no-fault benefits for claims submitted by the motion defendants because: 1) Destine and Romelus failed to attend EUOs on multiple occasions, thereby breaching a condition precedent to coverage; 2) Luthers failed to subscribe and return his EUO transcript, thereby breaching a condition precedent to coverage; and 3) State Farm maintains a founded belief that the loss in question was not a covered event.

In opposition to the motion, the motion defendants assert that summary judgment should not be granted because 1) State Farm has failed to establish a *prima facie* entitlement to summary judgment; 2) substantial and necessary discovery remains outstanding including demanded discovery that was not provided; and 3) there are material triable issues of fact that are apparent in the record.

First, the motion defendants assert generally that any EUO/deposition taken before the inception of the action are not admissible under CPLR § 3117 and affidavits that plaintiff relies on are not admissible as they are hearsay. Regarding State Farm's argument that there was a failure to complete a condition precedent to coverage, the motion defendants argue that: 1) State Farm has failed to provide sufficient evidence to demonstrate that the service of the EUO notices and notices to subscribe Luthers' EUO were compliant with the timeliness requirements of 11NYCRR §§ 65-3.5, 3.6 & 3.8; and 2) State Farm failed to demonstrate that it had an objective justification to request the EUOs of the individual claimants. Regarding State Farm's founded belief defense, the motion defendants argue that: 1) to establish that it has no duty to pay no-fault benefits to a given defendant, State Farm must demonstrate that the defendant was responsible for the intentional collision. None of the individual claimants who have been accused of creating a fraudulent collision have "assigned his or her benefits to the Provider

Defendants” and thus the motion must be denied; and 2) the affidavit of an investigator with no personal knowledge of the incident cannot be the basis of a founded belief of fraud.

On reply, State Farm argues that: 1) the affirmation in opposition to the motion should be disregarded because it fails to contain the requisite certification of counsel; 2) the motion defendants failed to offer an affidavit of an individual with personal knowledge and which is insufficient to raise a triable issue of fact; 3) State Farm has established its EUO no-show, failure to subscribe EUO and founded belief defenses; 4) State Farm has provided the motion defendants with the requested discovery.

### Discussion

It is well established that “failure to submit to an EUO and ‘subscribe to the same’ violates a condition precedent to coverage” (*Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 AD3d 617 [1st Dept 2018]; 11 NYCRR § 65-2.4[c][2]). A violation of a condition precedent to coverage vitiates an insurance policy (*PV Holding Corp. v. Hank Ross Med., P.C.*, 188 AD3d 429 [1st Dept 2020]; *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]). Through the affidavit of Andrea Hutchinson and the affirmation of Garrett Rigby, State Farm has demonstrated that Romelus and Destine failed to appear for their EUOs. Additionally, the affidavit of Hutchinson and the affirmation of Harlan Schreiber demonstrate that Luthers failed to subscribe to his EUO despite State Farm’s efforts to obtain his signature. Therefore, the burden shifts to the answering defendants to demonstrate that a triable issue of fact exists.

At the outset, it is well established that an affidavit or affirmation from someone with personal knowledge is sufficient to support a summary judgment motion (*see eg. Wilson v. Bristol-Myers Co.*, 403 NYS2d 251 [1978]). Here, the affirmations of Rigby and Schreiber and the affidavit of Hutchinson are all provided based on the personal knowledge of the affirmants based upon their review of the State Farm and GMR records. Therefore, the affidavit and affirmations can be considered in support of this summary judgment motion.

First, the court will consider the motion defendants’ argument that State Farm has failed to demonstrate sufficient evidence that the service of the EUO notices and notices to subscribe Luthers’ EUO were compliant with the timeliness requirements of 11NYCRR §§ 65-3.5, 3.6 & 3.8. 11 NYCRR § 65-3.8 states that an insurer must pay a claim or issue a denial within 30 days of receipt of proof of the claim. However, contrary to the assertion of the answering defendants, the timeliness of State Farm’s denial of their claims is irrelevant since the violation of a condition precedent to coverage gives plaintiff the right “to deny all claims retroactively to the date of the loss, regardless of whether the denials were timely issued” (*Unitrin Advantage Ins. Co. v. Dowd*, 194 AD3d 507 [1st Dept 2021]; *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]; *see Kemper Independence Ins. Co. v. Cornerstone Chiropractic, P.C.*, 185 AD3d 468 [1st Dept 2020][stating that failure to subscribe to an EUO warranted denial of a claim “notwithstanding plaintiff’s failure to present proof of proper delivery of the denials”]).

11 NYCRR § 65-3.5(b) states that an EUO must be requested within fifteen days of receipt of the claim or verification form. The motion defendants state that State Farm must demonstrate that it demanded and EUO within fifteen days of receipt of their individual claims. However, an insurer need only demonstrate that it requested an EUO within 15 business days from receipt of a bill (*State Farm Fire and Cas. Co. v. Blackburn*, 79 Misc3d 1229[A] [Sup Ct NY Co 2023]). An insurer seeking judgment against a given provider need not show that it timely requested an EUO relative to a bill received from that provider; rather, as long as the EUO requests were timely relative to a bill from any provider, the claimant’s failures to appear at the EUO will support the insurer’s coverage defense (*Id.*). Here, State Farm has submitted the Supramed bill that served as the basis for Destine’s EUO request. The bill is dated September 9, 2021 and is marked as received on September 17, 2021. State Farm mailed a notice to Destine to appear for an EUO on September 22, 2021, within the 15-day time frame permitted by the regulation. State Farm also submitted the bill from Bedford Medical Services, PC that served as the basis for Romelus’ EUO request. That bill is dated September 2, 2021 and the bill is marked as

received on September 9, 2021. State Farm mailed a notice to Romelus to appear for an EUO on September 22, 2021, within the fifteen-day time frame permitted by the regulation. Finally, State Farm has submitted a bill from Ridgewood Diagnostic Laboratory LLC that served as the basis for Luthers' EUO request. The bill is dated September 9, 2021 and is marked as received on September 15, 2021. State Farm mailed a notice to Luthers to appear for an EUO on September 22, 2021, within the 15-day time frame permitted by the regulation.

State Farm has met its burden of demonstrating that its requests for EUOs were served within 15 days of receipt of bills that served as the bases for those requests. Therefore, the burden shifts to the motion defendants to demonstrate a triable issue of fact. The motion defendants have not submitted any evidence that contradicts State Farm's claims concerning the timeliness of their EUO notices. Assuming *arguendo* that State Farm's defense fails if it did not demand EUOs within 15 days of the receipt of the claims of each of the individual motion defendants, the motion defendants must prove that their claims were filed with State Farm more than 15 days before State Farm noticed the subject EUOs. Yet the answering defendants have not submitted any of their bills as evidence that the EUO requests were untimely. Therefore, the motion defendants have failed to raise an issue of fact on this point.

Next, 11 NYCRR § 65-3.6 states that "if any requested verification has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 business days, follow up with the party from whom the verification was requested..." This means that after a failed EUO, the plaintiff-insurer must request a follow up EUO within 10 days (*see eg. Mapfre Ins. Co. of N.Y. v. Manoo*, 140 AD3d 468 [1st Dept 2016]). State Farm has demonstrated through the affirmation of Rigby that Destine was mailed a follow up EUO request the same day as his first missed EUO and that Romelus was mailed a follow up EUO request five days after his first missed EUO. Therefore, State Farm has met its burden of demonstrating that the follow up letters for Destine and Romelus were sent within 10 days as required by the regulation. The motion defendants do not introduce any evidence challenging the assertions made in Rigby's affirmation. Accordingly, the motion defendants have failed to raise an issue of fact on this point.

Next, the motion defendants argue that State Farm failed to demonstrate that it had an objective justification to request the EUOs of the individual claimants. However, in her affidavit, Hutchinson expounds on the facts that raised a strong possibility that the collision did not occur as the claimants allege. These facts provide a reasonable basis to request an EUO. Therefore, State Farm has demonstrated an objective justification for its EUO requests.

Finally, the motion defendants argument that the summary judgment motion is premature because there has not been adequate time for discovery is rejected. State Farm has provided the court with a copy its response to defendants' demand for verified interrogatories. Otherwise, the moving defendants have failed to point to any specific items of discovery not in their possession which would enable them to defeat State Farms' motion. Therefore, summary judgment is not premature (CPLR 3212[f]).

Based on the foregoing, State Farm has established a *prima facie* case that a condition precedent to coverage was breached thereby relieving plaintiff of the duty to pay no-fault benefits in connection with the underlying accident and the motion for summary judgment is granted in its entirety. Accordingly, the cause of action for denial of coverage based upon a founded belief that the loss did not arise from a covered event is denied as moot.

In accordance herewith, it is hereby

**ORDERED** that motion sequence numbers 002 is granted in its entirety.


Settle judgment.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

12/20/23  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.