

Liberty Mut. Ins. Co. v Assoumanou

2024 NY Slip Op 31951(U)

June 3, 2024

Supreme Court, New York County

Docket Number: Index No. 650618/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 650618/2021

LIBERTY MUTUAL INSURANCE COMPANY and LM
GENERAL INSURANCE COMPANY,
Plaintiffs,

MOTION SEQ. NO. 002

- v -

SIMBEY ASSOUMANOU,
21ST CENTURY CHIROPRACTIC CARE,
ALINA ACUPUNTURE PC,
ALL CITY FAMILY HEALTHCARE CENTER, INC.,
ALL NATIONS DME CORP,
CARESOFT LEASING CORP.,
CENTRAL PARK EAST MEDICAL, PC,
DIANON SYSTEMS, INC,
GO FLEX REHAB PHYSICAL THERAPY, PC,
HEALTHWISE MEDICAL ASSOCIATES PC,
IRONBOUND MRI LLC,
KV MEDICAL OF NY PC,
LENCO DIAGNOSTIC LABORATORIES, INC.,
LIFE CHIROPRACTIC PC,
MACINTOSH MEDICAL, PC,
MED TROVE INC.,
MKR MEDICAL PC,
MULTIMED SUPPLY, INC,
NYC BEST MEDICAL SUPPLY, INC,
PRIMAVERA PHYSICAL THERAPY PC,
QUALITY CARE RX INC,
RK MED INC,
SEDATION VACATION PERIOPERATIVE MEDICINE, PLLC,
SKY RADIOLOGY PC,
TOTAL ANESTHESIA PROVIDER PC,
UNIVERSAL BRACE SUPPORT INC,
VITAL MEDICAL OF FOREST HILLS, and
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for SUMMARY JUDGMENT

The relevant facts of this case are set forth in the decision and order dated June 30, 2022, wherein the court granted a default judgment against certain non-answering defendants¹

¹ SIMBEY ASSOUMANOU, 21ST CENTURY CHIROPRACTIC CARE, GO FLEX REHAB PHYSICAL THERAPY, PC, IRONBOUND MRI LLC, KV MEDICAL OF NY PC, LENCO DIAGNOSTIC LABORATORIES, INC., MKR MEDICAL PC, QUALITY CARE RX INC, RK MED INC, SEDATION

(NYSCEF Doc. No. 36, *decision and order*). This case concerns a motor vehicle collision on July 11, 2020, involving a vehicle insured by Liberty Mutual Insurance Company (“Liberty Mutual”) to Simbey Assoumanou (“Assoumanou” or “claimant”), under a policy effective October 24, 2019 through October 24, 2020. Claimant later sought medical treatment for injuries allegedly sustained during the collision, but plaintiff denied coverage, on the ground that claimant, when he procured the insurance coverage, made a material misrepresentation about his residence and where the vehicle would be garaged (NYSCEF Doc. No. 40, *Statement of Material Facts*).

Plaintiffs now move, pursuant to CPLR 3212, for an order granting them summary judgment against answering defendants ALINA ACUPUNCTURE PC, ALL CITY FAMILY HEALTHCARE CENTER, INC., ALL NATIONS DME CORP., CENTRAL PARK EAST MEDICAL PC, CARESOFT LEASING CORP., HEALTHWISE MEDICAL ASSOCIATES PC, LIFE CHIROPRACTIC PC, MACINTOSH MEDICAL PC, and PRIMAVERA PHYSICAL THERAPY PC (NYSCEF Doc. No. 41, *Grossman affirmation*).²

Plaintiffs argue that the answering defendants are not entitled to no-fault benefits since claimant made a material misrepresentation when he procured the subject policy. According to plaintiffs, Assoumanou knowingly and intentionally misrepresented the policy address and garaging location of the insured vehicle when applying for insurance with plaintiffs to secure a lower premium. They note that, although Assoumanou secured the policy using the address at 5 Valley Forge Drive, Wyandanch, New York 11798-1214, the vehicle was routinely garaged at 2175 Reeds Mills, #2F, Bronx, New York 10475. In addition, plaintiffs contend that their investigation revealed that the medical billing for treatment listed claimant’s address as 2136 Strang Avenue, Bronx, NY. Assoumanou testified at his Examination Under Oath (“EUO”) held on September 9, 2020, that he resided at 5 Valley Forge Drive, Wyandanch, New York from June 2018 until January 15, 2020, and relocated to 2136 Strang Avenue, Bronx, New York with his wife and four children in January 2020. He further stated that he purchased the Nissan involved in this accident in May 2020, and that even though the vehicle was always parked in the Bronx and never remained at the Wyandanch residence overnight, he never updated the address on his policy or advised Liberty Mutual as to his Bronx residence (NYSCEF Doc. No. 52, *Assoumanou EUO testimony*, pg. 28-30).

Plaintiffs submit the subject insurance claim denials (NYSCEF Doc. No 54, *denials*), and the affidavit of Anthony Augugliaro, II, plaintiffs’ investigator, who affirms that Assoumanou misrepresented his address to procure the insurance policy (NYSCEF Doc. No. 50, *investigator affidavit*). They also submit the affidavit of Darren Demmon, plaintiffs’ lead analyst, who avers that the misrepresentation caused Assoumanou’s annual policy premium to be only \$5,188.00 but it would have been \$1,075.00 more for the same vehicle at the inception of the policy had he provided plaintiffs with his actual place of residence in the Bronx, New York (NYSCEF Doc. No. 53, *Demmon affidavit*). Lastly, plaintiffs proffer the affidavit of Dawn Smith, Claims

VACATION PERIOPERATIVE MEDICINE, PLLC, SKY RADIOLOGY PC, and UNIVERSAL BRACE SUPPORT INC.

² The remaining defendants have been dismissed from this action, pursuant to stipulations of discontinuance dated May 26, 2021, and November 9, 2022, respectively. (NYSCEF Doc. No. 46, *Exhibit D*).

Department Team manager, who affirms that the medical bills, verification requests and denials were timely mailed to claimant (NYSCEF Doc. No. 55, *Team Manager affidavit*).

This motion is unopposed.

It is well-settled that the proponent of a motion for summary judgment 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

“In New York, an insurance company has a statutory right to rescind an insurance policy if the applicant makes a ‘material misrepresentation’ on the insurance application (Insurance Law § 3105[a], [b][1]” (*Alexi Home Design, Inc. v Union Mut. Fire Ins. Co.*, 223 AD3d 449, 449 [1st Dept 2024]). “A misrepresentation in an insurance application is material, voiding the policy ab initio, if, had the true facts been known, either the insurer would not have issued the policy or would have charged a higher premium” (*Starr Indem. & Liab. Co. v Monte Carlo, LLC*, 190 AD3d 441, 441-442 [1st Dept 2021]). While the materiality of a misrepresentation is usually a question for the jury, materiality can be established by an affidavit from an underwriter and documentary evidence concerning its underwriting practices showing that the same policy would not have been issued if the correct information had been provided (see *Mehta v New York Life Ins. Co.*, 203 AD2d 8, 9 [1st Dept 1994]).

Here, plaintiffs have established their *prima facie* entitlement to summary judgment by demonstrating through portions of claimant’s EUO testimony, and the investigator’s affidavit, that Assoumanou misrepresented the physical address of the insured’s automobile on the application for insurance and that the annual premium for the subject vehicle would have been \$1,075.00 more if the correct address would have been provided to plaintiffs when the insurance was procured. As the burden shifts, defendants fail to create an issue of fact precluding summary judgment as the motion is unopposed. Based on the foregoing, it is hereby

ORDERED that plaintiffs’ motion for summary judgment is granted in favor of plaintiffs without opposition; and it is further

ORDERED that Judgment shall be entered in favor of plaintiffs, together with costs and disbursements in the amount to be determined by the Clerk of the Court against defendants ALINA ACUPUNCTURE PC, ALL CITY FAMILY HEALTHCARE CENTER, INC., ALL NATIONS DME CORP., CENTRAL PARK EAST MEDICAL PC, CARESOFT LEASING CORP., HEALTHWISE MEDICAL ASSOCIATES PC, LIFE CHIROPRACTIC PC, MACINTOSH MEDICAL PC, and PRIMAVERA PHYSICAL THERAPY PC; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiffs have no duty to pay any no-fault benefits in the form of sums, monies, damages, awards or benefits to ALINA

ACUPUNCTURE PC, ALL CITY FAMILY HEALTHCARE CENTER, INC., ALL NATIONS DME CORP., CENTRAL PARK EAST MEDICAL PC, CARESOFT LEASING CORP., HEALTHWISE MEDICAL ASSOCIATES PC, LIFE CHIROPRACTIC PC, MACINTOSH MEDICAL PC, and PRIMAVERA PHYSICAL THERAPY PC, 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 July 11, 2020 loss, referenced in the complaint; and it is further

ORDERED, ADJUDGED and DECLARED that all no-fault lawsuits, arbitrations, claims filed by ALINA ACUPUNCTURE PC, ALL CITY FAMILY HEALTHCARE CENTER, INC., ALL NATIONS DME CORP., CENTRAL PARK EAST MEDICAL PC, CARESOFT LEASING CORP., HEALTHWISE MEDICAL ASSOCIATES PC, LIFE CHIROPRACTIC PC, MACINTOSH MEDICAL PC, and PRIMAVERA PHYSICAL THERAPY PC arising from or related to the July 11, 2020 loss referenced in the complaint are hereby stayed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court 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).

This constitutes the decision and order of this court.

June 3, 2024


HON. VERNA L. SAUNDERS, JSC

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