

**All Kind Physical Therapy, P.C. v State Farm Mut.  
Ins. Co.**

2024 NY Slip Op 32445(U)

April 23, 2024

Civil Court of the City of New York, Kings County

Docket Number: Index No. CV-700343-18/KI

Judge: Babatunde I. Akowe

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS PART 41

ALL KIND PHYSICAL THERAPY, P.C.,  
A/A/O NICOLE GOODING,

*Plaintiff,*

-against-

STATE FARM MUTUAL INSURANCE. CO.,

*Defendant.*

Index No. CV-700343-18/KI  
Motion Cal. # 97/98 Motion Seq. # 1+2  
**DECISION AND ORDER**

Recitation, as required by CPLR § 2219(a) of the  
papers considered in review of this Motion:

**Papers**

Notice of Motion and Affidavits Annexed 1-2  
Answering Affidavits.....3-4  
Replying Affidavits..... 5  
Exhibits.....NYSCEF

Upon the foregoing cited papers and after oral argument, the Decision/Order on Defendant’s Motion for Summary Judgment and Plaintiff’s Cross-Motion for Summary Judgment pursuant to CPLR 3212 are decided as follows:

Defendant’s Motion is GRANTED IN PART as to COA # 1, 4 and 5 AND DENIED IN PART as to COA # 2, 3 and 6.

Plaintiff’s Motion is GRANTED IN PART as to COA # 2, 3 and 6 where in pursuant to CPLR 3212(g) this Court finds that that Plaintiff established its *prima facie* proof that the bill(s) at issue were mailed to and received by Defendant and that Defendant did not pay Plaintiff’s bill(s) as to COA # 2, 3 and 6 and DENIED IN PART as to COA # 1, 4 and 5.

As to COA # 1, DOS 2/14/13-3/1/13 in the amount of \$431.20, Defendant has shown through admissible evidence that the balance of this bill \$105.48 has been paid. While the initially submitted bill was partially paid, Defendant’s Expert Coder following her review determined that additional monies were owed and were paid in accordance to Workers’ Compensation fee scheduled and Plaintiff and cashed the check in full satisfaction. Therefore, accord and satisfaction applies and COA # 1 action is dismissed with prejudice.

As to COA # 4 and 5, incorrectly identified in Defendant’s Motion papers as bills 3 and 4, the Court agrees with Defendant that pursuant to a Declaratory Judgment in the New York Supreme Court, Nassau County, Defendant established that COA # 4 and 5, with dates of service 10/1-10/10/13 in the amount of \$277.20 (correct amount \$246.60) and date of service 11/4-11/4/13 in the amount of \$138.60 (correct amount \$123.20) are listed in Plaintiff’s Summons and Complain in Exhibit 1, have been disposed by a Declaratory Judgment action bearing the caption: *State Farm Mutual Automobile Insurance Company, et. al., Plaintiffs, against All Kind Physical Therapy P.C.,* in Supreme Court, Nassau County, under Index No. 10866/15, in that Plaintiff has breached a

condition precedent to coverage pursuant to 11 N.Y.C.R.R. §65-1.1(d) and has no right to receive payment on the aforementioned bills due to its failure to appear for the Examination Under Oath on November 21, 2013 and December 27, 2013 which had been requested by State Farm.

As to the remaining COA # 2, 3 and 6 these bills were denied by Defendant also based on a EUO no-show defense, to wit, the failure by the Plaintiff to allegedly to appear for Examination Under Oath on November 21, 2013 and December 27, 2013 which had been requested by State Farm.

The Court finds that there remain triable issues of fact. The Defendant's motion is based upon the alleged failure of the Plaintiff to appear for two (2) duly scheduled Examinations Under Oath ("EUO" s). First, the Court finds that there are material triable issues of fact as to the mailing of the EUO Notices by Defendant. "Generally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee. The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed." Progressive Cas. Ins. Co. v. Infinite Ortho Prods., Inc., *supra*. See also Residential Holding Corp. v. Scottsdale Ins. Co., 286 A.D.2d 679, 680 (2d Dep't, 2001). And as the Court of Appeals succinctly put it, "[w]e would hasten to add, however, that *in order for the presumption to arise, office practice must be geared so as to ensure the likelihood that a [document] is always properly addressed and mailed.*" Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 830 (1978) (emphasis added).

Submitted in support of Defendant's Motion NYSCEF # 14 were allegedly 24 pages of denials with a Proof of Mail Form PS 3877 allegedly mailing all these documents on lines 3 and 4 (2 separate mailings of 24 pages) all fo4 \$.44 each (the last column titled "Fee"). Attached as NYSCEF # 30 is Plaintiff's USPS print out that shows that USPS raised postage to \$.46 per ounce of mail. The Court finds it credulous that Defendant would mail 24 pages to Plaintiff's 2 separate addresses in lines 3 and 4 all for \$.44 each when the prices for 1<sup>st</sup> Class 1 oz. mail was increased to \$.46 per ounce. Plaintiff through its submission was able to establish that 24 8.5 x 11 pages plus a regular white envelope weight 4 oz thus at the very least that would be \$1.84 but not \$.44 as indicated by Defendant in its proof of mail. For those reasons this Court finds that Defendant failed to establish the proper malign of its denials and EUO notices which also rely on the same USPS PS 3877 Form that shows that Defendant paid \$.44 for each 1 oz of mail when the postal rated in 2013 were increased to \$.46. See generally, Carle Place Chiropractic v. New York Cent. Mut. Fire Ins. Co., 19 Misc.3d 1139(A) (Dist. Ct., Nassau County, 2008) (Engel, J.); see also, Nocella v. Fort Dearborn Life Ins. Co. of N.Y., 99 A.D.3d 877, 879 (2d Dep't, 2012).

As to Defendant's proof that the Plaintiff failed to appear for the EUOs, the annexed attorney affirmation discussing events approximately seven (7) years after the alleged non-appearance raises a matter of credibility which this Court cannot determine on a motion for summary judgment. Due to the significant lapse in time between the alleged non-appearance at the EUOs and the date of the affirmation, this Court declines to credit the affirmation as proof of the non-appearance.

A "[c]ourt is not required to accept the affiant's testimony as competent evidence merely because he swore to the fact." Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 254 (1<sup>st</sup>

Dep't, 2011). “A conclusory statement from an attorney which fails to demonstrate his or her personal knowledge is insufficient to support summary judgment.” Alrof, Inc. v Safeco Nat. Ins. Co., 39 Misc.3d 130(A) (App. Term, 2d Dep't, 2013). However, Defendant's affiant does not set forth what records were reviewed or attach any records. As such, the only evidence in admissible form demonstrating that the plaintiff failed to appear at the EUOs is the personal knowledge of the affiant. See Beauvoir v. Samuel, 204 A.D.3d 741, 742 (2d Dep't, 2022) (“Here, the plaintiffs' conclusory affidavit, which was based upon unidentified sources, was insufficient.”). Alleged knowledge in an affidavit based on review of unidentified business records constitutes inadmissible hearsay and lacks probative value. See Bank of N.Y. Mellon v. Gordon, 171 A.D.3d 197 (2d Dep't 2019); see also, Great Am. Ins. Co. v. Auto Mkt. of Jamaica, N.Y., 133 A.D.3d 631 (2d Dep't 2015); Dempsey v. Intercontinental Hotel Corp., 126 A.D.2d 477 (1<sup>st</sup> Dep't, 1987); Barraillier v. City of New York, 12 A.D.3d 168 (1<sup>st</sup> Dep't, 2004).

In Adam v. Cutner & Rathkopf, 238 A.D.2d 234, 237 (1<sup>st</sup> Dep't, 1997), the Appellate Division held on similar facts as before this Court that an attorney lacked personal knowledge because the attorney affirmation failed to state “[t]he basis of ... [affiant's] *knowledge of these facts is not divulged*, but his affirmation is not professed to be made upon personal knowledge.” (Emphasis added). Defendant affiant's “status as an attorney for some of the parties, however, is highly pertinent. It is evident that plaintiffs, having been challenged to supply acceptable proof, have attempted to remedy the deficiency by submitting yet another affirmation by an attorney who, similarly, does not profess to have any personal knowledge of the facts (Capelin Assocs. v. Globe Mfg. Corp., *supra*, at 342 (bald conclusory assertions insufficient to defeat summary judgment); Israelson v. Rubin, 20 A.D.2d 668 (affirmation of counsel without personal knowledge of the facts of no probative value), aff'd 14 NY2d 887).” *Id.* at 238 (internal citations omitted).

Accordingly, separate and distinct from the lack of any record support or assertion of personal knowledge, the Court is left to speculate whether Defendant's counsel was in the office for five minutes or for twenty-four hours on that date, and speculation by the Court cannot furnish the basis for granting Defendant summary judgment. Cf. Meridian Psychological Servs., P.C. v Allstate Ins. Co., 51 Misc.3d 128(A) (App. Term, 2d Dep't, 2016) (“At trial, defendant's witness testified that, for the second EUO, she checked at 11:30 a.m. to see whether the assignor had appeared and continued to check for another 15 minutes, but plaintiff's assignor never appeared. However, the letter scheduling the second EUO scheduled the EUO for 11:00, not 11:30. As the testimony did not prove that the assignor did not appear at 11:00, defendant failed to establish that plaintiff's assignor had, in fact, failed to appear for two scheduled EUOs.”).

Generally, “[t]he attorney who was assigned to the file and who would have conducted the EUO if the defendants had appeared certainly was in a position to state that the defendants did not confirm their appearances as directed in the notice and did not otherwise appear in his office on the date indicated.” Hertz Corp. v. Active Care Med. Supply Corp., 124 A.D.3d 411 (1<sup>st</sup> Dep't, 2015). However, where, as here, the affirmation regarding an alleged failure to appear at an EUO fails to adequately state the basis for the affiant's knowledge more than six (6) year after the alleged no-show, the affirmation lacks probative value. See Vil. Med. Supply, Inc. v. Travelers Prop. Cas. Co. of Am., 51 Misc.3d 126(A) (App. Term, 1st Dep't, 2016) (“The affidavits of defendant's IME doctors lacked probative value, since they failed to state the basis of their recollection, some 12 months later, that the assignor did not appear on the scheduled IME dates); Utica Acupuncture

P.C. v. Amica Mut. Ins. Co., 55 Misc.3d 126(A) (App. Term, 1st Dep't, 2017) ("The conclusory affirmation of defendant's IME doctor lacked probative value, since she failed to adequately state the basis of her recollection, some two years later, that the assignor did not appear on the scheduled IME dates."); Westmed Physician, P. C. v. State Farm Auto Ins. Co., 17 Misc.3d 133(A) (App. Term, 1st Dep't, 2007) ("Although the affidavit indicated that the affiant personally mailed the bill to defendant, it did not explain the office mailing practice of her employer nor did it state the basis for the affiant's recollection, three years later, of mailing the bill."); Metro 8 Med. Equip., Inc. v. Elrac, Inc., 50 Misc.3d 140(A) (App. Term, 1st Dep't, 2016) ("The affidavit of defendant's chiropractor/acupuncturist, who affirmatively stated that she does not maintain records of a claimant's nonappearances at IMEs scheduled with her office, lacked probative value, since it failed to state the basis of her recollection, some 18-months later, that the assignor did not appear on the scheduled IME dates."); Satya Drug Corp. v. Glob. Liberty Ins. Co. of New York, 65 Misc.3d 127(A) [App. Term, 1st Dep't, 2019] (the conclusory affirmation of defendant's IME doctor lacked probative value, since he failed to adequately state the basis of his recollection, some 16-months later, that the assignor did not appear on the scheduled IME dates); *see also*, Active Care Med. Supply, Corp. v Am. Tr. Ins. Co., 61 Misc.3d 1208(A) (Civ. Ct., Kings County, 2018).

"Although the Appellate Term Second Department has accepted affirmations similar to the affirmation at issue in this case, it does not appear that any Second Department, Appellate Court decision has directly addressed the issue of the probative value of an affirmation or affidavit made over six (6) years after the alleged IME or EUO no-show. *See e.g.*, SVP Med. Supply, Inc. v. GEICO, 75 Misc.3d 139(A) (App. Term, 2d Dep't, 2022) (the affirmation submitted by defendant's attorney, who was present in her office to conduct the EUO of plaintiff on the scheduled dates, was sufficient to establish that plaintiff had failed to appear on those dates)." GC Chiropractic P.C. v. State Farm Mut. Auto. Ins. Co., 2022 NY Slip Op 34508(U) (Civ. Ct., Kings County 2022) (Moyne, J.).

As to the remaining COA # 2, 3 and 6 the action is to proceed to trial *solely* on the issue of Defendant's prima facie case and the defense of EUO-No Show.

This constitutes the Decision/ Order of this Court

Date: April 23, 2024  
Brooklyn, NY

  
HON. BABATUNDE I. AKOWE  
JUDGE, KINGS COUNTY, CIVIL COURT

ENTERED - Kings Civil Court  
7/17/2024, 9:24:34 AM