

Liberty Mut. Ins. Co. v Archer

2024 NY Slip Op 32649(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 655663/2020

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. 655663/2020

LIBERTY MUTUAL INSURANCE COMPANY and WAUSAU
UNDERWRITERS INSURANCE COMPANY,
Plaintiffs,

MOTION SEQ. NO. 002

- v -

KADIJA ARCHER,
Individual Defendant,

and
AAA MEDICAL DME INC,
ATLAS PHARMACY LLC,
INJE PHYSICAL THERAPY PC,
KJL ACUPUNCTURE PC,
KTJ PHYSICAL THERAPY PC,
M&D ELITE PHARMACY LLC,
MEDAID RADIOLOGY LLC,
METRO PAIN SPECIALISTS PROFESSIONAL
CORPORATION, MJG MEDICAL PC,
NEMAAN GHUMAN, DPM,
NEW CAPITAL 1 INC,
PDA NY CHIROPRACTIC PC

Medical Provider Defendants,
Collectively, the Defendants

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 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

were read on this motion to/for

SUMMARY JUDGMENT

The relevant facts of this case are set forth in detail in the decision and order dated September 22, 2021. This case concerns a motor vehicle collision on October 11, 2019, involving a vehicle insured by Liberty Mutual Insurance Company (“Liberty Mutual”) to defendant Kadija Archer (“Archer” or “claimant”), under a policy effective December 10, 2018, through December 10, 2019. Archer sought medical treatment for injuries allegedly sustained during the collision, amounting to \$20,368.27. Plaintiffs commenced this action seeking a declaratory judgment that they are not obliged to pay no-fault benefits arising from the subject collision accident insofar as claimant misrepresented that she resided in Piscataway, New Jersey when she procured the insurance policy, when she in fact resided in the Bronx, New York and the vehicle was being garaged there. The bills that the medical providers submitted to plaintiffs on claimant’s behalf contained Archer’s Bronx address (NYSCEF Doc. No. 7, *Bynum affirmation in support of default judgment*).

Plaintiffs now move, pursuant to CPLR 3212, for an order granting summary judgment in their favor and against defendants ATLAS PHARMACY LLC, M&D ELITE PHARMACY LLC, MEDAID RADIOLOGY LLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MJG MEDICAL PC, NEW CAPITAL 1 INC, and PDA NY CHIROPRACTIC PC (hereinafter “medical providers”) and KADIJA ARCHER (“claimant” or “Archer”) (collectively, “answering defendants”),¹ declaring, among other things, that the answering defendants are not entitled to any no-fault benefits (NYSCEF Doc. No. 58, *notice of motion*).

Plaintiffs argue that the answering defendants are not entitled to no-fault benefits since claimant made a material misrepresentation by failing to inform plaintiffs that she no longer resided at the policy address, that she relocated to the Bronx, and that the insured vehicle would be garaged there. Plaintiffs contend that summary judgment is appropriate because Archer misrepresented her residence to procure the motor vehicle insurance policy with plaintiffs using the Piscataway, NJ address to secure a lower premium even though she resided and garaged the insured vehicle at the Bronx address. Plaintiffs assert that the policy was created and issued to Archer at the Piscataway, NJ address with a premium of \$2,666.00 for the period of December 10, 2018, through December 10, 2019, but the premium would have been \$5,986.00 for the same policy period if it was issued for a vehicle at the Bronx address. They further furnish claimant’s Examination Under Oath (“EUO”) transcript wherein she testified that she resided at the Bronx address at the time of the motor vehicle collision, and that her vehicle was garaged at or near that address. She further testified that she lived at the Bronx address from January 2019 through August 2019 during which time she was employed in New York, NY, and that before such time, she lived at the Piscataway address. Claimant testified that she filed her 2018 tax returns in New Jersey (NYSCEF Doc. No. 86, *Archer’s Examination Under Oath*, pg. 11-19, 47). Plaintiffs also submit the affidavit of David J. DeGeorge, an investigator in the Special Investigations Unit for plaintiff Liberty Mutual, who affirms that his investigation revealed that Archer lived at the Bronx address and that her driver’s license at the time of the accident listed her address as the Bronx. He also references claimant’s EUO testimony that her Chase bank account statements have the Bronx address (NYSCEF Doc. No. 82, *DeGeorge affidavit*). Plaintiffs also attach the affidavit of Dawn Smith, Liberty Mutual’s Claims Department Team Manager, who details the policy and procedure for handling no-fault claims (NYSCEF Doc. No. 89, *Smith affidavit*). Lastly, plaintiffs note that they denied all bills submitted by the medical provider defendants based on Archer’s material misrepresentation of her address (NYSCEF Doc. No. 59, *affirmation in support of summary judgment*).

Archer opposes and cross-moves, pursuant to CPLR 3212, for an order declaring that plaintiffs must provide no-fault coverage for medical treatment she received in connection with the subject accident. Archer denies that she made any material misrepresentations when she obtained said policy. According to claimant, plaintiffs do not argue that she made any material misrepresentations when she procured the subject policy but rather, that she moved from the NJ address to the Bronx address prior to her accident. Archer articulates that she neither lived nor housed the insured vehicle at the Bronx address for any extended period of time, but that she

¹ On September 22, 2021, the Court granted plaintiffs’ motion for default judgment against all non-answering defendants (NYSCEF Doc. No. 36, *decision and order*).

visited the Bronx address because her mother resided there. Archer further asserts that she was registered to vote in New Jersey and that she filed her personal income taxes in New Jersey. In support of this, Archer attaches a copy of her interim driver's license during the time of the subject collision bearing a New Jersey address (NYSCEF Doc. No. 95, *Archer's NJ Interim Driver License*). Archer submits an affidavit wherein she states that she was not advised to seek legal representation when she was notified of the EUO, and that she did not understand that plaintiffs were claiming that she lived at the Bronx address instead of the NJ address. She further claims that the questions asked during the EUO were misleading but that she nevertheless testified that the Bronx address was neither her primary residence nor the primary place where she garaged her vehicle (NYSCEF Doc. No. 123, *Archer affidavit in opposition*). She also sets forth that plaintiffs' denials of the coverage were untimely. Hence, Archer argues that all the medical treatment she received in connection with the subject collision should have been covered by her no-fault insurance with plaintiffs (NYSCEF Doc. No. 122, *Maldonado affirmation in opposition*).

In reply and in opposition to Archer's cross-motion, plaintiffs maintain that Archer's testimony at the EUO demonstrates that she lived in the Bronx at the time of the motor vehicle collision and that she failed to inform plaintiffs of the change of address. According to plaintiffs, they would not have issued the subject policy to Archer if they knew she resided at the Bronx address at the time of the application. They maintain that, had Archer applied for the policy using the Bronx address, plaintiffs would have issued a policy for her with New York policy language and the premium level reflective of the risk associated with the Bronx address, which would have been approximately \$3,320.00 more. They posit that Archer was represented by Field Law Group during her EUO conducted on January 9, 2020, contrary to her claim that plaintiffs did not advise her to seek legal representation when she was notified of the EUO. Regarding the timeliness of denying Archer's coverage, plaintiffs posit that they sent an initial letter to Archer and her legal counsel on November 22, 2019, thirteen (13) days after receipt of Archer's claim for no-fault benefits, when they noticed a discrepancy between the policy address and the address on the claim for no-fault benefits.

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' motion for summary judgment is denied insofar as there are issues of fact as to claimant's address when she procured the subject vehicle insurance on December 10, 2018. Plaintiffs' reliance on portions of claimant's EUO testimony that, *inter alia*, claimant has a bank account bearing the Bronx address, that she was residing at the Bronx address at the time of the accident, and that the car was typically parked on the street near the Bronx address, in support of the argument that she materially misrepresented her address when she procured the policy, is insufficient to establish that claimant resided at the Bronx address and not at the NJ address when she procured the insurance policy. Claimant testified at her EUO that she lived at the New Jersey address when she procured the subject insurance policy but that she failed to update same after moving to the Bronx address. Given the issue of fact with respect to claimant's address at time of procurement of the subject policy, the motion and cross-motion are denied. It is hereby

ORDERED that plaintiffs motion for summary judgment is denied, and Archer's cross-motion for summary judgment is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiffs.

This constitutes the decision and order of this court.

June 21, 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