

**Liberty Mut. Ins. Co. v Cruz**

2024 NY Slip Op 32775(U)

July 24, 2024

Supreme Court, New York County

Docket Number: Index No. 651912/2021

Judge: Verna L. Saunders

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. VERNAL SAUNDERS, JSC PART 36**

*Justice*

-----X  
LIBERTY MUTUAL INSURANCE COMPANY and LM INSURANCE CORPORATION,  
Plaintiffs,  
INDEX NO. 651912/2021  
MOTION SEQ. NO. 002

- v -

BULMARO CRUZ, BRADLEY WASSERMAN, MD  
PLLC, BURKE PHYSICAL THERAPY, P.C., BV PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY, P.C., COMPLETE NEUROPSYCHOLOGY PC, DIMITRI BAZIN, PA, ERF PHYSICAL THERAPY, PC, GYSAKA SERVICES INC, KIM CHIROPRACTIC PC, LENOX HLL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, PC, LIANA BINNS, NP, LZ MEDICAL DIAGNOSTIC PC, MEDAID RADIOLOGY, LLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MITSOU DOROTI PHILOGENE, NP, MPO MS INC., S&K WARBASSE PHARMACY, INC., SANFORD CHIROPRACTIC, P.C., SUPPORTIVE PRODUCTS CORP., SYOSSET ACUPUNCTURE, P.C., and TOPLAB A/K/A ADVANCED COMPREHENSIVE LABORATORY, LLC  
Defendants.

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77  
were read on this motion to/for SUMMARY JUDGMENT

This action arises from claims for no-fault reimbursement stemming from a motor vehicle accident on March 13, 2020 (hereinafter, the “occurrence” or the “accident”), involving a 2008 Nissan Pathfinder (hereinafter, “insured vehicle”) owned by non-party Jessica Jimenez, policyholder (hereinafter, “Jimenez”), operated by her uncle and claimant, Bulmaro Cruz (hereinafter “Cruz”), and insured by Liberty Mutual Insurance Company (“Liberty Insurance”) for the period of March 1, 2020, through March 1, 2021, with no-fault medical coverage limits. Plaintiffs seek to deny no-fault benefits relating to the motor vehicle accident on March 13, 2020, based on the alleged material misrepresentation of the policyholder that Cruz was not a frequent user of the insured vehicle (NYSCEF Doc. No. 1, *summons and complaint*).

The court by the decision and order dated July 7, 2022, granted plaintiffs a default judgment against defendants BULMARO CRUZ, BV PHYSICAL THERAPY PC, CHANG HEALTH PHYSICAL THERAPY, P.C., DIMITRI BAZIN, PA, KIM CHIROPRACTIC PC, LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, PC, LIANA BINNS, NP, LZ MEDICAL DIAGNOSTIC PC, MPO MS INC., S&K WARBASSE PHARMACY, INC., SUPPORTIVE PRODUCTS CORP., and SYOSSET ACUPUNCTURE, P.C. (NYSCEF Doc. No. 40, *decision and order*).

Plaintiffs now move, pursuant to CPLR 3212, for an order granting summary judgment in their favor against answering defendants BURKE PHYSICAL THERAPY, P.C., COMPLETE NEUROPSYCHOLOGY PC, ERF PHYSICAL THERAPY, PC, GYSAKA SERVICES INC, MEDAID RADIOLOGY, LLC, METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION, MITSOU DOROTI PHILOGENE, NP, and SANFORD CHIROPRACTIC, P.C. (hereafter, “medical provider defendants”) (NYSCEF Doc. No. 50, *Grossman affirmation*).<sup>1</sup>

Plaintiffs argue that the medical provider defendants are not entitled to no-fault benefits because Jimenez failed to list Cruz as a driver when procuring the policy, and that Cruz testified falsely in his Examination Under Oath (“EUO”) to perpetuate the material misrepresentation. Plaintiffs contend that Jimenez’s failure to list Cruz as an additional operator when the policy was procured amounts to material misrepresentation because, as part of the investigation conducted in this matter, a Vehicle Locator Report revealed 147 sightings of the insured vehicle at Cruz’s home address prior to the policy inception (12 days prior to the accident on March 13, 2020, and after policy inception) (NYSCEF Doc. No. 60, *Anderson affirmation*). They furnish a copy of Jimenez’s EUO testimony wherein she testified that the insured vehicle was regularly parked on the street next to her apartment, and that she allowed Cruz to use the car once or twice a week for work, or to pick up her children from school, as he lived roughly ten (10) minutes from her. She testified that the subject car was parked near Cruz’s apartment when Cruz was using the vehicle, or when she was unable to find parking near her apartment. Jimenez also testified that Cruz was not added as an additional operator on the policy because she is the sole owner of the vehicle (NYSCEF Doc. No. 64, *Jimenez deposition transcript*). Plaintiffs further submit a copy of Cruz’s EUO testimony wherein he testified that Jimenez, who lives about a mile from him, allowed him to use the insured vehicle twice or three times a month to go to work. He further testified that he did not have his own set of keys to the insured vehicle, and that he did not recall being involved in an accident before the accident at issue (NYSCEF Doc. No. 65, *Cruz deposition transcript*).

Plaintiffs dispute Cruz’s and Jimenez’s testimony, and posit that their own investigations revealed that Cruz regularly used the insured vehicle and should have been listed as a driver on the policy.<sup>2</sup> They set forth that Cruz made material misrepresentations when he testified that he only used the subject vehicle two to three times per month, that the vehicle was not regularly garaged at his residence, and that he was not previously involved in an accident involving the subject insured vehicle. Plaintiffs also submit the affidavit of their Lead Compliance Analyst, Darren Demmon, who affirms that, upon information and belief, Cruz was a frequent user of the insured vehicle, and that, had Cruz been added as an operator to Jimenez’s policy, the policy premium would have been \$7,299.00, instead of \$3,008.00 (NYSCEF Doc. No. 66, *Demmon affidavit*). In addition, plaintiffs submit the affirmation of Jennifer Petito, their Special Investigation Unit Team Manager, who affirms that Cruz was complicit in Jimenez’s material misrepresentation, and that all claim denials were timely. A copy of the policy issued to Jimenez was attached with the affirmation (NYSCEF Doc. No. 68, *Petito affirmation*). Plaintiffs also

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<sup>1</sup> The remaining defendants have been dismissed from this action pursuant to the stipulation of discontinuance dated October 26, 2022 (NYSCEF Doc. No. 57, *stipulations*).

<sup>2</sup> Plaintiffs claim that Jimenez’s prior carrier, Progressive, informed her that she should add Cruz on her policy because he was a frequent user of the vehicle insured by Progressive.

furnish a copy of Jimenez's policy application, which contains her responses to questions asked on the policy application (NYSCEF Doc. No. 69, *Jimenez's Liberty Mutual application*).

The medical provider defendants oppose the motion, arguing that the alleged misrepresentations are immaterial as a matter of law and therefore, summary judgment should be denied. They rely on New York Insurance Law § 3105[b] which provides, in pertinent part, that “[n]o misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract” to contend that plaintiff does not state in unqualified terms that they would not have issued the subject insurance policy had they known of the alleged misrepresentation and, thus that summary judgment does not lie. The medical provider defendants maintain that plaintiffs admit that they would have issued the policy, but at a higher premium rate. They articulate that plaintiffs fail to establish material misrepresentation insofar as they fail to submit the required underwriting practices, such as underwriting manuals, bulletins, that would show that plaintiffs would not have issued the subject policy if Cruz's frequent use of the vehicle would have been disclosed on the policy application. In addition, they assert that plaintiffs do not submit any proof to demonstrate that Cruz was required to be listed as a regular operator of the insured vehicle such that the alleged material misrepresentation may be determined as a matter of law. The medical provider defendants argue that Cruz and Jimenez testified, to the contrary, that the vehicle was principally garaged at Jimenez's residence and that Cruz only used the vehicle for occasional work purposes. They also assert that the record is devoid of any proof to support the claim that Cruz intended to defraud plaintiffs. Lastly, the medical provider defendants furnish a letter in which they rejected plaintiffs' discovery responses as incomplete (NYSCEF Doc. No. 75, *letter rejecting plaintiff's discovery responses*) to argue that the instant motion is premature insofar as there is outstanding discovery from plaintiffs (NYSCEF Doc. No. 71, *Rybak affirmation*).

In reply, plaintiffs state that the motion in opposition is untimely as it was filed on April 19, 2024, instead of April 16, 2024. They further note that they need not prove Cruz's intentions when establishing their right to deny the claims at issue because in the context of Insurance Law, the falsity of the representation is the relevant characteristic, and not the intent to misrepresent. Next, plaintiffs contend that contrary to the medical provider defendants' claim, the First Department has held that any misrepresentation causing a policy to be issued at a lower premium than what would have been issued had the correct information been provided, is a material misrepresentation. They maintain that if Cruz would have been added as a regular driver of the insured policy, the premium would have been \$7,299.00, instead of \$3,008.00. Plaintiffs further state that they have furnished a copy of Jimenez's policy application, wherein she allegedly attested to, *inter alia*, the drivers who would be using the insured vehicle, which was a relevant factor in plaintiffs' calculation of the policy premium on the subject policy. Lastly, plaintiffs assert that, contrary to the medical provider defendants' contention, they have provided all discovery materials, in the form of exhibits, that the medical provider defendants have requested in this action (NYSCEF Doc. No. 77, *reply*).

“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], quoting *Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213

AD2d 246, 247 [1st Dept 1995]). 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]). A court, in finding a material misrepresentation as a matter of law, generally relies upon two categories of evidence, an affidavit from the insurer's underwriter and the insurer's underwriting manual (see *Feldman v Friedman*, 241 AD2d 433, 434 [1st Dept 1997]).

Here, plaintiffs have failed to establish their *prima facie* entitlement to summary judgment as a matter of law. The proof submitted, i.e, the Jimenez and Cruz EUO testimonies and a copy of the insurance policy, is insufficient to establish that Jimenez made a material misrepresentation by not adding Cruz as an additional operator of the insured vehicle when procuring the subject insurance. Jimenez and Cruz both testified at their respective EUOs that Cruz used the insured vehicle sparingly, and that the insured vehicle was garaged at Cruz's address only during the few instances Cruz either operated the insured vehicle or when Jimenez could not find parking near her own address. This court finds that the deposition testimony of claimant and Cruz raises an issue of fact as to whether omitting Cruz as an additional driver on the policy was a material misrepresentation. Where, as here, defendant's factual averments require a credibility determination, summary judgment is not appropriate (see *St. Marks Assets, Inc. v Sohayegh*, 167 AD3d 458, 459 [1st Dept 2018]). Furthermore, plaintiffs point to no proof to establish how often one must operate the insured vehicle to be considered an additional operator of the said vehicle under the subject policy. Given the foregoing, the motion for summary judgment is denied, and this court need not address defendants' proof in opposition to the application. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that plaintiffs' 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.

July 24, 2024

HON. VERA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	