Liberty Mut. Ins. Co. v Barrett
2025 NY Slip Op 33199(U)
August 26, 2025
Supreme Court, New York County
Docket Number: Index No. 650384/2023
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LORI S. SATTLER — *Justice* | PART 02M

INDEX NO. 650384/2023

MOTION DATE 07/30/2024

MOTION SEQ. NO. 002

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LIBERTY MUTUAL INSURANCE COMPANY, LM GENERAL INSURANCE COMPANY,

Plaintiff,

- v -

MARK BARRETT, DAMONTE MCDOWELL, AAG PHYSICAL THERAPY PC,ADVANCED COMPREHENSIVE LABORATORY LLC,ALL HEALTH DME INC, ATLANTIS SURGERY CENTER LLC,AZTEC MEDICAL PA, CENTURION ANESTHESIA SURGICAL CENTERS LLC,CITIMED SURGERY CENTER LLC,COMFORT CARE NP IN FAMILY HEALTH PC,CONTEMPORARY DIAGNOSTIC IMAGING LLC,EMOTE MEDICAL SERVICES PC,ERF PHYSICAL THERAPY PC,FALLA POLYCARPE, NP, FILL RX NY INC, HEADLAM MEDICAL PROFESSIONAL CORPORATION, HUDSON REGIONAL HOSPITAL, KONATA SOLOMON STALLINGS PSYD DBA TITAN EQUIPMENT INC, NEW SENSE ACUPUNCTURE PC,RAFAEL ANTONIO DELACRUZ-GOMEZ MD, RALLY SUPPLY INC, SANFORD CHIROPRACTIC PC,SASHA ARISTIDE FNP, SHERRIE RAWLINS MEDICAL PC AKA SHERRIE ANN RAWLINS MD, SOORAJ POONAWALA DO, TERRA CHIROPRACTIC PC,TITAN EQUIPMENT INC, TOPLAB AKA ADVANCED COMPREHENSIVE LABORATORY, LLC,TRI-BOROUGH NY MEDICAL PRACTICE PC,WELLBEING NP IN FAMILY HEALTH PLLC,YOUR WELLNESS PHARMACY NY INC

Defendant.

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DECISION + ORDER ON MOTION

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, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for JUDGMENT - SUMMARY.

This declaratory judgment action arises out of a motor vehicle accident that purportedly occurred on September 12, 2021 involving individual defendants Mark Barrett and Damonte McDowell ("Claimants"), passengers in a car insured by plaintiffs Liberty Mutual Insurance Company and LM General Insurance Company ("Plaintiffs"), which was allegedly struck by an

unknown vehicle. Claimants purportedly sought treatment from the other defendants (collectively the "Medical Provider Defendants"), which then submitted bills to Plaintiffs seeking reimbursement under the vehicle's No-Fault policy. As part of the claims' investigation process, Plaintiffs requested that Claimants appear for Examinations Under Oath ("EUOs"). Damonte McDowell appeared at his EUO (NYSCEF Doc. No. 54), but Mark Barrett failed to do so (NYSCEF Doc. Nos. 51, 52). Plaintiff denied the bills submitted by the Medical Provider Defendants as to both Claimants.

Plaintiffs thereafter commenced this action seeking a declaratory judgment that they have no obligation to reimburse the Medical Provider Defendants under the applicable No-Fault policy. Default judgment was entered against Claimants and certain Medical Provider Defendants on January 10, 2024 (NYSCEF Doc. No. 47). Plaintiffs now move for summary judgment against the answering Medical Provider Defendants. Emote Medical Services P.C., ERF Physical Therapy, P.C., Falla Polycarpe, NP, Headlam Medical Professional Corporation, Kontana Solomon Stallings Psyd d/b/a/ Titan Equipment Inc., Rafael Antonio Delacruz-Gomez, MD, Sanford Chiropractic, P.C., Tri-Boroughny Medical Practice, P.C., and Wellbeing NP In Family Health, PLL oppose this motion.

On a motion for summary judgment, a movant must make a prima facie showing that they are entitled to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any issue of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After the movant makes this showing, "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 such that trial of the action is required" (*id.*).

11 NYCRR § 65-1.1 requires that full compliance by an eligible injured person with the terms of coverage in a No-Fault policy is a condition precedent to all claims against an insurance company under the relevant policy. A claimant-defendant's failure to submit to an EUO constitutes a breach of a condition precedent to coverage under a No-Fault policy and vitiates the policy (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]). However, an insurer must establish that it requested EUOs in accordance with the procedures and time frames in the No-Fault regulations (11 NYCRR § 65-3.5) in order to deny a claim where a claimant-defendant fails to appear for an EUO (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841-42 [1st Dept 2019]). In particular, the insurer must generate the first EUO scheduling letter within 15 days business of receipt of the first provider's bill, and the second EUO scheduling letter must be generated less than ten calendar days after the first nonappearance, as required pursuant to 11 NYCRR 65-3.6 (b) (*see Hertz Vehs. LLC v Significant Care, PT, P.C.*, 157 AD3d 600, 601 [1st Dept 2018]).

Here, Plaintiffs furnish insufficient evidence to meet its prima facie burden of demonstrating that the EUO of Mark Barrett was properly and timely noticed. While the first EUO scheduling letter was timely, the second one was not, as it was generated more than ten calendar days after Barrett's first nonappearance. The submitted copies of the EUO requests and proof of Claimant's nonappearance show that the first EUO scheduling letter was sent to Mark Barrett on October 20, 2021 (NYSCEF Doc. No. 51 at 1-4), scheduling the EUO for November 16, 2021. Plaintiffs allege Barrett did not appear at this EUO, and present a second scheduling letter, sent to Mark Barrett on December 2, 2021 (NYSCEF Doc. No. 51 at 5-8), that is 16 days after the date of the alleged first nonappearance. By November 16, 2021, Plaintiffs already received bills from some of the Medical Provider Defendants (NYSCEF Doc. No. 55), triggering the obligation to

adhere to the time frame required under 11 NYCRR 65-3.6 (b) and making the second EUO scheduling letter untimely (*see Mapfre Ins. Co. of NY v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]). Further scheduling letters were also untimely as they also were not issued within ten days of Barrett's nonappearance (NYSCEF Doc. No. 51, at 9, 20, 34). Accordingly, the Court must deny Plaintiffs' summary judgment motion as to the Medical Provider Defendants for Mark Barrett's claims.

Furthermore, Plaintiffs failed to show that they are entitled to summary judgment as to reimbursement for treatment of Damonte McDowell. While Plaintiffs claim material misrepresentation of the circumstances of the accident, they do not explain which facts were allegedly misrepresented, precluding a finding in their favor.

Accordingly, it is hereby:

ORDERED that Plaintiffs' motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

8/26/2025
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:	[ ] **CASE DISPOSED**		[X] **NON-FINAL DISPOSITION**		
	[ ] **GRANTED**	[X] **DENIED**	[ ] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	