

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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NATIONWIDE AFFINITY INSURANCE COMPANY
OF AMERICA,

Index No. 159374/2016

Plaintiff,

-against-

INDIVIDUAL DEFENDANTS

GWENDOLYN FOX, ORAL FOX, PRISCILLA SMITH,
LESLIE FOX, RADCLIFF SMITH

HEALTHCARE PROVIDER DEFENDANTS

AHMED MEDICAL CARE, PC, BIG APPLE MEDICAL
SUPPLY, INC., CLEAR WATER PSYCHOLOGICAL
SERVICES, PC, DIRECT CHIROPRACTIC CARE, PC,
FJL MEDICAL SERVICES, PC, GAO ACUPUNCTURE, PC,
GORDON C. DAVIS, MEDICAL, PC, HAAR ORTHOPAEDICS
& SPORTS MEDICINE, PC, HANDS ON PHYSICAL
THERAPY CARE, PC, ISLAND AMBULATORY SURGERY
CENTER, LLC, JUBILEE STAR ACUPUNCTURE, PC,
LENEX SERVICES, INC, LESLEY ANNE BENDIGO, PT,
LIFE EQUIPMENT, INC., LR MEDICAL, PLLC, MED
EQUIPMENTS SERVICES, INC., PRO-ALIGN CHIROPRACTIC,
PC, RADIOLOGY RESOURCES, PC, RA MEDICAL
SERVICES, PC, U.S. HEALTH PRODUCTS, INC.,

Defendants.

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JENNIFER G. SCHECTER, J.:

The motion by plaintiff Nationwide Affinity Insurance Company of America (Nationwide) for summary judgment against Ahmed Medical Care, PC (Ahmed), Direct Chiropractic Care, PC (Direct), FJL Medical Services, PC (FJL), Island Ambulatory Surgery Center LLC (Island) and RA Medical Services, PC (RA) (collectively Rybak Defendants) based on the failure of assignors Priscilla Smith (PSmith), Leslie Fox (Fox) and Radcliff Smith (RSmith) (collectively Individual Defendants) to attend duly scheduled examinations under oath (EUOs) is granted.

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Background

Plaintiff commenced this action, stemming from an alleged June 22, 2016 incident (Claim No: 320933-GD), for a declaration that it is under no obligation to reimburse defendant healthcare providers for services rendered to the individually named defendants for, among other things, their failure to appear for duly scheduled EUOs. The Rybak Defendants appeared and the Individual Defendants, along with multiple healthcare providers defaulted (Affirmation in Support [Supp], Ex C).

Nationwide claims that a preliminary investigation into the facts and circumstances of the June 22, 2016 incident revealed suspicious circumstances warranting a further investigation to determine whether the incident was a covered loss under the applicable insurance policy (Supp at ¶¶ 17-20). On that basis, Nationwide sought EUOs of the Individual Defendants.

Priscilla Smith

Psmith's no-fault application, signed and dated July 14, 2016, was received and stamped by Nationwide on July 19, 2016. Her address on the application is stated as 1426 Loring Ave, Apt 23 A, Brooklyn, NY 11208 (Supp, Ex G).¹ On July 28, 2016, nine days

¹Based on Supp, Exs G, H, J and K and its mailings to Alen Blumen, P.C., it appears that Nationwide thought that PSmith was represented by counsel. However Alen Blumen, P.C.'s letter to Nationwide states that he represents RSmith and does not mention representing PSmith.

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after receiving her no-fault application, Nationwide's attorneys mailed PSmith a first request to appear for an EUO by first-class mail and certified mail return receipt requested (Supp, Ex H). On August 24, 2016, the date of the scheduled EUO, Psmith failed to appear (Supp, Ex I).

Five days later, by letter dated August 29, 2016, a second EUO notice was mailed to PSmith (Supp, Ex J). PSmith failed to appear for the second scheduled EUO on September 19, 2016 (Supp, Ex K).

On September 27, 2016, Nationwide denied no-fault benefits to PSmith (Supp, Ex M).

Leslie Fox

Fox's no-fault application, dated and signed June 28, 2016, was received and stamped by Nationwide on July 13, 2016. Fox's listed address on the application was 4018 Clarendon Rd. Brooklyn, NY 11203 (Supp, Ex N). By letter dated July 28, 2016, 15 days after receiving her no-fault application, Nationwide's attorneys mailed Fox a first request to appear for an EUO by first-class mail and certified mail return receipt requested (Supp, Ex O). On August 25, 2016, the date of the scheduled EUO, Fox failed to appear (Supp, Ex P).

Five days later, by letter dated August 29, 2016, a second EUO notice was mailed to Fox (Supp, Ex Q). Fox failed to appear for the second scheduled EUO on September 20, 2016 (Supp, Ex R).

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Nationwide denied no-fault benefits to Fox on September 27, 2016 (Supp, Ex S).

Radcliff Smith

RSmith, represented by counsel, submitted two no-fault applications. The first was signed on June 23, 2016 and dated July 8, 2016 and another application was signed and dated July 14, 2016. The earlier dated application was stamped received on July 13, 2016 (Supp, Ex T). It is unclear when the later application was actually received because the stamp is illegible on the submitted exhibit (Supp, Ex T). RSmith's listed address on one application was listed as 637 East 88 Street, Apt #2, Brooklyn, NY 11236 and his attorney's listed address was Alan Blumen, PC 8776 Bay Parkway, Suite 201 Brooklyn, New York 11214 (Supp, Ex T). On the other application, RSmith listed his address as 911 East 85th Street, Brooklyn, NY 11236 (Supp, Ex T). By letter dated July 28, 2016-- at most 15 days after receiving his first no-fault application-- Nationwide's attorneys mailed RSmith by first-class mail and certified mail return receipt requested to both of his listed residential addresses and to his attorney by first class mail, a first EUO scheduling letter (Supp, Ex U). On August 24, 2016, the date of the scheduled EUO, RSmith failed to appear (Supp, Ex V).

Five days later, by letter dated August 29, 2016 and Amended Notice dated September 1, 2016, a second EUO notice was mailed to

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RSmith at his residential addresses and to his attorney (Supp, Ex W). RSmith failed to appear for the second scheduled EUO on September 19, 2016 (Supp, Exs X [see Transcript], Y).

Nationwide denied no-fault benefits to RSmith on September 23, 2016 (Supp, Ex Z).

Nationwide now moves for summary judgment against the Rybak Defendants based on the Individual Defendants' breach of a condition precedent to coverage -- failure to appear for EUOs. The Rybak Defendants oppose the motion in boilerplate fashion urging that Nationwide failed to show that its EUO requests were properly and timely made and because substantial discovery remains outstanding (Affirmation in Opposition [Opp] at ¶¶ 3, 10).²

Analysis

Nationwide established that its verification requests and denial of claims were timely mailed (see 11 NYCRR 65-3.5; 11 NYCRR 65-3.6; 11 NYCRR 65-3.8). Affidavits submitted by plaintiff from a Centralized Administrative Team Supervisor, a Claims Specialist, and multiple attorneys involved in the handling of the EUOs established that the EUO letters and denials were timely mailed in

²Opposition was submitted for Big Apple Medical Supply, Inc., which waived any claims it may have arising out of the incident and therefore the decision does not pertain to Big Apple Medical Supply Inc. (Reply, Ex 1).

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accordance with plaintiff's standard office practices and that there was an objective basis for the exams.

Because an appearance at an EUO is a condition precedent to an insurer's liability and the Individual Defendants failed to comply with that condition, plaintiff's motion is granted (see *Hertz Corp. v Active Care Medical Supply Corp.*, 124 AD3d 411 [1st Dept 2015]).

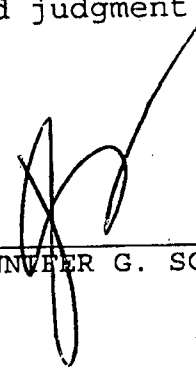
Accordingly, it is ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to provide coverage for the claims of the Rybak Defendants submitted by the Individual Defendants stemming from the June 22, 2016 incident (Claim No: 320933-GD); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision, order and judgment of the Court.

Dated: January 11, 2018

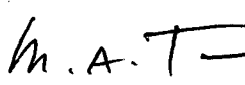


HON. JENNIFER G. SCHECTER

FILED

JAN 19 2018

**COUNTY CLERK'S OFFICE
NEW YORK**



CLERK

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Defendant(s)

Judgment

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File No.: 140-3051

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JAN 19 2018
AT 11:55 AM
N.Y., CO. CLK'S OFFICE

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this document, or the contentions contained therein, are not frivolous.

Dated: October 26, 2016

Signature _____
Print Signer's Name Allan S. Hollander

Service of a copy of the within
Dated, _____

is hereby admitted.

Attorney(s) for

Sir: Please take notice

NOTICE OF ENTRY
that the within is a (certified) true copy of a
duly entered in the office of the Clerk of the within named Court on

NOTICE OF SETTLEMENT
that an order
settlement to the HON.
on the _____ day of _____ at _____ m.

of which the within is a true copy will be presented for
one of the Judges of the within named Court, at