

**SUPREME COURT - STATE OF NEW YORK
TRIAL/TAS TERM, PART 27 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack

Justice

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**NATIONWIDE AFFINITY INSURANCE
COMPANY OF AMERICA,**

Index No. 605673/16

Plaintiff(s),

-against-

Motion Seq. No.: 001

Motion Submitted: 4/21/17

**IESHA GEORGE, ANY WILLAIMS,
AMANDA NIXON, SHAQUILLE SWAN,
JAMAICA WELLNESS MEDICAL, P.C.,
LVOV ACUPUNCTURE, P.C., UNITED
WELLNESS CHIROPRACTIC, P.C. AND BRIJ
KUMAR MITTAL, P.C.**

Defendant(s).

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The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition/Supporting Exhibits.....X
- Reply Affirmation/Supporting Exhibits.....X

Plaintiff, Nationwide Affinity Insurance Company of America, (Nationwide) moves this court for an order, pursuant to CPLR §3212, for summary judgment on the sole cause of action in the complaint for a declaratory judgment against Jamaica Wellness Medical, P.C., LVOV Acupuncture, P.C., United Wellness Chiropractic, P.C. and Brij

Kumar Mittal, P.C., as assignees of Andy Williams (Williams), Amanda Nixon (Nixon) and Shaquille Swan (Swan). Defendants, Jamaica Wellness Medical, P.C., LVOV Acupuncture, P.C., and United Wellness Chiropractic, P.C.(collectively “the Answering Defendants”), oppose the motion.

Nationwide commenced this action by service of a summons and complaint dated June 20, 2016. Issue was joined by the Answering Defendants by an answer with a counter claim dated August 23, 2016. Neither Iesha George (George) nor Brij Kumar Mittal have appeared, or responded to this motion.

George was the owner of a vehicle for which she procured insurance from Nationwide. On June 18, 2015, George’s vehicle was involved in an accident on Bedford Avenue in Brooklyn, with Williams, Nixon and Swan claiming to have been passengers in the car. As a result of the accident, Williams, Nixon and Swan alleged injuries. Nationwide sought to have Williams, Nixon and Swan appear for examinations under oath (EUOs). Notices were sent to each of them at their last known addresses, and Nixon and Swan had notices sent to their counsel as well. Prior to the date of the EUO, Nationwide contacted Nixon’s and Swan’s counsel to attempt to confirm the EUOs, but were unable to do so. None of them appeared for the first scheduled EUO. Nationwide then noticed all three for a second EUO by sending notices to the last known addresses as well as to Nixon’s and Swan’s counsel. This time, counsel for Nixon and Swan confirmed the EUO and even asked that its location be changed to accommodate them. Nationwide agreed, however none of the three appeared either at the new site for the

EUO or the original site. Finding that the insurance contract had therefore been breached, Nationwide commenced this action and seeks to be relieved of having to pay for medical services provided by the answering Defendants, as assignees of Willaims, Nixon and Swan. Nationwide now moves for summary judgment on the sole cause of action in the complaint.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35

N2d 361 [1974]).

The purpose of the no-fault statute is to ensure prompt payment of claims by accident victims (*see Presbyterian v. Maryland*, 90 N.Y.2d 274 [1997]). In ensuring that legitimate accident victims receive swift compensation, the regulations are strictly construed and insurance companies have strict guidelines to follow (*see Presbyterian Hosp. in City of N.Y. v. Aetna Cas. & Sur. Co.*, 233 A.D.2d 431 [2d Dept.1996]).

Failure to appear for EUOs constitutes a material breach of an insurance contract. (*IDS Prop. Cas. Ins. Co. v. Stracar Med. Svcs, P.C.*, 116 A.D.3d 1005 [2nd Dept. 2014]). As such, the court finds Nationwide has established entitlement to summary judgment as a matter of law. The burden shifts to Defendants to raise a material issue of fact requiring a trial of the action.

In opposition, the Answering Defendants raise a number of arguments, not all of which are relevant to this motion. First, Defendants claim that Nationwide failed to lay a proper foundation. The court disagrees. Nationwide submitted proper affidavits of persons with knowledge to lay a foundation for, and substantiate the court relying on, the documents submitted. As such, the court finds Nationwide submitted proof in admissible form. Second, Defendants argue that Nationwide failed to prove it mailed the denials of coverage in timely manner. The court finds this argument to be without merit. The affidavits and other admissible evidence submitted by Nationwide clearly establish their denial was timely issued. Third, Defendants claim that Nationwide failed to sufficiently prove the nonappearance of Williams, Nixon and Swan at their EUOs. This argument is

particularly specious when considering that Nixon's and Swan's counsel was contacted before each appointment, confirmed the second one and even appeared on their clients' behalf, even though the clients failed to appear. The court finds Nationwide's procedures in scheduling and arranging for the EUO's, including the manner in which Defendants were noticed, was appropriate and in accord with all necessary regulations and law.

Finally, the court notes that all arguments in opposition were made by counsel, and there were no affidavits of someone with firsthand knowledge submitted with the opposition. This is particularly important when considering the arguments that notices were sent to the wrong address or that the recipients never received them. As such, the court finds Defendants are unable to raise a material issue of fact.

Accordingly, it is hereby

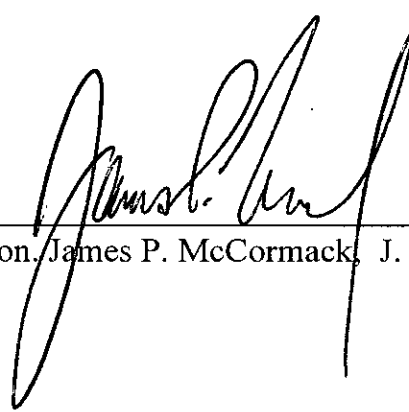
ORDERED, that Nationwide's motion for summary judgment is **GRANTED** in its entirety.

This constitutes the Decision and Order of the Court.

The court has considered the other arguments raised by the parties and finds them to be without merit.

Dated: July 6, 2017
Mineola, N.Y.

ENTERED
JUL 11 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE



Hon. James P. McCormack, J. S. C.