

**APPELLATE TERM OF THE SUPREME COURT
OF THE STATE OF NEW YORK FOR THE 2ND, 11TH & 13TH JUDICIAL DISTRICTS**

Argued - September 9, 2020 Term

THOMAS P. ALIOTTA, P.J.
MICHELLE WESTON
WAVNY TOUSSAINT, JJ.

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DECISION & ORDER

Longevity Medical Supply, Inc., as Assignee of Hodge,
Kerry, Respondent, v Nationwide Ins., Appellant.

Appellate Term Docket No.
2018-2563 K C

Lower Court # 708551/17

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Hollander Legal Group , P.C. (Allan S. Hollander of counsel), for appellant.

The Rybak Firm, PLLC (Damin J. Toell of counsel), for respondent.

Appeal from an order of the Civil Court of the City of New York, Kings County (Richard J. Montelione, J.), entered November 13, 2018. The order, insofar as appealed from and as limited by the brief, denied defendant’s motion for summary judgment dismissing the complaint.

ORDERED that the order, insofar as appealed from, is reversed, with \$30 costs, and defendant’s motion for summary judgment dismissing the complaint is granted.

In this action by a provider to recover assigned first-party no-fault benefits, defendant moved for summary judgment dismissing the complaint on the ground that plaintiff’s assignor had failed to appear for duly scheduled examinations under oath (EUOs), and plaintiff cross-moved for summary judgment. As limited by the brief, defendant appeals from so much of an order of the Civil Court entered November 13, 2018 as denied defendant’s motion.

We find that defendant established that the EUO scheduling letters had been timely mailed (*see St. Vincent’s Hosp. of Richmond v Government Empls. Ins. Co.*, 50 AD3d 1123 [2008]), that plaintiff’s assignor had failed to appear for the duly scheduled EUOs (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721 [2006]), and that the claims had been timely denied on that ground (*see St. Vincent’s Hosp. of Richmond*, 50 AD3d 1123; *ARCO Med. N.Y., P.C. v Lancer Ins. Co.*, 34 Misc 3d 134[A], 2011 NY Slip Op 52382[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists [2011]). Plaintiff failed to raise a triable issue of fact in opposition. Contrary to the Civil Court’s determination, “appearance at an [EUO] is required whether the

insurance company demands the [EUO] before the claim form is submitted or after the claim form is submitted” (*Stephen Fogel Psychological, P.C.*, 35 AD3d at 721; *LDE Med. Servs., P.C. v Interboro Ins. Co.*, 31 Misc 3d 146[A], 2011 NY Slip Op 50946[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2011]). Consequently, although the first EUO scheduling letter was mailed to the assignor before defendant received plaintiff’s first claim form, the scheduling letter was not a nullity (*id.*).

Accordingly, the order, insofar as appealed from, is reversed and defendant’s motion for summary judgment dismissing the complaint is granted.

ALIOTTA, P.J., WESTON and TOUSSAINT, JJ., concur.

ENTER:


Paul Kenny
Chief Clerk