

**At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on May 8, 2020.**

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

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

**NATIONWIDE AFFINITY INSURANCE COMPANY OF
AMERICA, NATIONWIDE GENERAL INSURANCE
COMPANY, NATIONWIDE INSURANCE COMPANY
OF AMERICA, NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, NATIONWIDE MUTUAL
INSURANCE COMPANY, NATIONWIDE ASSURANCE
COMPANY, NATIONWIDE PROPERTY & CASUALTY,
TITAN INDEMNITY COMPANY, VICTORIA FIRE &
CASUALTY COMPANY, VICTORIA AUTOMOBILE
INSURANCE COMPANY and any and all of their
subsidiaries, affiliates and/or parent companies,**

**DECISION AND ORDER
ON MOTION**

Index No.: 011030/2019

Plaintiffs,

v.

M & M SUPPLIES GROUP, INC.,

Defendant.

**APPEARANCES: ALLAN S. HOLLANDER, ESQ., OF HOLLANDER LEGAL GROUP, P.C.
For Plaintiffs**

**DAVID LANFAIR, ESQ., OF THE RYBAK GROUP, PLLC
For Defendant**

The Nationwide plaintiffs (hereinafter collectively referred to as “plaintiff”) move for summary judgment in this matter, which seeks a declaratory judgment pursuant to CPLR section 3001, declaring that the defendant breached a material condition precedent to coverage under the subject insurance policy and Insurance No Fault regulations by refusing and failing to appear for

certain Examinations Under Oath (EUO's) and thus plaintiff is not obligated to pay on or reimburse any of defendant's claims set forth in the complaint.

As the proponents of the motion for summary judgment, the plaintiff is required to establish entitlement to summary judgment through the tender of admissible evidence before the burden shifts to the defendant to raise an issue of fact. *See, Hunt v. Kostarellis*, 27 AD3d 1178 (4th Dept. 2006). The plaintiff has met its burden here. Plaintiff has done so by demonstrating that the defendant failed to meet a critical and material condition precedent to coverage by failing to appear for the subject EUO's that were reasonably requested and thus breached a material condition precedent to coverage under the No Fault regulations and applicable insurance policies. It has also shown that said failure negated its obligation to pay any of the outstanding bills. Plaintiff has demonstrated a reasonable basis for requesting the EUO's in order to determine whether defendant was eligible to collect No Fault benefits. *See, 11 NYCRR § 65-3.16(a)(12); see also, Insurance Law § 3102(a)(1)*. It has shown that it conducted an investigation concerning defendant's eligibility to collect No Fault benefits as well as its billing practices. Plaintiff has demonstrated through the affidavit of Linda Arnold that it compared the bills for defendant and M & E General Supply, Inc. and found the fonts on the bills were very similar with the delivery receipts being identical. In addition, the referrals for the DME involved in the claims were prescribed by medical professionals with questionable backgrounds whom plaintiff was investigating. In addition, plaintiff's representative went to the address listed and there was no company at that address. Plaintiff has sufficiently set forth in proper evidentiary form the specific facts concerning the following: the scheduling of the subject EUO's, documentation concerning defense counsel's objection letters, plaintiff's counsel's responses with the explanation of its reasonable basis for seeking those EUO's, the defendant's repeated

failure to appear at the subject EUO's as well as the requisite documentation concerning denial of the subject claims. *See, Nationwide Affinity Insurance Co. of America v. Jamaica Wellness Medical P.C.*, 180 AD3d 1379 (4th Dept. 2020). Plaintiff has likewise provided copies of the denial forms to establish that it issued timely and proper denials in the Arnold affidavit. *See, Nationwide Affinity Insurance Co. of America v. Jamaica Wellness Medical P.C.*, 167 AD3d 192 (4th Dept. 2018).

Plaintiff has also demonstrated that the failure to meet the condition precedent renders defendant ineligible to receive No Fault reimbursements, as there is no liability on the part of a No Fault insurer if there has not been full compliance with condition precedence to coverage. *See, 11 NYCRR § 65-1.1*. The regulations provide that "no action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage"; one such condition being the appearance of the eligible injured person or that person's assignee or representative at an EUO. *Id.* The regulation further provides that "upon request by the company the eligible injured person or that person's assignee or representative shall: "... (b) as may reasonably be required to submit to examinations under oath by any person named by the company and subscribed the same". *Id.* Thus, the appearance of an eligible person's assignee at an EUO is a condition precedent to coverage. *See, Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co.*, 35 AD3d 720 (2d Dept. 2006).

Plaintiff has also demonstrated that defendant is not entitled to No Fault benefits by submitting sufficient proof of mailing correspondence to defendant regarding the scheduling of EUO's on multiple occasions and defendant's failure to appear. *See, Hertz Corp. v. Active Care Medical Supply Corp.*, 124 AD3d 411 (1st Dept. 2015). An affidavit is provided which sets forth that the notices were mailed and the standard practices and procedures in the office for mailing

the EUO scheduling letters, thus creating the presumption of receipts. *See, Longevity ME Supply, Inc. v. IDS Prop. & Casualty Insurance Co.*, 44 Misc.3d 137(A) (2d Dept. 2014). There is no dispute that defendant received said notices as defense counsel sent objection letters on multiple occasions. In addition, plaintiff has established the non-appearances by affidavits of the attorney that was present on the dates of the scheduled examinations and who would have conducted the exam had the witness appeared. *See, Hertz Corp., supra*. It has likewise shown that it timely and properly issued denials of the subject claims and that the claims were timely denied within 30 days. Therefore, plaintiff's detailed claims specialist affidavit, the subject denial of claim forms and the affidavit of the operations manager are sufficient to prove timely denying the subject claims. *See, Nationwide Affinity Insurance Co. of America v. Jamaica Wellness Medical P.C., supra*. Inasmuch as the plaintiff has demonstrated their entitlement to summary judgment in the first instance and the burden shifts to defendant to raise an issue of fact. *See, Hunt, supra*.

In opposition, the defendant contends that plaintiff failed to establish a prima facie showing of entitlement to summary judgment as a matter of law by eliminating all factual issues. *See, Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986). It alleges that plaintiff failed to establish that the EUO requests were based on objective standards, that the EUO requests were timely and that the EUO letters were properly mailed. Its opposition fails both procedurally and substantively. When opposing a motion for summary judgment, defendant as the opposing party is required to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *See, Alvarez, supra*. Defendant failed to offer an affidavit of an individual with personal knowledge of facts in opposition and instead provide only an affidavit by opposing counsel, who lacks personal knowledge of the facts; such an affidavit is without probative value.

See, Albridge v. Rumsey, 275 AD2d 897 (4th Dept. 2000); *see also, Deronde Products, Inc. v. Steve General Contractor, Inc.*, 302 AD2d 989 (4th Dept. 2003). Even considering defendant's legal arguments based upon plaintiff's documentary submissions, it fails to raise an issue of fact. The defendant is correct that the regulations require that the EUO demand be based upon "the application of objective standards so that there is specific objective justification supporting the use of such examination" and that there be "good reasons" to demand an EUO. *11 NYCRR 65.3.5(e); 11 NYCRR 65-1.1(d)*. Defendant offered timely and specific objection to the reasonableness of plaintiff's EUO requests and thus is not precluded from raising that issue here. *See, American Tr. Ins. Co v. Jaga Med. Servs., PC*, 128 AD3d 441 (1st Dept. 2015). Defendant argues that the Arnold affidavit is insufficient to address the reasonable basis issue, arguing that she relied upon sources that do not constitute admissible evidence. *See, Nationwide Gen. Ins. Co v. Bates*, 130 AD3d 795 (2d Dept. 2015). Defendant further contends that plaintiff failed to establish that the EUO's were timely scheduled citing alleged deficiencies with the date stamps on the relevant documents. These issues are without basis and the affidavit of Matthew McLendon addresses in detail the practices in which plaintiff receives mail and specifically addresses each of the bills as organized in batches. These affidavits have been found to be sufficient to meet plaintiff's burden in a factually similar case. *See, Nationwide Affinity Ins. Co. of America v. Jamaica Wellness Med., supra*. Moreover, even if the Court were to accept defendant's argument concerning when certain bills were received by plaintiff, the record shows that the EUO requests were timely issued within thirty days of the date from which the bills were created. Defendant further claims that plaintiff did not establish proper mailing of the EUO letters or that it issued timely and proper denials. While defendant takes issue with the evidence offered by the affidavit of plaintiff's counsel, and the lack of certified tracking printouts, the

record shows that the letters were also sent via regular mail, which carries a presumption of receipt. *See, American Tr. Ins. Co. v. Lucas*, 111 AD3d 423 (1st Dept. 2013).

NOW, therefore, for the foregoing reasons, it is

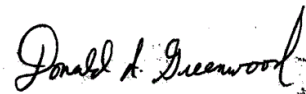
ORDERED, that plaintiff's motion for summary judgment is granted, and it is further

ORDERED, ADJUDGED and DECLARED, that plaintiff is under no obligation to pay or reimburse any of the subject claims, and it is further

ORDERED, that all other relief not specifically granted is herein denied.

ENTER

Dated: May 8, 2020
Syracuse, New York



DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion for summary judgment dated January 24, 2020.
2. Affirmation of Katherine Lalor, Esq. in support of plaintiffs' motion, dated February 11, 2020, and attached exhibits.
3. Affirmation of David Landfair, Esq. in Opposition to plaintiffs' Motion, dated April 21, 2020, and attached exhibits.
4. Reply Affirmation of Allan S. Hollander, Esq., dated April 22, 2020, and attached exhibits.