

**At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga March 1, 2021**

**PRESENT: HON. JOSEPH E. LAMENDOLA
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.: 005587/2020

Plaintiffs,

-vs-

MEDICAL SUPPLY DEPOT GROUP CORP.,

Defendant.

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

**DAVID LANFAIR, ESQ., OF KOPELEVICH & FELDSHEROVA,
P.C.
For Defendant**

I.

The Nationwide plaintiffs (collectively referred to as "Plaintiff") move for summary judgment pursuant to CPLR §3212 against Medical Supply Depot Group Corp., ("Defendant").

Plaintiff seeks judgment declaring that Defendant breached a material condition precedent to receiving coverage under the No-Fault regulations by repeatedly failing to submit to Examinations Under Oath (“EUO”).

Plaintiff further seeks judgment, due to Defendant’s failure to satisfy a condition precedent to coverage under the No-Fault regulations. Therefore, Plaintiff is under no obligation to pay or reimburse any of Defendant’s claims under claim numbers 780893-GJ and 782307-GJ.

II.

Generally, the party moving for summary judgment must affirmatively demonstrate the merits of its cause of action or defense and establish a prima facie case. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 720 (1980). If the moving party meets that threshold burden, the non-moving party must respond with admissible evidence which raises a genuine issue of material fact in order to survive a motion for summary judgment. *Card v. Brown*, 43 A.D.3d 594, 595, 840 N.Y.S.2d 840, 840 (3d Dept. 2007). The non-movant's evidence must be sufficient enough to require a trial on material questions of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 476 N.E.2d 642 (1985).

When considering a motion for summary judgment, the court must review the evidence in the light most favorable to the non-moving party, according "every inference" which may properly be drawn from the facts presented. *Canale v. L & M Assocs. of New York, Inc.*, 155 A.D.3d 675, 677, 64 N.Y.S.3d 272, 274 (2d Dept. 2017).

III.

In support of its motion for summary judgment, Plaintiff submitted the affirmation of Allan S. Hollander, Esq., (*See* NYSCEF Doc. 10) and supporting Exhibits (*see* NYSCEF Docs. 11-44; NYSCEF Docs. 47-49).

Plaintiff also submitted the following Exhibits: the affidavit of Linda Arnold (*see* NYSCEF Doc. 13); documentation detailing the scheduling of the subject EUO's by Plaintiff (*see* NYSCEF Docs. 14, 17, 21, 27, 29); defense counsel's objections to the subject scheduled EUO's (*see* NYSCEF Docs. 18, 23, 24, 30, 32); Plaintiff's counsel's responses explaining its basis for seeking the subject scheduled EUO's (*see* NYSCEF Docs. 19, 22, 25, 31, 33); affidavits of statements on record of Defendant's repeated failure to appear at the subject scheduled EUO's (*see* NYSCEF Docs. 16, 20, 26, 28, 34); and documentation of Plaintiff's denials of Defendant's claims with affidavits concerning the process of mailing the subject claims (*see* NYSCEF Docs. 35-39).

In opposition to Plaintiff's motion for summary judgment, Defendant submitted the affirmation of David Landfair, Esq., (*see* NYSCEF Doc. 45). Defendant also submitted the affidavits of Tammie Ulmer and Zach Trahan in opposition (*see* NYSCEF Doc. 46.). The Court acknowledges Mr. Landfair's lack of personal knowledge of the facts in consideration of its decision, *infra*.

Plaintiff submitted an Affirmation in Reply to Defendant's Affirmation in Opposition, (*see* NYSCEF Doc. 47). Additionally, Plaintiff submitted two orders entered by the Supreme Court of Onondaga County (*see* NYSCEF Docs. 48 and 49).

The first submitted order, dated May 8, 2020: Judge Greenwood granted Plaintiff's motion for summary judgment where Plaintiff claimed they were not obligated to reimburse the insured-defendant under the No-Fault regulations due to insured-defendant's failure to appear for scheduled Examinations Under Oath, "EUOs" (*See* NYSCEF Doc. 48.)

The second submitted order, dated July 18, 2019: Judge Karalunas issued a letter decision granting Plaintiff's motion for summary judgment where Plaintiff claimed, as in above, they did not have to reimburse the insured-defendant because the insured-defendant did not show up to scheduled Examinations Under Oath, "EUOs" (*See* NYSCEF Doc. 49).

IV.

The evidence submitted by the Plaintiff in support of its motion for summary judgment indicates that Plaintiff has met its burden of establishing a *prima facie* entitlement to judgment. In addition, because Defendant fails to raise a genuine issue of material fact, Plaintiff is entitled to judgment as a matter of law. *Zuckerman*.

Before proceeding to the sufficiency of Plaintiff's evidence, the Court will note that in its Affirmation in Opposition, Defendant's counsel did not allege personal knowledge of the facts of this case. (*See* NYSCEF Doc. 45). Should an affidavit or affirmation be submitted by an individual without personal knowledge of the facts, such an affidavit or affirmation should not be considered to be sufficient proof which raises a triable issue of fact. McKinney's CPLR 3212(b). The caselaw of the Court of Appeals and the Appellate Division, Fourth Department, have held this to be the controlling standard in motions for summary judgment. *See Zuckerman*, discussed *supra*, *Hammond v. Smith*, 151 A.D.3d 1896, 57 N.Y.S.3d 832 (4th Dept. 2017), *Mortillaro v. Rochester Gen. Hosp.*, 94 A.D.3d 1497, 1499, 942 N.Y.S.2d 743, 745 (4th Dept. 2012).

Zuckerman and its progeny make clear that if a party has met its initial burden in establishing a *prima facie* case, the burden is on the opposing party to produce evidentiary proof in admissible form sufficient to establish a genuine issue of material fact. If the opposing party's

supporting evidence is an affidavit/affirmation submitted by an attorney without personal knowledge of the facts, such an affidavit/affirmation will not be sufficient to defeat a showing of prima facie entitlement to summary judgment by the moving party. *Caruso v. City of Buffalo Urban Renewal Agency*, 162 A.D.2d 974, 975, 557 N.Y.S.2d 200, 201 (4th Dept.1990), “...an affidavit of [their] attorney, who had no personal knowledge of the facts and circumstances... such an affidavit is ‘without evidentiary value and thus unavailing’ citing *Zuckerman*.

Zuckerman also clarifies that an affirmation by an attorney without personal knowledge of the facts can nonetheless serve as a “vehicle” for admissible exhibits and documents which provide evidentiary proof to oppose a motion for summary judgment. *See id.* However, the Exhibits submitted by Defendant in this case are insufficient to establish the existence of a triable issue of material fact.

Defendant’s submission of the affidavits of Tammie Ulmer and Zach Trahan do not raise any material doubts as to the properly mailed denials by Plaintiff. (*See* NYSCEF Doc. 46). These affidavits of individuals unknown to the Court on behalf of insurance companies uninvolved with the present litigation are insufficient to establish a genuine issue of material fact as to the proof of the properly mailed denials by Plaintiff.

The Court now turns to the sufficiency of Plaintiff’s evidence in support of its motion for summary judgment.

The Plaintiff has demonstrated that Defendant failed to meet a critical and material condition precedent to receive coverage under the No-Fault Regulation by failing to appear to for the subject EUO’s. (*See* NYSCEF Docs. 16, 20, 26, 34). Defendant claims it objected to the requests

for the subject EUOs by erroneously stating that Plaintiff is required by law to provide a reasonable basis for requesting the subject EUOs. (*See* NYSCEF Doc. 45).

The controlling caselaw in New York makes clear that an insurer does not need to demonstrate the reasonableness of its EUO request in order to establish its *prima facie* case on a motion for summary judgment. *See, generally: Island Life Chiropractic Pain Care, PLLC v. Nationwide Ins.*, 2018 NY Slip Op 51733(U) (N.Y. App. Term, 2d Dep't. 2017); (N.Y. App. Term, 2d Dep't. 2017); *Barakat Med. Care, P.C. v. Nationwide Ins. Co.*, 2015 NY Slip Op 51677(U) (N.Y. App. Term, 2d Dep't. 2015); *Gentlecare Ambulatory Anesthesia Servs. v. GEICO Ins. Co.*, 2019 NY Slip Op 51684(U) (N.Y. App. Term, 2d Dep't. 2019); *Actual Chiropractic, P.C. v. State Farm Ins.*, 2019 NY Slip Op 51552(U) (N.Y. App. Term, 2d Dep't. 2019); *New Way Med. Supply Corp. v. State Farm Mut. Auto. Ins. Co.*, 2019 NY Slip Op 51158(U) (N.Y. App. Term, 2d Dep't. 2019).

Despite the fact it is under no obligation to do so, Plaintiff nonetheless submitted evidence demonstrating it had a reasonable basis for requesting the subject EUOs (*see* NYSCEF Doc. 13). Further, and again under no recognized obligation under law, Plaintiff informed Defendant of its reasonable basis to request the subject EUOs in its responses to Defendant's objection letters (*see* NYSCEF Docs. 19, 22, 25, 31, 33).

Defendant's proffered excuse for failing to attend the subject EUO's amounts to, at best, a reliance on misstatement of the law. (*See* NYSCEF Doc. 45). Accordingly, failure to comply with a condition precedent to receive coverage entitles Plaintiff to deny Defendant's claims. *Interboro Ins. Co. v. Clennon*, 113 A.D.3d 596, 979 N.Y.S.2d 83 (2014).

Second, Plaintiff has established that its denials of Defendants claims were timely pursuant to New York State Insurance Law, *11 NYCRR §65*. Under the New York insurance regulations, an insurer must request additional verification (i.e., an EUO), within fifteen (15) business days of the insurer's receipt of the complete verification forms. *See* 11 NYCRR §65-3.5(b). Any deviation from this 15-day allotment reduces the thirty (30) calendar days allowed to submit a timely denial of claims. *See* 11 NYCRR §65-3.8(1).

Plaintiff admitted that notice letters of the subject EUOs were mailed on January 14, 2020, the twenty first (21st) business day after receipt of Defendant's initial claims under Claim Number 780893-GJ were received on December 16, 2019. (*See* NYSCEF Doc. 47 ¶ 38). Pursuant to New York regulations, Plaintiff's time to deny the claims were reduced by six (6) days, from thirty (30) to twenty-four (24) days. Plaintiff accordingly denied Defendant's claims on July 9, 2020, twenty (20) days after the last nonappearance by Defendant at the subject EUO. (*See* NYSCEF Doc. 47, ¶ 40). Therefore, Plaintiff has demonstrated it complied with New York regulations in a timely denial of Defendant's claims.

Defendant argued that because Plaintiff failed to deny the claims within thirty (30) days of the second non-appearance, Plaintiff's denial of claims was not timely under New York regulations. (*See* NYSCEF Doc. 45, ¶13). However, the caselaw does not reflect Defendant's contention that insurers are required to deny claims within thirty (30) days of the second non-appearance: *see Mapfre Ins. Co. of N.Y. v. Manoo*, 140 A.D.3d 468 (N.Y. App. Div., 1st Dep't. 2016) holding an insurer may deny a claim after the third non-appearance; *see Unitrin Advantage Ins. Co. v. Cohen & Kramer M.D., P.C.*, 2020 N.Y. App. Div. LEXIS 6777, 2020 NY Slip Op 06474 (N.Y. App. Div., 1st Dep't. 2020), similarly holding that an insurer may deny a claim

after a claimant failed to appear for three (3) noticed IMEs; and see *Nationwide Affinity Insurance Company of America et al., v. JPF Medical Services P.C.*, Index No.: 003752/2018 (Sup. Ct., Onondaga County 2018), (Hon. Karalunas holding that the grant of summary judgment in favor of insurers was appropriate where claims were denied within thirty (30) days of the final missed EUO, where the insurer offered seven (7) opportunities to the noticed party to appear for an EUO).

Additionally, the Appellate Division, Fourth Department, granted summary judgment where the defendant-claimant failed to appear for an EUO on four (4) separate occasions. *Nationwide Affinity Ins. Co. of Am. v. Jamaica Wellness Med., P.C.*, 2020 NY Slip Op 00971 (N.Y. App. Div., 4th Dep't. 2020). Defendant's claim that an insurer's denial is valid only where it is issued within thirty (30) days of the second non-appearance EUO is not supported by the controlling caselaw.

Therefore, the evidence submitted by Plaintiff reflects that its denials were timely pursuant to New York regulations. Additionally, Defendant has not submitted evidence which raises an issue of fact that contravenes Plaintiff's timely denials of the claims, discussed *supra*.

Third, Plaintiff has demonstrated that its denials were properly mailed through the submission of copies of the mailed denial forms and the supporting affidavits of Matthew McLendon. (See NYSCEF Docs. 35, 36, 37, 38, 39).

Considering the sufficiency of Plaintiff's evidence in support of its claims and Defendant's lack of evidence, which fails to raise a genuine issue of material fact, summary judgment in favor of Plaintiff is appropriate.

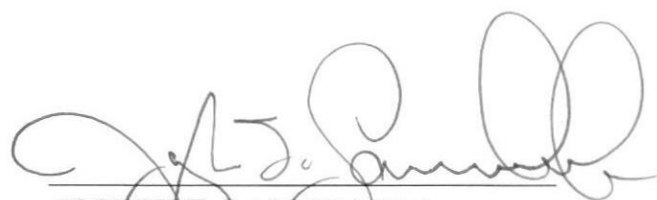
NOW, therefore, for the forgoing reasons, it is

ORDERED, that the Plaintiff's Motion for Summary Judgment pursuant to CPLR §3212 is GRANTED, and it is further

ORDERED, that Plaintiff is hereby relieved of its obligations to pay, honor or reimburse any of Defendant's claims under claim numbers 780893-GJ and 782307-GJ.

ENTER

**Dated: March 1, 2021
Syracuse, New York**



**JOSEPH E. LAMENDOLA
Supreme Court Justice**

Papers Considered:

1. Summons and Verified Complaint, with attached exhibits thereto, dated August 21, 2020
2. Plaintiff's Counsel Affirmation in Support of Motion for Summary Judgment, with attached exhibits thereto, dated December 1, 2020
3. Defense Counsel's objection to the subject scheduled EUO's, dated February 27, 2020, March 27, 2020, April 16, 2020, June 6, 2020, June 15, 2020
4. Plaintiff's Counsel's response explaining basis for seeking the subject scheduled EUO's, dated March 3, 2020, March 25, 2020, April 16, 2020, June 15, 2020, June 17, 2020
5. Plaintiff's denials of Defendant's claims with affidavits
6. Defense Counsel's Affirmation in Opposition to Motion dated January 14, 2021
7. Affidavits of Tammie Ulmer and Zach Trahan in opposition, dated June 20, 2014
8. Plaintiff's Counsel Affirmation in Reply to Defendant's Affirmation in Opposition, dated January 19, 2021
9. Supreme Court orders of Hon. Donald Greenwood, dated May 8, 2020 and Hon. Deborah Karalunas, dated July 18, 2019