SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

NATIONAL CONTINENTAL INSURANCE COMPANY,

Plaintiff,

- against -

RICHARD HENRY, EARL JOSEPH, PATRICK MORRIS, SHORN THOMPSON, LLOYD KEMP, KERVINS ST. JEAN, SHAWNELLE OTTLEY, SALIM ANTOINE, CHRISTOPHER TARRY, PANCITO D. ELLIS, ROBINSON V. ELLIS, KEVIN LIBERT, RACHUEL LIBERT, KIMBERLY LIBERT, KELLYANN LIBERT, SHAWN QUAMINA ("Individual Defendants"),

-and-

ARNICA ACUPUNCTURE, P.C., B.C. CHIROPRACTIC, P.C., BARON LEA, INC., BIG APPLE CHIROPRACTIC, P.C., BEST HEALTH ACUPUNCTURE, P.C, BETH ISRAEL MEDICAL CENTER, BONNE SANTO, INC., BORIS GILZON, PT, CHT, BROMER MEDICAL, P.C., BROOKDALE ER PHYS DEPT., BROOKDALE HOSPITAL, BQE ACUPUNCTURE, P.C., CANARSIE MEDICAL HEALTH, P.C., CLEARVIEW OF BROOKLYN MEDICAL, P.C., CORNELIA PAIN MANAGEMENT, COVE CHIROPRACTIC, P.C., DOSHI DIAGNOSTIC IMAGING SERVICES, P.C., DUMONT MEDICAL DIAGNOSTICS, P.C., FDNY EMS, GBI ACUPUNCTURE, P.C., GIANNA MEDICAL, P.C., GORDON C. DAVIS, MEDICAL, P.C., GREAT HEALTH CARE CHIROPRACTIC, P.C., HARVARD MEDICAL, P.C., KARINA K. ACUPUNCTURE, P.C., KDM CHIROPRACTIC & DIAGNOSTIC, P.C., KINGS COUNTY HOSPITAL CENTER, LENCO DIAGNOSTIC LABORATORIES, INC., L.N.L.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 2513/11
Motion Seq. No.: 02
Motion Date: 11/04/11

REHABILITATION PHYSICAL THERAPY, P.C., M & M MEDICAL, P.C., MEDISYS AMBULANCE SERVICE, INC., MOBILITY EXPERTS MEDICAL, P.C., NEW CAPITAL SUPPLY, INC., NEW WAVE CHIROPRACTIC, P.C., NEW WAY MASSAGE THERAPY, P.C., NORTH STAR MEDICAL, P.C., OMEGA DIAGNOSTIC IMAGING, P.C., POWER SUPPLY, INC., PROGRESSIVE ORTHOPEDICS, PLLC, SANLI ACUPUNCTURE, P.C., SEACOAST MEDICAL, P.C., SK PRIME MEDICAL SUPPLY, INC., SKILLMAN MEDICAL DIAGNOSTICS, P.C., SMQ MEDICAL, P.C., SP CHIROPRACTIC. P.C., SPEEDY WAY PT, P.C., STAND UP MRI OF BROOKLYN, P.C., SUNRISE ACUPUNCTURE, P.C., THERAPEUTIC SOLUTIONS MASSAGE THERAPY, P.C., TOTAL BODY DIAGNOSTICS, P.C., ULTIMATE HEALTH PRODUCTS, INC., UNIVERSAL REHAB PT, P.C., WOODHULL MEDICAL CARE, P.C. and YORK ANESTHESIOLOGISTS, PLLC ("Provider Defendants"),

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	**1**
Affirmation in Opposition by Defendant Lloyd Kemp	**2**
Affirmation in Opposition by Defendants GBI Acupuncture, P.C. and Great Health Care Chiropractic, P.C.	**3**
Reply Affirmation	**4**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting it summary judgment as to defendants Lloyd Kemp ("Kemp"), GBI Acupuncture, PC ("GBI") and Great Health Care Chiropractic ("Great Health Care"); and moves for an order granting an Inquest on reimbursement with respect to same. Defendants Kemp, GBI and Great Health Care oppose the motion.

This is an action for declaratory judgment, pursuant to CPLR § 3107(b), defining and

declaring the rights, duties, obligations and legal relationship by and between plaintiff and defendants.

Plaintiff submits that it issued an insurance policy to defendant Richard Henry ("Henry") under policy number 04500415-0. Said policy provides liability coverage for bodily injury and property damage claims brought against the covered persons, mandatory personal injury protection for eligible persons ("no-fault benefits") and uninsured motorist coverage as a result of an accident. Said policy went into effect on January 4, 2010, and three losses then occurred on said policy within the span of three months.

Plaintiff states that "[u]pon information and belief, these losses were intentionally staged 'accidents' to defraud NATIONAL and the public at large."

Defendant Kemp was involved in the second of the three alleged "intentionally staged accidents." Said automobile accident occurred on August 3, 2010, at or near the intersection of Empire Boulevard and New York Avenue in Kings County, New York. The accident involved defendant Henry's insured vehicle and another vehicle driven by defendant Pancito D. Ellis with passenger defendant Robinson V. Ellis. Defendant Shorn Thompson was the alleged driver of defendant Henry's insured vehicle with defendant Kemp in said vehicle as a passenger.

Plaintiff submits that "[o]n 10/14/10 defendant RICHARD HENRY gave a signed and notarized statement regarding the loss of 8/3/10. Defendant RICHARD HENRY stated that: (a) he did not give defendant SHORN THOMPSON permission to drive the NATIONAL insured vehicle on 8/3/10. (b) that approximately one (1) week before such loss, his vehicle was in 'Jermaine's shop for tranny repair.' (c) that on 8/1/10 Jermaine returned the car to defendant RICHARD HENRY's girlfriend and that the car key was placed in a glass jar by RICHARD

HENRY's girlfriend in defendant RICHARD HENRY's home. (d) Defendant RICHARD HENRY was not at home at the time, but defendant SHORN THOMPSON was at defendant RICHARD HENRY's home as defendant SHORN THOMPSON had lived with defendant RICHARD HENRY 'from time to time since 2004.' (e) defendant SHORN THOMPSON took his vehicle without permission. (f) he did not know of the 8/3/10 loss until he was notified by the insurance company. (g) defendant SHORN THOMPSON never informed him of such loss. Defendant RICHARD HENRY then went on to state that, from speaking to other people who know defendant SHORN THOMPSON, defendant SHORN THOMPSON is known to stage motor vehicle accidents....Defendant RICHARD HENRY denied knowing defendant LLOYD KEMP, and stated that, from what he knows, defendant LLOYD KEMP is a friend of defendant SHORN THOMPSON."

Plaintiff further submits that, on November 2, 2010, it conducted an Examination Under Oath ("EUO") of defendant Kemp. During said EUO, it was revealed that "(a) LLOYD KEMP was at a 'check cashing place' and intended to go from there to his mother's house. Once outside such 'check cashing place' he attempted to hail a taxi cab. (b) The NATIONAL insured vehicle pulled up along side defendant LLOYD KEMP and defendant LLOYD KEMP asked, 'You a taxi?' to which the driver of the NATIONAL insured vehicle replied, 'Yeah.' The driver of the NATIONAL insured vehicle, whom defendant LLOYD KEMP claimed he had never seen before, was defendant SHORN THOMPSON. (c) Defendant LLOYD KEMP paid defendant SHORN THOMPSON eight (8) dollars for the ride. (d) Defendant LLOYD KEMP stated that he believed defendant SHORN THOMPSON had fallen asleep and that is what led to the loss."

Plaintiff argues that defendants Kemp, GBI and Great Health Care have provided nothing whatsoever to contradict the undisputed facts as set forth in the Verified Complaint and the

Affidavit of Gary Lamay, a Senior Medical Representative employed by plaintiff (offered in support of the instant motion) as to the obvious seriousness of the intentionally caused losses that are the subject of this action. Plaintiff contends that "based upon the uncontroverted evidence herein that there is no issue of fact to prevent this Court from issuing an order granting summary judgment to Plaintiff in this matter as to answering defendants LLOYD KEMP, GBI ACUPUNCTURE, PC, and GREAT HEALTH CARE CHIROPRACTIC." Plaintiff submits that "[i]t is well settled that the carrier is entitled to defendant any claim at any time where there is a 'lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident' even where no denial was issued....An 'accident' that was a deliberate event caused in the furtherance of an insurance fraud scheme is not a covered event."

In opposition to the motion, defendant Kemp argues that "[i]n an attempt to show that plaintiff NATIONAL CONTINENTAL INSURANCE COMPANY is entitled to summary judgment, Plaintiff NATIONAL CONTINENTAL INSURANCE COMPANY's counsel relies on a series of incredible and self-serving statements made by Plaintiff's NATIONAL CONTINENTAL INSURANCE COMPANY's insured, defendant RICHARD HENRY and another insured, Charmain Edomonson. First, with respect to the motor vehicle accident on August 3, 2010, in which defendant LLOYD KEMP was seriously injured, defendant RICHARD HENRY allegedly stated that he did not give permission to defendant SHORN THOMPSON to drive his car on that day. However, defendant RICHARD HENRY avered (*sic*) that defendant SHORN THOMPSON 'lives with him from time to time' and therefore has access to his home and presumably his car. Vehicle & Traffic Law Section 388(1) holds the owner of a vehicle is liable for the negligence of any person using or operating the vehicle with the permission, express or implied of the owner." Defendant Kemp adds that defendant Richard Henry never

reported his car stolen on the date at issue to either the police department or plaintiff, his insurance company.

Defendant Kemp also contends that it is clear from his EUO testimony that he did not know defendant Shorn Thompson, nor defendant Richard Henry, nor had he met defendant Shorn Thompson at any time prior to the alleged date of the subject accident. Defendant Kemp states that "[b]ased on Defendant LLOYD KEMP's testimony and in the absence of any admissible evidence to the contrary, it is clear that from Defendant LLOYD KEMP's perspective the incident on August 3, 2010 was unexpected and unintended event. Defendant LLOYD KEMP sustained serious personal injuries and was a victim rather than perpetrator."

Defendants GBI and Great Health Care also oppose the instant motion. They argue that "[m]issing from Plaintiff's motion are any facts concerning The Rybak Defendants [defendants GBI and Great Health Care] to the scenarios set forth in Plaintiff's motion. Such missing information includes, *inter alia*: whether The Rybak Defendants submitted claims to Plaintiff related to the described motor vehicle losses; which losses The Rybak Defendants' claims concerned; which persons assigned their benefits to The Rybak Defendants regarding such claims; the dates on which such claims were received by Plaintiff; whether Plaintiff issued NF-10 denial of claim forms regarding claims submitted by The Rybak Defendants; the dates on which such NF-10s were mailed; and proof of timely and proper mailing of such NF-10s. Therefore, even assuming *arguendo*, that Plaintiff established that the described motor vehicle losses were intentionally staged, Plaintiff has submitted no proof whatsoever that The Rybak Defendants have any connection whatsoever to such intentional losses. Thus, for example, not having demonstrated that The Rybak Defendants submitted any claims regarding these losses, Plaintiff cannot be entitled to summary judgment as against The Rybak Defendants."

Defendants GBI and Great Health Care further contend that "in order to disclaim coverage on the basis that the underlying collision was not an 'accident,' and that therefore Plaintiff need not provide coverage to the assignor in this matter, Plaintiff would have to demonstrate that The Rybak Defendants submitted claims as an assignor of someone that was a party to the alleged intentional nature of the collision. Here, not only has Plaintiff failed to establish through admissible evidence that the collision was intentional on the part of a particularized person who is alleged to have assigned his or her benefits to The Rybak Defendants, Plaintiff has failed to establish through admissible evidence that *anyone* intentionally caused the described losses. Plaintiff's motion mainly relies upon alleged discrepancies in testimony alleged given in statements and at examinations under oath....Since Plaintiff (*sic*) motion is supported by nothing more than speculation concerning meaningless alleged discrepancies, Plaintiff has failed to demonstrate as a matter of law that the described losses were fraudulent and not covered events."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition

transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Plaintiff, in its motion, has demonstrated *prima facie* entitlement to summary judgment against defendants Kemp, GBI and Great Health Care. Therefore, the burden shifts to defendants Kemp, GBI and Great Health Care to demonstrate issues of fact which preclude summary

judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that defendants Kemp, GBI and Great Health Care have meet their burden to demonstrate an issue of fact which precludes summary judgment. The Court finds that there are issues of fact with respect to the accident involving defendant Kemp and whether it was indeed part of the alleged "intentionally staged accidents." The Court is asked to determine that said accident was one of the "intentionally staged accidents" based upon the conflicting testimony of defendant Richard Henry, the actual insured, and the other named defendants involved in the subject accidents. The testimony of defendant Kemp raises issues with respect to the accident in which he was an alleged victim. In rendering a decision on a summary judgment motion, the Court is not to resolve issues of fact or determine matters of credibility. With respect to victims GBI and Great Health Care, no reference whatsoever was made to these specific defendants in plaintiff's instant motion. As stated in defendants GBI and Great Health Care's opposition, "[m]issing from Plaintiff's motion are any facts concerning The Rybak Defendants [defendants GBI and Great Health Care] to the scenarios set forth in Plaintiff's motion."

The Court further notes that the case cited by plaintiff in its reply affirmation, *State Farm Mutual Automobile Insurance Company v. Laguerre*, 305 A.D.2d 490, 759 N.Y.S.2d 531 (2d Dept. 2003), is not **exactly** like the case at bar, as alleged by plaintiff. In fact, it is difficult to determine from said decision precisely what the facts were in the *State Farm Mutual Automobile Insurance Company v. Laguerre* matter. Said decision does state that "[w]ithin weeks after the plaintiff issued insurance policies for vehicles registered to the defendant Jacques Laguerre, the vehicles were involved in three collisions." Said decision does not detail how plaintiff demonstrated that the accident in question in that case was one of three collisions deliberately

caused to fraudulently obtain insurance benefits.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting it summary judgment as to defendants Kemp, GBI and Great Health Care and for an order granting an Inquest on reimbursement with respect to same is hereby **DENIED**.

It is further ordered that plaintiff and defendants Kemp, GBI and Great Health Care shall appear for a Preliminary Conference on February 22, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 23, 2012