

Progressive Advanced Ins. Co. v McIntosh
2012 NY Slip Op 32056(U)
July 19, 2012
Supreme Court, Nassau County
Docket Number: 4889/11
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X
PROGRESSIVE ADVANCED INSURANCE CO.,

Plaintiff,

-against-

MARK MCINTOSH, MICHAEL AUGUSTIN,
SHARICE TAYLOR, JOHN CAMERON, VIP CAR
SERVICE INC., DANIEL JEAN FRANCOIS,
TERRANCE GERALD GARRY, SHAWN WILTSHIRE,
CHAKA GREEN, GERALDINE VITA, MARIA A.
VITA, HENRY CLAUDE DORCE, ANDREW
DOWD, M.D.,

(Individual Defendants)

ALL ABOUT REHABILITATION & P.T., P.C., B.Y.,
M.D., P.C., BONNE SANTO INC., CITY CARE
ACUPUNCTURE, P.C. EXCEL IMAGING, P.C.,
HEAL ME MEDICAL, P.C., INNOVATIVE VIEW
MEDICAL, P.C., KARINA K. ACUPUNCTURE, P.C.,
LMK PSYCHOLOGICAL SERVICES, P.C., MEDIX
SURGICAL SUPPLY, INC., MK CHIROPRACTIC, P.C.,
NAQIY MEDICAL SERVICES, P.C., OASIS PHYSICAL
THERAPY, P.C., OMEGA DIAGNOSTIC IMAGING,
P.C., ONE OF THE BEST, INC., PARKWAY SUPPLIES,
INC., PERFECT POINT ACUPUNCTURE, P.C.,
QUALITY MEDICAL SUPPLY INC., QUALITY
PSYCHOLOGICAL SERVICES, P.C., QUALITY
SERVICE SUPPLIES INC., QUEST SUPPLY, INC.,
SEARAY MEDICAL, P.C., SERENITY ANESTHESIA,
P.C., TIMBER CHIROPRACTIC, P.C.,

(Provider Defendants)

collectively, the Defendants.

-----X

TRIAL/IAS PART 17

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Motion Seq. 2,3
Motion Date 6.22.12
Submit Date 7-9-12

The following papers were read on this motion:

Papers Numbered

Notice of Motion, Cross Motion Affidavits (Affirmations), Exhibits Annexed...	1, 2
Answering Affidavit	3
Reply Affidavit.....	4

Plaintiff moves by notice of motion for the following relief: an order pursuant to CPLR 3212 granting summary judgment against defendants BY, M.D. P.C, CITY CARE ACUPUNCTURE P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C., and QUALITY PSYCHOLOGICAL SERVICES, P.C.

Defendants BY, M.D. P.C, CITY CARE ACUPUNCTURE P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C. cross-move pursuant to CPLR 3212 granting summary judgment dismissing the complaint as interposed against them.

The court notes that defendant QUALITY PSYCHOLOGICAL SERVICES, P.C. has not submitted any papers with respect to this application.

The plaintiff contends that shortly after issuing an automobile insurance policy to its insured, defendant Mark McIntosh, the insured vehicle was involved in two deliberately "staged" accidents in Brooklyn, New York (Cmplt., ¶¶ 48, 49). In essence, the two losses occurred within the first two months on the same McIntosh policy, within two weeks of each other and in close proximity to McIntosh's residence.

After conducting an investigation into the accident, plaintiff commenced the within declaratory judgment action, alleging in substance that since the accidents had been staged, the policy was void and/or it was no longer contractually obligated to pay benefits thereunder.

Plaintiff now moves for summary on its staged accident theory. The defendants BY, M.D. P.C, CITY CARE ACUPUNCTURE P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C., have opposed the application and cross-move for summary judgment dismissing the complaint insofar as interposed against them.

Preliminarily, the court notes that a prior judgment of default has already been entered in this action as against certain defendants (Brown, J., 9/6/11) and discontinued as against certain defendants.

In support of its application, plaintiff submits the following documents: policy declaration page; no-fault applications for Michael Augustin, Sharice Taylor, John Cameron, Terrance Gerald Garry, Shawn Wiltshire and Chaka Green; police reports; correspondence requesting an examination under oath (hereinafter "EUO") of Michael Augustin, John Cameron, and Chaka

Green; EUO transcripts of Sharice Taylor, Terrance Gerald Garry, and Shawn Wiltshire.

Plaintiff argues that there are multiple discrepancies in the Garry and Wiltshire EUOs and that Augustin, Cameron and Green did not appear for their properly noticed EUOs. Additionally, plaintiff states that through its investigation, it obtained a written statement of the named insured, McIntosh, which contradicted the statements of Garry and Wiltshire in their EUOs.

"A deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident (*see Matter of Metro Med. Diagnostics v Eagle Ins. Co.*, 293 AD2d 751 [2002])" (*State Farm Mut. Auto. Ins. Co. v. Laguerre*, 305 A.D.2d 490, 491, 759 N.Y.S.2d 531 [2003]). Upon review of the documentation presented, the court finds that plaintiff has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that the collisions occurring on July 8, 2010 and July 17, 2010 were deliberately caused to fraudulently obtain insurance benefits.

Approximately a month and a half after the McIntosh policy went into effect, the insured's vehicle was involved in a loss with a 2002 car service vehicle in Brooklyn, New York. The McIntosh vehicle was operated by defendant Augustin, with passengers defendant Taylor and defendant Cameron.

Approximately nine days after the first loss occurred on the McIntosh policy, the insured's vehicle was involved in another loss with a 2007 Toyota, in Brooklyn, New York. The McIntosh vehicle was operated by defendant Garry with passengers Wiltshire and Green.

Plaintiff submitted a notarized sworn statement of defendant Mark McIntosh which stated, in sum and substance, the following: that he did not know or ever heard of a Terrance Garry a/k/a "cash, or a guy named "Eric"; that he never gave the vehicle to use other than to Augustin; that he is only aware of the accident that took place on 7/17/10 as was advised by Michael Augustin; that regarding the accident dated 7/8/10, he was not aware of the loss details nor does he know Terrance Garry, Shawn Wiltshire or Chaka Green.

In contrast, defendant Garry testified at his EUO that he is also known by the name "Cash"; that he knew defendant McIntosh for a long time; that he always sees him in his area; that he knew McIntosh owned the vehicle; and that McIntosh's friend gave him permission to use the vehicle on the date of the loss.

The court finds that the EUO transcripts of defendants Taylor, Garry, and Wiltshire are admissible evidence on this application as they were certified by the court reporter and are considered party admissions (*see R.M. Newell Co., Inc. v. Rice*, 236 AD2d 843).

The court finds that the testimony taken of these defendants at the EUOs contained various inconsistencies which give rise to a presumption that the losses were staged. The very fact that there is a contradiction of whether the insured and the driver knew each other before the

incident supports plaintiff's argument. Moreover, defendants Augustin, Cameron and Green did not appear for their EUOs despite being properly notified.

In opposition to the application for summary judgment and in support of the cross-motion, defendants BY, M.D. P.C, CITY CARE ACUPUNCTURE P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C. submit an attorney affirmation and a copy of the verified pleadings. The courts have long adhered to the rule that the party opposing a summary judgment motion must submit sufficient evidence, in admissible form, to establish that there is a triable issue (*Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383) or to explain why a proper tender of proof is not being made (*Zuckerman v City of New York*, 49 NY2d 557 {1988}). Defendants failed to adhere to such requirements here. Counsel's affirmation has no probative weight and cannot raise a triable issue (*Morissaint v. Raemar Corp.*, 271 A.D.2d 586; *Zuckerman v City of New York*, supra; *Zoldas v Louise Cab Corp.*, supra, at 383; *Rue v Stokes*, 191 AD2d 245; *Johnson v. Phillips*, 261 A.D.2d 269). Nor is counsel's affirmation sufficient to establish summary judgment in defendants' favor. The court requires an affidavit by someone with personal knowledge of the facts to attest that the subject losses were not intentionally staged.

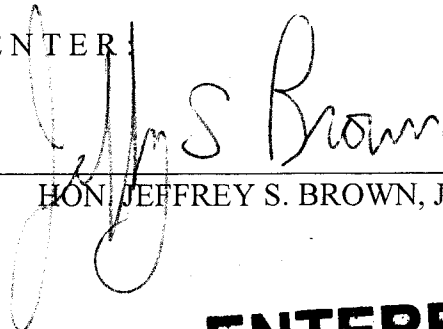
Accordingly, it is

ORDERED, that plaintiff's application pursuant to CPLR 3212 granting summary judgment as against defendants BY, M.D. P.C, CITY CARE ACUPUNCTURE P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C., and QUALITY PSYCHOLOGICAL SERVICES, P.C., is **GRANTED**; and it is further

ORDERED, that defendants' BY, M.D. P.C, CITY CARE ACUPUNCTURE P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C., cross-motion for summary judgment is **DENIED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: July 19, 2012

ENTER

HON. JEFFREY S. BROWN, JSC

ENTERED
JUL 27 2012
MASSAHOUSSETTS COUNTY CLERK'S OFFICE

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