

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 13

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 023559/10

Motion Sequence No: 002

Original Return Date: 10-24-11

**SHAKA ANDRE-WILLIE DEVEAUX
PARKVIEW MEDICAL & SURGICAL, P.C.
BROOKDALE HOSPITAL EMERGENCY DEPT.
COMPREHENSION PT, P.C.
SUNRISE ACUPUNCTURE, P.C.
SK PRIME MEDICAL SUPPLY, INC.
NAQIJ MEDICAL SERVICES, P.C.
PUGLSEY CHIROPRACTIC, PLLC
KKM MEDICAL DIAGNOSTIC, P.C.
FIVE BORO PSYCHOLOGICAL AND LICENSED
MASTER SOCIAL WORK SERVICES, PLLC
TOTAL BODY DIAGNOSTICS, P.C.
BAY NEEDLE CARE ACUPUNCTURE, P.C.
MOBILITY EXPERTS MEDICAL, P.C.
SM CHIROPRACTIC, P.C.
M. SADDESS, MD, P.C.
TONG LI, M.D.**

Defendants.

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P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 12 were submitted on this Notice of Motion on November 25, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmations(2) and Affidavits(5)	1-8
Affirmations in Opposition (2)	9-10
Reply Affirmations (2)	11-12

This motion by plaintiff American Transit Insurance Company for an Order (1) pursuant to CPLR 3215 for a default judgment against the non- appearing defendants and (2) pursuant to CPLR 3212 for summary judgment against the appearing defendants declaring that there is “no no-fault coverage” for defendant Shaka Andre-Willie Deveaux and his assigns as a result of an automobile accident which allegedly occurred on August 5, 2010 and that none of the defendants or their assigns are entitled to first-party no fault benefits on the grounds that the claimant Shaka Andre-Willie Deveaux failed to appear for an Examination Under Oath is **denied**, as a question of fact is presented with respect to plaintiff’s *prima facie* case.

Plaintiff American Transit Insurance Company’s claim for declaratory judgment against the defendant medical providers is premised solely upon the alleged failure of the claimant Shaka Andre-Willie Deveaux (Deveaux) to appear for scheduled examinations under oath (EUO). The complaint states at paragraphs 39 and 40:

39. On October 8, 2010, AMERICAN TRANSIT INSURANCE COMPANY) sent to Defendant SHAKA ANDRE-WILLIE DEVEAUX (and his/her attorney if one was retained) at the address stated on the application for benefits a letter requesting that he/she attend an Examination Under Oath (“EUO”) on October 26, 2010, at American Transit Insurance Company.

40. Defendant SHAKA ANDRE-WILLIE DEVEAUX *failed to attend the EUO.*(emphasis supplied).

The Denial of Claim dated 12/1/10 also stated that the claim was denied “as the eligible person failed to appear for an examination under oath on October 26, 2010 and November 24, 2010.”

In support of the application for judgment, plaintiff submits the affirmation of Michael I. Josephs, Esq., (Josephs), who states that he was prepared to conduct the first EUO scheduled for Friday, October 26, 2010 at 11:00 a.m. (Exhibit “4” to moving papers). However, Josephs’

affirmation does *not* state that the claimant failed to appear for the EUO, contrary to the allegations of the pleading and other supporting papers. Rather, Josephs' supporting affirmation states that counsel for the claimant and a man identified as his client appeared at the offices of American Transit Insurance Company, 330 West 34th Street, at Examination Room #2 on the seventh floor, that his identification was not satisfactory and that Josephs refused to go forward with the EUO. He states in relevant part:

At about 11:40 AM, Eric Tuy, Esq.; . . . came to the EUO Room door with a black male . . . who appeared to be in his twenties. The Attorney said this was his client. . . .

At about 11:50 AM, I began the Examination Under Oath. I introduced myself and the black male was sworn in. Prior to the proceeding I received proof of identity. The man offered me a New York State Benefit Identification Card listing the name Shaka Deveaux with a birth date of 06/08/1989. . . .

A copy of both sides of the card has been added to the file.

Josephs affirms that the claimant's identification was defective but fails to submit a copy for the Court's inspection, although he admittedly added a copy to the file. He describes the card as signed on the front instead of the back, with the lower right portion of the card missing. The photograph of Deveaux was on the lower right portion and the missing part "included the entire lower part of the face and on half of the middle of the face" as well as part of an "access number". Josephs opines that "[i]t appeared as if the card had been cut with a scissor or other type of cutter..."

Josephs states that "the man" did not have a social security card or other picture identification, and stated that he was "waiting to get the NYS Non-driver's ID card." Josephs further states, "[a]t this time I advised *the claimant* and his attorney that this Examination Under Oath could not proceed, but a new date would be scheduled for him to appear with ID." (emphasis

supplied).

Josephs also stated, apparently to the claimant and his attorney, that the American Transit Insurance Company letter notifying him of the EUO advised that “proof of identity was required in order to proceed.” However the exhibits of the notice of EUO submitted to the court do *not* contain such advice.

Plaintiff sent an additional EUO notice for November 24, 2010, and avers that the claimant failed to appear.

Plaintiff thus contends that Deveaux failed to appear twice for scheduled examinations under oath, that his failure vitiates coverage *ab initio*, and that, therefore, there is no coverage under which the defendant medical providers may seek reimbursement as assignees of Deveaux.

The mandatory personal injury protection endorsement for motor vehicle liability insurance policies contains two conditions precedent to coverage, written notice of the accident and written proof of a claim (11 NYCRR 65-1.1 [d]). The notice of accident condition requires an eligible injured person to set forth “details sufficient to identify the eligible injured person, along with reasonably obtainable information regarding the time, place and circumstances of the accident . . . as soon as reasonably practicable, but in no event more than 30 days after the date of the accident”.

The proof of claim condition, in the case of a claim for health service expenses, requires a claimant or his assignee health care service provider to give “full particulars of the nature and extent of the injuries and treatment received and contemplated, as soon as reasonably practicable but, in no event later than 45 days after the date services are rendered” (*supra*). Failure to comply with the time requirements of the first condition, written notice of accident, results in a failure of coverage even if a health care service provider timely submits proof of claim after the time has expired. “[T]he

submission of . . . *proof of claim* within 45 days of the date health care services are rendered may not serve as timely *written notice of accident* after the 30-day period for providing such written notice has expired” (*New York and Presbyterian Hosp. v. Country-Wide Ins. Co.*, 17 NY3d 586, 593 [2011][emphasis supplied]).

As noted, plaintiff American Transit Insurance Company relies upon the purported failures of Deveaux to appear for two EUOs to dismiss the claims of the named medical provider defendants for lack of coverage.

Simply, plaintiff has failed to sustain a *prima facie* claim that the claimant twice failed to appear. Rather, the affirmation of Michael I. Josephs, Esq., at best, raises a question of fact regarding the identity of the person who appeared for the first scheduled EUO. If it was Deveaux, then plaintiff cannot claim that he did not appear and there is no coverage defense. Defendants would be entitled to a judgment (*Maurizzio v. Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 953 [1989]; *Lanza v. Wagner*, 11 NY2d 317, 334 [1962]) declaring that plaintiff may not rely upon a coverage defense based upon Deveaux’ failure to appear for an EUO. A hearing is necessary where plaintiff may present evidence to support its pleading allegation and grounds for denial that the claimant did not appear for the EUO on October 26, 2011, i.e., that the person who appeared was not Deveaux.

With respect to a legal issue which is also presented, plaintiff avers that a failure to timely appear for properly noticed EUO and follow up EUO results in a coverage defense, and if the claimant failed to appear there is no coverage under which the defendant medical providers may assert a claim, citing *New York and Presbyterian Hosp. v. Country-Wide Ins. Co.*, 17 NY3d 586, 593 [2011]). The Court need not reach such issue if plaintiff fails to prove that the claimant did not

appear at the first scheduled EUO.

Accordingly the Court will not resolve the legal issue at this time as it may be rendered moot by the trial. It is enough at this juncture to note the question is whether the issue is governed by *Westchester Med. Ctr. v Lincoln Gen. Ins. Co.*, which held that failure to appear for EUOs does not present a coverage defense, or whether *Westchester* has been overruled by *New York and Presbyterian Hosp. v. Country-Wide Ins. Co.*, which held that there is no coverage if a timely written notice of accident within the 30-day period for providing such written notice has expired, notwithstanding a health care provider's timely submission of a proof of claim within 45 days of the date health care services are rendered (*compare, Westchester Med. Ctr. v Lincoln Gen. Ins. Co.*, 60 AD3d 1045, 1046-1047 [2d Dept 2009], *lv app den* 13 NY3d 714, with *New York and Presbyterian Hosp. v. Country-Wide Ins. Co.*, 17 NY3d 586, 593 [2011]).

Thus, after due deliberation, it is

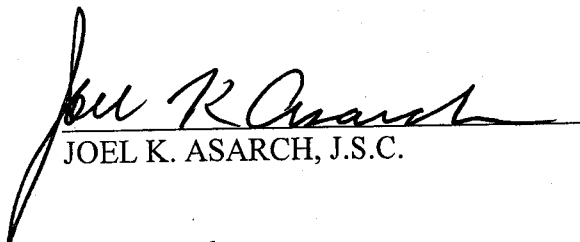
ORDERED, that the plaintiff's motion is **denied**; and it is further

ORDERED, that the compliance conference previously scheduled for **February 23, 2012** at 9:30 a.m. shall be held at the Courthouse, 100 Supreme Court Drive, Room 151, Mineola, New York 11501 on such date and time.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 10, 2012

ENTER:


JOEL K. ASARCH, J.S.C.

ENTERED

FEB 14 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Copies mailed to:

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Attorneys for Defendants Sunrise Acupuncture, P.C.,
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