

SCAW
MOD

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

PROGRESSIVE SPECIALTY INSURANCE CO. and
PROGRESSIVE MAX INSURANCE COMPANY,

Plaintiffs,

Index No. 005843/11

- against-

HERBY GEFFRARD, SHANNA KAY ROACH,
DARREN BURTON A.B.A. BARREN BURTON,
GERARD GRANT, B.Y., M.D., P.C., BARON
LEA, INC., CHARLES DENG ACUPUNCTURE, P.C.,
CITY CARE ACUPUNCTURE, P.C., COMPAS MEDICAL,
P.C., CORTLAND MEDICAL SUPPLY, INC., DELTA
DIAGNOSTIC RADIOLOGY, P.C., EXCEL IMAGING, P.C.,
GREAT HEALTH CARE CHIROPRACTIC, P.C.,
GREENWAY MEDICAL SUPPLY CORP., JOSEPH PAUL,
M.D., KINGS COUNTY HOSPITAL CENTER, METRO
PSYCHOLOGICAL SERVICES, P.C., MK CHIROPRACTIC,
P.C., OASIS PHYSICAL THERAPY, P.C., QUALITY
MEDICAL SUPPLY, INC., SEACOAST MEDICAL, P.C.
and T & J CHIROPRACTIC, P.C.,

MOTION SEQUENCE #002
ORIGINAL RETURN DATE: 11/30/11
SUBMISSION DATE: 01/30/12

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
Affirmations in Opposition.....	2, 3, 4
Reply Affirmation.....	5
Memorandum of Law.....	6

Plaintiffs move for an order granting summary judgment, pursuant to CPLR 3212, against defendants, B.Y., M.D., P.C., CITY CARE ACUPUNCTURE, P.C., MK CHIROPRACTIC, P.C., OASIS PHYSICAL THERAPY, P.C., CHARLES DENG

ACUPUNCTURE, P.C., COMPAS MEDICAL, P.C., DELTA DIAGNOSTIC RADIOLOGY, P.C., CORTLAND MEDICAL SUPPLY, INC., GREAT HEALTH CARE CHIROPRACTIC, P.C. and T & J CHIROPRACTIC, P.C., (the "Answering Defendants"), and for an inquest on reimbursement. The court notes from the outset that this action is for a declaratory judgment and that no relief has been sought for reimbursement. Accordingly, that branch of plaintiffs' motion for an inquest on reimbursement is denied. The Answering Defendants oppose the motion.

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiffs bring this action seeking a declaratory judgment that plaintiffs have no duty to provide liability coverage to any of the defendants with respect to the underlying incidents of May 31, 2010, and September 20, 2010, under the policies issued to Darren Burton a.k.a Barren Burton ("Burton") and Herby Geffrard ("Geffrard"); that they have no duty to defend or indemnify any of defendants in any pending or future actions that have or may be brought as a result of the underlying incidents of May 31, 2010, and September 20, 2010; and that they have no duty to provide coverage for claims for no-fault or uninsured motorist benefits made by or on behalf of any person or entity in connection with the underlying incidents of May 31, 2010, and September 20, 2010.

Plaintiffs challenge their obligation to provide coverage alleging that the underlying accidents of May 31, 2010, and September 20, 2010, were intentionally caused accidents for which coverage is not available (*see, Allstate Ins. Co. v. Massre*, 14 AD3d 610 [2d Dept. 2005]). In support of plaintiffs' claim, they submit an affirmation of counsel and an affidavit of Adam Figarsky, a Senior Medical Representative of plaintiffs, as well as a copy of the verified complaint (Ex. A).

It is alleged that certain separate policies of insurance were issued to the Burton and Geffrard defendants, providing liability, no-fault and uninsured motorist

coverage. Plaintiffs allege in their complaint that the policies were taken out with fictitious addresses that do not exist and bad bank accounts. Mr. Figarsky avers, upon information and belief, that the caller who incepted the policies was the same person. Moreover, it is alleged that the occupants of the adverse vehicles claimed that it appeared that their vehicles were intentionally hit.

This action arises out of alleged fraudulent claims in connection with motor vehicle accidents occurring on May 31, 2010, and September 20, 2010, in Brooklyn, New York. At the time of the accidents Gerrard Grant ("Grant") was allegedly a passenger in the Burton vehicle. The adverse motor vehicle was registered to Tawanda C. Hart and operated by Richard Turner with alleged passenger Carlos Villanueva.

Defendant, Shanna Kay Roach, and Mahesh Dwayne Whyte were allegedly passengers in the Geffrard vehicle. The adverse vehicle was driven by Joy L. Brown and insured by Jennifer McInnis. Beatrice Joemah was an alleged passenger in the adverse vehicle.

Mr. Figarsky avers that defendant Grant appeared for an Examination Under Oath ("EUO") and that Mr. Grant's testimony directly contradicts the events as described by Carlos Villanueva. It is submitted that defendant Grant made several false statements in his EUO and later admitted that his prior statements were not true. Plaintiffs, therefore, denied his claims as they do not cover claims presented with fraud and misrepresentations.

Likewise, defendant Geffrard's testimony at his EUO contradicted the testimony of Joy L. Brown and Mahesh Dwayne Whyte.

Defendants Burton and Shanna Kay Roach failed to appear for their EUOs. It is alleged that by failing to appear, they failed to comply with the terms of the insurance policy precluding them from receiving no-fault benefits.

The individual defendants purportedly sought treatment from the Answering Defendants for injuries alleged to have been sustained as a result of the accidents which occurred on May 31, 2010, and September 20, 2010.

Plaintiffs having demonstrated their *prima facie* entitlement to judgment as a matter

of law, the burden now shifts to the Answering Defendants to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In opposition the Answering Defendants submitted the affirmations of their counsel. The affirmation of an attorney without firsthand knowledge is without probative value (*McDermott v. South Farmingdale Water Dist.*, 167 AD2d 517, 518 [2d Dept. 1990]). Contrary to the arguments of the Answering Defendants, the EUOs of Gerard Grant, Darren Burton and Herby Geffard, although unsigned, were certified. Thus, they qualified as admissible evidence for purposes of plaintiffs' motion for summary judgment (*Rodriquez v. Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept. 2012]). The court notes that the recorded interview of Joy Brown was signed and notarized.

Based upon all of the foregoing, plaintiffs' motion for summary judgment is granted.

Submit declaratory judgment.

This decision constitutes the order of the court.

Dated: March 23, 2012

HON THOMAS P. PHELAN


THOMAS P. PHELAN, J.S.C.

ENTERED

MAR 27 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorneys/Parties of Record:

McCormack & Mattei, PC
Attention: Frank G. DiSpirito, Esq.
Attorneys for Plaintiffs
1035 Stewart Avenue, Second & Third Floors
Garden City, NY 11530
File No. PRO- 6265.dj

Amos Weinberg, Esq.
Attorney for Defendants
B.Y., M.D., P.C., City Care Acupuncture, P.C.,
MK Chiropractic, P.C. and Oasis Physical Therapy, P.C.
49 Somerset Drive South
Great Neck, NY 11020-1821

The Ryback Firm, PLLC
Attention: Oleg Rybak, Esq.
Attorneys for Defendant
Charles Deng Acupuncture, P.C.,
Compas Medical, P.C., Delta Diagnostic Radiology, P.C.,
Great Health Care Chiropractic, P.C, and T & J Chiropractic, P.C.
1506 Kings Highway, Second Floor
Brooklyn, NY 11229

Gary Tsirelman, PC
Attention: Selina Chin, Esq.
Attorneys for Defendant
65 Jay Street, Third Floor
Brooklyn, NY 11201