

Progressive Specialty Ins. Co. v Ulysee

2010 NY Slip Op 33406(U)

December 1, 2010

Supreme Court, Nassau County

Docket Number: 6004/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER,

Acting Supreme Court Justice

**TRIAL/IAS, PART 32
NASSAU COUNTY**

**PROGRESSIVE SPECIALTY INSURANCE
COMPANY, PROGRESSIVE PREFERRED
INSURANCE COMPANY and PROGRESSIVE
MAX INSURANCE COMPANY,**

**Index No.: 6004/10
Motion Seq. No.: 01
Motion Date: 09/16/10
XXX**

Plaintiffs,

- against -

**JEAN ULYSSE, SPENCER VIXAMA, EMMANUEL
ANTOINE a/k/a ANTOINE EMMANUEL, GEORGE
BRATHWAITE, TAKIYAH BROOMES,
("Claim One Individual Defendants"),**

**JEAN ULYSSE, RASHED MOHAMMED, HEROLD
PIERRE, KEITH JOHNSON, JUNIOR PIERRE,
("Claim Two Individual Defendants"),**

**AKEEM FEITON, JEFFERSON ETIENNE, JOVANY
KING, REGINA SCANDIFFIO, VINCENZA
SCANDIFFIO,
("Claim Three Individual Defendants"),**

**DEMETRI ALIE, FRITZGERALD DUPONT a/k/a
FITZ-GERALD DUPONT a/k/a FITZ DUPONT,
STANLEY JOSEPH, SAMUEL SHCHURI,
("Claim Four Individual Defendants"),**

**RAJIB MANNA, LUIS HERNANDEZ, MARTIN
CASTANEDO, ROSENTO GONZALEZ,
HONDU-MEX, INC.,
("Claim Five Individual Defendants"),**

**EDDIE ARISTHENE, CHARLES EMMANUEL,
JEAN HOLYBRICE, RICHARD CELESTIN,
("Claim Six Individual Defendants"),**

**ALLISTER SYLVESTER, MENALO LUXANA,
DAMONI BARNES, TONY AUGUSTE,
("Claim Seven Individual Defendants"),**

**TRELLIS LEE, WALTER ANDERSON, NORA
ALVEREZ, JOY CHRISTINA KAISER,
("Claim Eight Individual Defendants"),**

And

**ABC PHYSICAL THERAPY, P.C.,
AMERICHOICE MEDICAL P.C.,
ART OF HEALING MEDICINE, P.C.,
BROMER MEDICAL, PC,
CANARSIE CHIROPRACTIC P.C.,
CITY CHIROPRACTIC, P.C.,
CMS MEDICAL SUPPLY INC.,
COMPAS MEDICAL, P.C.,
COMPREHENSIVE PSYCHOLOGICAL EVALUATION, P.C.,
CORTLAND MEDICAL SUPPLY, INC.,
DELTA DIAGNOSTIC RADIOLOGY P.C.,
DIAGNOSTIC PLUS MEDICAL, P.C.,
DIVERSIFIED DIAGNOSTIC SERVICES MEDICAL CARE P.C.,
DOSHI DIAGNOSTIC IMAGING SERVICES, P.C.,
DR. DEREK LEZAMA D.C., P.C.,
DUMONT MEDICAL DIAGNOSTICS, P.C.,
EAGLE SURGICAL SUPPLY INC.,
EMPIRE PHYSICAL MEDICINE & REHABILITATION, P.C.,
ENERGY FLOW ACUPUNCTURE, P.C.,
EXCEPTIONAL MEDICAL CARE, P.C.,
FLATBUSH CHIROPRACTIC P.C.,
FLATBUSH MEDICAL CARE, P.C.,
FLATLANDS MEDICAL P.C.,
FOUR NEEDLE ACUPUNCTURE, P.C.,
FLUSHING TRADITIONAL ACUPUNCTURE P.C.,
G A PHYSICAL THERAPY, P.C.,
GABA MEDICAL P.C.,
GOLDEN HANDS CHIROPRACTIC, P.C.,**

IAV MEDICAL SUPPLY INC.,
I-GLA ACUPUNCTURE, P.C.,
IMA ACUPUNCTURE, P.C.,
IMMEDIATE IMAGING P.C.,
INFINITY CHIROPRACTIC HEALTH, P.C.,
INFINITY PSYCHOLOGICAL SERVICES P.C.,
JANAA PHYSICAL THERAPY, P.C.,
KETAN VORA, DO,
KJC CHIROPRACTIC, P.C.,
LA ACUPUNCTURE P.C.,
LENDER MEDICAL SUPPLY INC.,
MED-AID SUPPLY INC.
MERAV NICOLETTE SADEES PHYSICIAN P.C.,
MOUNTAINSIDE CHIROPRACTIC, P.C.,
MT SERVICES PT P.C.,
NATIONAL MEDICAL & SURGICAL SUPPLY, INC.,
NATURAL THERAPY ACUPUNCTURE, P.C.,
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION KINGS COUNTY HOSPITAL CENTER,
NEW YORK DIAGNOSTIC MEDICAL CARE P.C.,
NOVA ACUPUNCTURE, P.C.,
NOVACARE MEDICAL P.C.,
O & R PHYSICAL THERAPY, P.C.,
OMEGA DIAGNOSTIC IMAGING, P.C.,
OPTIMAL WELL-BEING CHIROPRACTIC, P.C.,
ORTHO-MED SURGICAL SUPPLY, INC,
OZONE PARK MEDICAL HEALTHCARE P.C.,
PHILDOV ANESTHESIOLOGY GROUP P.C.,
PHILIP RAFIY, MD,
POWER CHIROPRACTIC P.C.,
PRECISION MEDICAL DIAGNOSTICS OF NY, P.C.,
PROFESSIONAL HEALTHCARE & CHIROPRACTIC SVC., P.C.,
PROFESSIONAL HEALTH IMAGING, P.C.,
PROGRESSIVE ORTHOPEDICS, PLLC,
QUALITY DIAGNOSTIC IMAGING P.C.,
QUALITY MEDICAL SUPPLY OF NY INC.,
QUALITY PSYCHOLOGICAL SERVICES P.C.,
RELIABLE PHYSICAL THERAPY, P.C.,
RELIABLE SUPPLY OF NY, INC.,
ROM MEDICAL P.C.,
RUTLAND MEDICAL P.C.,
SG HORIZON MEDICAL P.C.,
SHORE ACUPUNCTURE, P.C.,

SHORE MEDICAL DIAGNOSTIC, P.C.,
 STAR MEDICAL & DIAGNOSTIC, PLLC,
 ST. MARKS' CHIROPRACTIC P.C.,
 SUCCESS ACUPUNCTURE P.C.,
 T & J CHIROPRACTIC, P.C.,
 THE NEW YORK COMMUNITY HOSPITAL OF BROOKLYN, INC.,
 U & R CITY SUPPLY INC.,
 UNLIMITED PRODUCTS LTD.,
 V & T MEDICAL P.C.,
 VESPA SUPPLY INC.,
 VG CHIROPRACTIC, P.C.,
 WESTENBAY ENTERPRISES INC., and
 WILLIAM TODD PORDY, MD,
 ("Medical Provider Defendants"),

collectively, the Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

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

Plaintiffs' motion, pursuant to CPLR §3215(a), for entry of a default against defendants

**JEAN ULYSSE, TAKIYAH BROOMES, AKEEM FEITON, FITZ-GERALD DUPONT
 a/k/a FITZ DUPONT, SAMUEL SHCHURI, RAJIB MANNA, MARTIN CASTANEDO,
 HONDU-MEX, INC., CHARLES EMMANUEL, JEAN HOLYBRICE, RICHARD
 CELESTIN, DAMONI BARNES, TRELIS LEE, ABC PHYSICAL THERAPY, P.C.,
 AMERICHOICE MEDICAL P.C., ART OF HEALING MEDICINE, P.C., CANARSIE
 CHIROPRACTIC P.C., CMS MEDICAL SUPPLY INC., COMPAS MEDICAL, P.C.,
 COMPREHENSIVE PSYCHOLOGICAL EVALUATION, P.C., CORTLAND
 MEDICAL SUPPLY, INC., DELTA DIAGNOSTIC RADIOLOGY P.C., DIAGNOSTIC**

PLUS MEDICAL, P.C., DOSHI DIAGNOSTIC IMAGING SERVICES, P.C., DR.
DEREK LEZAMA D.C., P.C., DUMONT MEDICAL DIAGNOSTICS, P.C., EAGLE
SURGICAL SUPPLY INC., EMPIRE PHYSICAL MEDICINE & REHABILITATION,
P.C., ENERGY FLOW ACUPUNCTURE, P.C., FLATBUSH CHIROPRACTIC P.C.,
FLATBUSH MEDICAL CARE, P.C., FLATLANDS MEDICAL P.C., FOUR NEEDLE
ACUPUNCTURE, P.C., FLUSHING TRADITIONAL ACUPUNCTURE P.C., G A
PHYSICAL THERAPY, P.C., GABA MEDICAL P.C., GOLDEN HANDS
CHIROPRACTIC, P.C., IAV MEDICAL SUPPLY INC., IMA ACUPUNCTURE, P.C.,
IMMEDIATE IMAGING P.C., INFINITY CHIROPRACTIC HEALTH, P.C., INFINITY
PSYCHOLOGICAL SERVICES P.C., KJC CHIROPRACTIC, P.C., LA
ACUPUNCTURE P.C., LENDER MEDICAL SUPPLY INC., MED-AID SUPPLY INC.,
MERAV NICOLETTE SADEES PHYSICIAN P.C., MOUNTAINSIDE
CHIROPRACTIC, P.C., MT SERVICES PT P.C., NATIONAL MEDICAL &
SURGICAL SUPPLY, INC., NATURAL THERAPY ACUPUNCTURE, P.C., NEW
YORK CITY HEALTH AND HOSPITALS CORPORATION KINGS COUNTY
HOSPITAL CENTER, NEW YORK DIAGNOSTIC MEDICAL CARE P.C., NOVA
ACUPUNCTURE, P.C., NOVACARE MEDICAL P.C., O & R PHYSICAL THERAPY,
P.C., OPTIMAL WELL-BEING CHIROPRACTIC, P.C., ORTHO-MED SURGICAL
SUPPLY, INC, PHILDOV ANESTHESIOLOGY GROUP P.C., PHILIP RAFIY, MD,
POWER CHIROPRACTIC P.C., PRECISION MEDICAL DIAGNOSTICS OF NY, P.C.,
PROFESSIONAL HEALTHCARE & CHIROPRACTIC SVC., P.C., PROFESSIONAL
HEALTH IMAGING, P.C., PROGRESSIVE ORTHOPEDICS, PLLC, QUALITY

DIAGNOSTIC IMAGING P.C., QUALITY MEDICAL SUPPLY OF NY INC., QUALITY PSYCHOLOGICAL SERVICES P.C., RELIABLE PHYSICAL THERAPY, P.C., RELIABLE SUPPLY OF NY, INC., ROM MEDICAL P.C., RUTLAND MEDICAL P.C., SHORE ACUPUNCTURE, P.C., STAR MEDICAL & DIAGNOSTIC, PLLC, ST. MARKS' CHIROPRACTIC P.C., T & J CHIROPRACTIC, P.C., THE NEW YORK COMMUNITY HOSPITAL OF BROOKLYN, INC., UNLIMITED PRODUCTS LTD., V & T MEDICAL P.C., VESPA SUPPLY INC., VG CHIROPRACTIC, P.C. and WESTENBAY ENTERPRISES INC. is hereby granted.

Plaintiff proves jurisdiction by annexing copies of the affidavits of service of the summons and complaints upon these defendants and proves their default in the affirmation of counsel. Plaintiff proves its claims in the supporting affidavit. CPLR §3215(f); *See Joosten v. Gale*, 129 A.D.2d 531, 514 N.Y.S.2d 729 (1st Dept. 1987).

The Court notes plaintiff's compliance with additional service of the summons and complaints as required by CPLR §3215(g)(4).

Based upon the default of the aforementioned defendants the Court hereby orders that plaintiff has no contractual duty to defend, nor to provide indemnity coverage, nor to provide liability coverage in any pending or future action for personal injury or property damages, nor any duty to provide coverage for any claims of no-fault and/or uninsured motorist coverage made by any of the aforementioned defendants and/or their assignees, arising from any said underlying incidents of March 12, 2009, July 20, 2009, July 25, 2009, August 5, 2009, August 15, 2009, August 27, 2009, August 28, 2009 and September 17, 2009.

The Court notes that plaintiff has withdrawn the portion of its motion which sought an

extension of time and substituted service against the following defendants and plaintiff has discontinued the action without prejudice as to these defendants only:

SPENCER VIXAMA, EMMANUEL ANTOINE a/k/a ANTOINE EMMANUEL, GEORGE BRATHWAITE, RASHED MOHAMMED, HEROLD PIERRE, KEITH JOHNSON, JUNIOR PIERRE, JEFFERSON ETIENNE, JOVANY KING, DEMETRI ALIE, STANLEY JOSEPH, LUIS HERNANDEZ, ROSENTO GONZALEZ, EDDIE ARISTHENE, ALLISTER SYLVESTER, MENALO LUXANA, TONY AUGUSTE, WALTER ANDERSON, NORA ALVEREZ, JOY CHRISTINA KAISER, KETAN VORA, DO and WILLIAM TODD PORDY, MD.

Plaintiff also received an executed Stipulation of Discontinuance with Prejudice as to defendants **REGINA SCANDIFFIO** and **VINCENZA SCANDIFFIO** and hereby withdraws the portion of the motion that sought a default judgment as to those two defendants only.

Plaintiff also moves, pursuant to CPLR §3212, for an order granting summary judgment in favor of plaintiff and against defendant **OZONE PARK MEDICAL HEALTHCARE P.C.** (“Ozone”). Defendant Ozone opposes the motion.

Plaintiff submits that, in its Answer to plaintiff’s Verified Complaint, defendant Ozone denied knowledge or information sufficient to form a belief as to all allegations in the Verified Complaint including Paragraph 261 which alleged that defendant Ozone submitted a request for no-fault reimbursement for parties involved in the Eddie Aristhene loss of August 5, 2009. Plaintiff argues that, on the sheer basis alone that defendant Ozone does not even know that it submitted claimed treatment to any of the parties to the alleged “sham loss,” plaintiff is entitled to summary judgment. Plaintiff states that defendant Ozone has provided nothing whatsoever to

contradict the facts as set forth in the Verified Complaint and the affidavit of Daniel Mack, Senior Medical Representative employed by plaintiff, which was offered in support of its summary judgment motion, as to the obvious intentionally caused losses that are the subject of this action. Plaintiff submits that when a loss is the result of an intentional act there is no coverage.

In opposition, defendant Ozone submits that plaintiff has failed to come forth with admissible proof entitling it to summary judgment, relying upon its own conclusory allegations in support of its motion. Defendant Ozone argues that plaintiff does not claim that defendant Ozone was a party to any alleged fraud, so it has not established that defendant Ozone is not entitled to recover no-fault medical benefits from plaintiff for services provided to its assignors as a matter of law. Defendant Ozone contends that there are issues of fact with respect to its right to reimbursement for no-fault medical services which were undisputedly provided to assignors who are also defendants in this action.

In reply to defendant Ozone's opposition, plaintiff submits that defendant Ozone has provided nothing to create an issue of fact to avoid summary judgment. Defendant Ozone has not provided one piece of evidence in its opposition to counter the "mountain of evidence in this case." Plaintiff argues that defendant Ozone, like all medical providers, is subject to the consequence that there is no coverage for a provider seeking no-fault reimbursement if the patient-assignor violates a policy condition.

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).

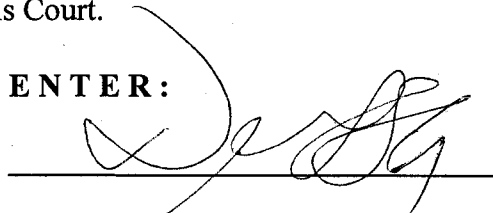
Based upon the evidence and legal argument provided in the motions as detailed above, the Court finds that plaintiff has established *prima facie* entitlement to summary judgment against defendant Ozone as a matter of law.

As previously stated, since plaintiff demonstrated a sufficient *prima facie* showing, the burden shifts to defendant 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, supra*.

The Court finds that defendant Ozone has offered no evidence to demonstrate the existence of any material triable issue of fact. Therefore, plaintiff's motion, pursuant to CPLR § 3212, for an order granting summary judgment against defendant Ozone is hereby granted. The Court hereby orders that plaintiff has no contractual duty to defend, nor to provide indemnity coverage, nor to provide liability coverage in any pending or future action for personal injury or property damages, nor any duty to provide coverage for any claims of no-fault and/or uninsured motorist coverage made by any defendant Ozone and/or its assignees, arising from the incident of August 5, 2009.

This constitutes the decision and order of this Court.

ENTER:



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

Dated: Mineola, New York
December 1, 2010

ENTERED

DEC 07 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE