

**State Farm Fire & Cas. Co. v 3 Star Acupuncture**

2024 NY Slip Op 34162(U)

November 25, 2024

Supreme Court, New York County

Docket Number: Index No. 154162/2021

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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STATE FARM FIRE AND CASUALTY COMPANY,
Plaintiff,

INDEX NO. 154162/2021
MOTION DATE 05/31/2024
MOTION SEQ. NO. 003

- v -

3 STAR ACUPUNCTURE, 5 STAR CHIROPRACTIC SERVICES, P.C., ADAGIO CHIROPRACTIC, P.C., ADVANCED RX PHARMACY, INC., ALLIED CARE, P.T., P.C., AMIT KHANEJA NEUROLOGY PRACTICE, PLLC, ATLANTIC DIAGNOSTIC, LLC, BETTER MEDICAL HEALTH, P.C., BOULEVARD 9229 LLC, CAVALLARO MEDICAL SUPPLY, INC., COMPLETE NEUROPSYCHOLOGY, P.C., ECLIPSE MEDICAL IMAGING, P.C., EQUINOX PHYSICAL THERAPY, P.C., FAST RECOVERY CPM AND EQUIPMENT CORP, GARA MEDICAL CARE, P.C., GM MEDICAL SUPPLIES, P.C., GORDON C DAVIS MEDICAL, P.C., GRAHAM WELLNESS MEDICAL, P.C., GRAND MEDICAL SUPPLY CORP, HERSCHEL KOTKES, M.D., P.C., IZM PT, P.C., LONGEVITY MEDICAL SUPPLY, INC., LR MEDICAL, PLLC, METROPOLITAN MEDICAL AND SURGICAL, P.C., MORNING STAR PHYSICAL THERAPY, P.C., MZY ACUPUNCTURE, P.C., NEW YORK PHYSICAL THERAPY CARE, P.C., PAK HONG SIK, M.D., MEDICAL CARE, P.C., RAND MEDICAL, P.C., REBOUND ACUPUNCTURE, P.C., REHAB TIME, P.T., P.C., RELIANCE CHIROPRACTIC, P.C., SACRUM CHIROPRACTIC, P.C., ST. SEBASTIAN MEDICAL, P.C., STREAMLINE RX, TIME TO CARE PHARMACY, INC., VNP ACUPUNCTURE, P.C., JIANG XIAO YAN, SHOP -N- SAVE PHARMACY, INC., PROFESSIONAL BILLING COLLECTIONS, LLC, COLIN CLARKE, M.D., DAMIEN BEND, TYLER STRACHAN, ANDREW PETTY, JEAN MARC RICHARDSON

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, this motion is decided as follows.

This is a declaratory judgment action. Plaintiff State Farm Fire and Casualty Company (State Farm) moves for an order [1] pursuant to CPLR §3212, granting plaintiff leave to enter a summary judgment against 3 STAR ACUPUNCTURE, P.C., AMIT KHANEJA NEUROLOGY PRACTICE, PLLC, CAVALLARO MEDICAL SUPPLY, INC., COMPLETE NEUROPSYCHOLOGY, P.C., GORDON C. DAVIS MEDICAL, P.C., GRAHAM WELLNESS MEDICAL, P.C., GRAND MEDICAL SUPPLY, CORP., LONGEVITY MEDICAL SUPPLY, INC., LR MEDICAL, PLLC, MZY ACUPUNCTURE, P.C., PAK HONG SIK, M.D. MEDICAL CARE, P.C., RAND MEDICAL, P.C., RELIANCE CHIROPRACTIC, P.C., SACRUM CHIROPRACTIC, P.C. and VNP ACUPUNCTURE, P.C.; and [2] pursuant to CPLR §3211 to dismiss the counter-claims of defendants AMIT KHANEJA NEUROLOGY PRACTICE, PLLC and RAND MEDICAL, P.C.

Defendants PAK HONG SIK, M.D. MEDICAL CARE, and RELIANCE CHIROPRACTIC, P.C. oppose the motion to the extent plaintiff seeks summary judgment against them, against 3 STAR ACUPUNCTURE, P.C., CAVALLARO MEDICAL SUPPLY, INC., COMPLETE NEUROPSYCHOLOGY, P.C., GRAND MEDICAL SUPPLY, CORP., LONGEVITY MEDICAL SUPPLY, INC., LR MEDICAL, PLLC, and VNP ACUPUNCTURE, P.C. have also submitted written opposition to the motion. Finally, the Law Offices of Gary Tsirelman, P.C. has submitted opposition to the motion, but failed therein to identify on behalf of which defendants Tsirelman represents and is opposing the motion, referring simply to itself as “attorneys for Defendants”.

The relevant facts are as follows. On March 18, 2020, Tyler Strachan was driving a car (the “Insured Vehicle”) with passengers Andrew Petty and Jean Marc Richardson (collectively the “Claimants”) which was allegedly involved in a collision with another vehicle on East 6th Street and Avenue Z in Brooklyn, New York. The Insured Vehicle was insured under the name of Damien Bend, who was not in the vehicle at the time of the collision.

According to the police report, which was provided by State Farm, Strachan claimed that the accident occurred when he struck the vehicle after making a U-Turn, while the adverse driver claims that Strachan was coming from behind him and struck the vehicle in the rear despite seeing the adverse vehicle. No injuries were reported to the police. The report also notes that the collision was minor, the involved vehicles sustained minimal damage and no airbags deployed.

Claims specialist Andrea Hutchinson investigated the claims (NYSCEF doc 114) in which she found questions in the legitimacy of the claim based on several factors, to wit: lack of contact information and being unable to confirm DOB/SSN of claimants; claims submitted under same policy with three different occupants subsequent to accident; and history of prior collisions from claimants.

Based on the result of the investigation, State Farm sought Examinations Under Oaths (EUOs) from the claimants. SFFACC sent letters requesting the EUOs to Bend and the three claimants (exhibits L, M, N and O) on April 29, 2020, however they all failed to appear for their EUOs on two occasions each, violating the No-Fault regulations. State Farm has provided to the court an affirmation of attorney Michael Tomsky (NYSCEF doc 113) who supervised the EUO requests

which sets forth details about the standard practices when requesting EOUs as well as specific details about the attempts to get an EUO of each Claimant.

### Parties arguments

State Farm argues that they have provided sufficient evidence to establish the accident was intentionally caused or not an insured accident, that the claimants failure to appear for EUOs constitutes a violation of the No-Fault Regulations and a breach of conditions precedent to coverage, and material misrepresentations made in the submission of the claim.

In opposition, defendants argue that summary judgment is premature, that the motion is based upon evidence not in admissible form, and that plaintiff has otherwise failed to meet its burden on this motion.

### Discussion

A motion for summary judgment is premature when the opponent to the motion can point to information in the exclusive possession of a movant or third-party which is necessary to mount an opposition to the motion (see generally CPLR § 3212[f]). Not only have the defendants not pointed to specific information which would enable them to defeat State Farm's motion, instead complaining that they are entitled to depositions and entire files, but this case has been pending for three years. Delay and a general lack of due diligence in seeking discovery militates against a finding that summary judgment is premature at this juncture.

Turning to the merits of the motion, the court finds that State Farm has easily met its burden of establishing that the claimants violated a condition precedent to coverage by failing to appear for their duly noticed EUOs. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The evidence which State Farm relies upon to establish its EUO claims is properly in admissible form and establishes a violation of the No-Fault Insurance Regulations. In turn, defendants have failed to raise a triable issue of fact on this point.

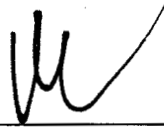
Accordingly, it is hereby



**ORDERED** that State Farm's motion is granted in its entirety. In light of this result, the court declines to consider the parties' remaining arguments.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

Settle judgment.

<u>11/25/2024</u> DATE		 LYNN R. KOTLER, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED
	<input checked="" type="checkbox"/> GRANTED	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED IN PART	
	<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> FIDUCIARY APPOINTMENT	