

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 23-01180

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA,
NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE
INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL
INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY,
NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY
COMPANY, VICTORIA FIRE & CASUALTY COMPANY AND
VICTORIA AUTOMOBILE INSURANCE COMPANY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SILVA ACUPUNCTURE, P.C., DEFENDANT-APPELLANT.

THE RYBAK FIRM, PLLC, BROOKLYN (MAKSIM LEYVI OF COUNSEL), FOR
DEFENDANT-APPELLANT.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN S. HOLLANDER OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order and judgment (one paper) of the
Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered
January 3, 2023. The amended order and judgment, inter alia, granted
the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the amended order and judgment so
appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking a judgment
declaring that they are not obligated to pay certain insurance claims
and alleging that defendant, by repeatedly failing to appear at
requested examinations under oath (EUOs), breached a material
condition precedent to coverage. Plaintiffs then moved for summary
judgment on the complaint. Supreme Court granted the motion and
issued a declaration in plaintiffs' favor. Defendant now appeals, and
we affirm.

We conclude upon our review of the record that plaintiffs met
their burden as movants and that defendant failed to raise a triable
issue of fact (*see Nationwide Affinity Ins. Co. of Am. v Jamaica
Wellness Med., P.C.*, 180 AD3d 1379, 1381 [4th Dept 2020]; *Nationwide
Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836,
1837 [4th Dept 2019]). Contrary to defendant's contention, plaintiffs
established that they had a "specific objective justification"

supporting the use of EUOs (11 NYCRR 65-3.5 [e]). In addition, defendant's " 'mere hope or speculation' that further discovery will lead to evidence sufficient to defeat [plaintiffs' motion] is insufficient to warrant denial thereof" (*Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP*, 87 AD3d 1343, 1345 [4th Dept 2011], *lv dismissed* 18 NY3d 975 [2012], *rearg denied* 19 NY3d 938 [2012]; see *Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1301 [4th Dept 2014]; see generally CPLR 3212 [f]).

Finally, defendant's contentions concerning the scheduling of EUOs are improperly raised for the first time on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).