

# ***Rizz Management Inc. v. State Farm Mut. Auto. Ins. Co.***

## **NASSAU COUNTY Insurance Law**

July 16, 2008

PLAINTIFF PROVIDER sought recovery of no-fault benefits for medical services allegedly provided to its assignor. Defendant insurer moved for summary judgment arguing the subject accident was staged, and not a covered event, alleging this issue was previously decided in two prior actions, thus plaintiff was collaterally estopped from contesting this defense. The court noted plaintiff was not a party to either action upon which defendant relied, nor was plaintiff's assignor a party in or in privity with a party in either action. Hence, it ruled neither of the prior determinations could bar this plaintiff from re-litigating the issue of a staged accident in the matter before the court. Therefore, as defendant failed to demonstrate that plaintiff was in privity with its assignor in the prior proceedings upon which defendant relied, and the court noted the prior proceedings resulted in orders entered on default, it concluded they would not be given preclusive effect in the instant matter, denying defendant's motion.

## **Rizz Management Inc. v. State Farm Mut. Auto. Ins. Co., 10700/07 Decided: June 17, 2008**

Judge Andrew M. Engel

NASSAU COUNTY  
District Court

Attorneys for plaintiff: Friedman, Harfenist, Langer & Kraut

Attorneys for defendant: McDonnell & Adels, PC

**Judge Engel**

[Click here to see Judicial Profile](#)

### **DECISION and ORDER**

The Plaintiff commenced this action to recover no-fault first party benefits for medical

services allegedly provided to its assignor between February 1, 2002 and April 18, 2002, in the total sum of \$200.00, which has not been paid. The action was commenced on or about March 22, 2007. Issue was joined on or about June 1, 2007. The Defendant now moves for summary judgment. The Plaintiff opposes the motion.

Summary judgment is a drastic remedy, [Sillman v. Twentieth Century-Fox Film Corporation](#), 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), which should not be granted where there is any doubt as to the existence of a triable issue of fact. [Rotuba Extruders, Inc. v. Ceppos](#), 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978) To prevail, the movant must first make a showing of entitlement to judgment, as a matter of law, [Bank of New York v. Granat](#), 197 A.D.2d 653, 602 N.Y.S.2d 942 (2nd Dept. 1993), tendering evidentiary proof in admissible form. [Friends of Animals, Inc. v. Associate Fur Manufacturers, Inc.](#), 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). It is only thereafter incumbent upon the party opposing summary judgment to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do." [Zuckerman v. City of New York](#), 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). A movant's failure to make such a showing, regardless of the sufficiency of opposing papers, mandates the denial of a summary judgment motion. [Winegrad v. New York University Medical Center](#), 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)

"It is the position of the defendant that summary judgment should be granted as the accident of January 11, 2002 which is the subject of this claim was an intentional fraudulent act and therefore an uncovered event." (Byrnes Affirmation 1/23/08, ¶2) The Defendant alleges, in the first instance, that this issue has already been decided in two (2) prior actions and that the Plaintiff is collaterally estopped from contesting this defense. In the alternative, the Defendant alleges that it has submitted sufficient evidence for the court to determine, as a matter of law, that the alleged accident of January 11, 2002 was no accident at all, but a staged event. Each of these arguments will be addressed separately.

In support of its collateral estoppel argument, the Defendant points to two (2) prior special proceedings seeking to permanently stay uninsured motorist arbitrations which had been filed by the driver and occupants of the vehicle involved in the alleged accident of January 11, 2002. One proceeding, *State Farm v. Canela and Caba*, was commenced in the Supreme Court of New York County; the other, *State Farm v. Tavares and Fernandez*, was commenced in the Supreme Court of Bronx County. Each of those applications was granted upon the default of the respondents therein. In addition thereto, the Defendant points to an order of the Civil Court of Queens County, in an action entitled *Support Billing I Management Co. a/s/o Jeffery Canela v. State Farm Mutual Insurance Co.*, which afforded preclusive effect to the Bronx County default and granted the Defendant summary judgment.

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." [Ryan v. New York Telephone Co.](#), 62 N.Y.2d

[494, 478 N.Y.S.2d 823 \(1984\)](#); See also: [Choi v. State, 74 N.Y.2d 933, 550 N.Y.S.2d 267 \(1989\)](#); [G. Rama Const. Enterprises, Inc. v. 80-82 Guernsey Street Associates, 43 A.D.3d 863, 841 N.Y.S.2d 669 \(2nd Dept. 2007\)](#) "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (see, [Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 441 N.Y.S.2d 49, 423 N.E.2d 807 \[1981\]](#))."  
[Buechel v. Bain, 97 N.Y.2d 295, 740 N.Y.S.2d 252 \(2001\)](#); See also: [Capital Telephone Co., Inc. v. Pattersonville Telephone Co., Inc., 56 N.Y.2d 11, 451 N.Y.S.2d 11 \(1982\)](#) There is no question, in the matter sub judice, that there is an identity of issue. In each of the actions relied upon by the Plaintiff, as in the matter before this court, the issue presented is whether or not the alleged accident of January 11, 2002 was a staged event. The questions confronting the Defendant, however, are whether or not this issue was previously decided against the Plaintiff herein, or one in privity with the Plaintiff, and whether or not this issue was necessarily decided in those prior actions.

It is not disputed that the Plaintiff was not a party to the prior actions upon which the Defendant relies. It is also undisputed the Plaintiff's assignor was neither a party nor in privity with a party in either *State Farm v. Canela and Caba* or *Support Billing I Management Co. a/s/o Jeffery Canela v. State Farm Mutual Insurance Co.* Clearly, neither of these determinations can bar this Plaintiff from re-litigating the issue of a staged accident in the matter before this court. While the Plaintiff's assignor was a party to the *State Farm v. Tavares and Fernandez* proceeding, the determination as to whether or not the Plaintiff was in privity with its assignor will depend upon when the assignment was made.

"In the assignor-assignee relationship, privity must have arisen after the event out of which the estoppel arises. Hence, an assignee is deemed to be in privity with the assignor where the action against the assignor is commenced before there has been an assignment."  
[Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 414 N.Y.S.2d 308 \(1979\)](#); See also: [A.B. Medical Services PLLC v. State Farm Mutual Auto Ins. Co., 11 Misc.3d 1077, 816 N.Y.S.2d 693 \(Civ. Ct. Kings Co. 2006\)](#) Given the fact that it is the Defendant's burden to demonstrate "that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party[.]" [Buechel v. Bain, supra.](#), See also: [Capital Telephone Co., Inc. v. Pattersonville Telephone Co., Inc., supra.](#), before collateral estoppel will apply, it is incumbent upon the Defendant to provide proof of when the assignment herein took place. The Defendant, however, has not done so. Moreover, it would appear from the dates of treatment, February 1, 2002 and April 18, 2002, that if there was in fact an assignment of benefits, it occurred prior to the commencement of the special proceedings upon which the Defendant relies, the petitions for which are dated December 2, 2002.

Even more problematic for the Defendant is the fact that the two determinations upon which it relies were rendered on the default of the respondents therein. Before collateral estoppel will apply, the issue in dispute must have been "actually litigated and determined" in the prior action. See: [Koch v. Consolidated Edison Company of New](#)

[York, Inc., 62 N.Y.2d 548, 479 N.Y.S.2d 163 \(1984\)](#), quoting Restatement of Judgments, Second §27; See also: [Scultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189, 491 N.Y.S.2d 90 \(1985\)](#) As the Court of Appeals has decisively stated in [Kaufman v. Eli Lilly and Company, 65 N.Y.2d 449, 492 N.Y.S.2d 584 \(1985\)](#), "If the issue has not been litigated, there is no identity of issues between the present action and the prior determination. An issue is not actually litigated if, . . . there has been a default . . . ." See also: [Chambers v. City of New York, 309 A.D.2d 81, 764 N.Y.S.2d 708 \(2nd Dept. 2003\)](#); [Zimmerman v. Tower Ins. Co. of New York, 13 A.D.3d 137, 788 N.Y.S.2d 309 \(1st Dept. 2004\)](#)

The Defendant having failed to demonstrate that the Plaintiff herein was in privity with its assignor in the prior proceedings upon which the Defendant relies, and the prior proceedings having resulted in orders entered on default, they shall not be given preclusive effect in the matter presently before this court. The question remains, however, whether or not the Defendant has demonstrated that the alleged accident of January 11, 2002 was staged, as a matter of law. This question must be answered in the negative.

At the outset it is noted that the papers submitted in support of the Defendant's motion are not in admissible form sufficient to support a summary judgment motion. The affidavit of Erin K. Lawler, the Defendant's investigator, makes clear that she does not have any personal knowledge and bases her opinion of fraud on a number of documents obtained, inter alia, from the Defendant and the Department of Motor Vehicles, along with conversations she allegedly had with members of the New York City Police Department and the insurance company of the alleged adverse vehicle. The statements allegedly made to Ms. Lawler by unidentified police officers and by an unidentified individual for the alleged adverse carrier are clearly hearsay statements and inadmissible. Similarly, a number of the documents upon which Ms. Lawler relies are not submitted to the court; and, no proper foundation is laid for those that are submitted. Simply annexing documents to the moving papers, without a proper evidentiary foundation is inadequate. [Higen Associates v. Serge Elevator Co., Inc., 190 A.D.2d 712, 593 N.Y.S.2d 319 \(2nd Dept. 1993\)](#)

The Defendant also relies upon what are represented to be a number of inconsistencies in recorded statements and examinations under oath allegedly taken from the Plaintiff's assignor and the other occupants of the vehicle in which he was a passenger. The court notes that these transcripts, particularly those of the examinations under oath, are of extremely poor quality and largely illegible. Unless the Defendant considers these pages to be nothing more than filler, it would behoove the Defendant, in the future, to provide the court with legible copies.

While the Defendant's attempt to submit the transcripts of these examinations is not barred by the hearsay rule, because the Defendant is not offering the statements contained therein for their truth, [Spensieri v. Lasky, 94 N.Y.2d 231, 701 N.Y.S.2d 689 \(1999\)](#); [Nucci v. Proper, 95 N.Y.2d 597, 721 N.Y.S.2d 593 \(2001\)](#); [Winant v. Carras, 208 A.D.2d 618, 617 N.Y.S.2d 487 \(2nd Dept. 1994\)](#) lv. den. [85 N.Y.2d 812, 631 N.Y.S.2d 288 \(1995\)](#), but for the exact opposite reason, to show their falsity and fraud, [Stern v.](#)

[Waldbaum, Inc.](#), 234 A.D.2d 534, 651 N.Y.S.2d 187 (2nd Dept. 1996); [DeLuca v. Ricci](#), 194 A.D.2d 457, 599 N.Y.S.2d 267 (1st Dept. 1993); [Dawson v. Raimon Realty Corporation](#), 303 A.D.2d 708, 758 N.Y.S.2d 100 (2nd Dept. 2003), the transcripts, nevertheless, are not properly before this court. These transcripts are neither signed nor verified, [Krupp v. Aetna Life & Casualty Co.](#), 103 A.D.2d 252, 479 N.Y.S.2d 992 (2nd Dept.1984); [Tancos v. Centaur Insurance Company](#), 133 A.D.2d 622, 519 N.Y.S.2d 730 (2nd Dept.1987); and, the Defendant offers no explanation as to why. [McDonald v. Mauss](#), 38 A.D.3d 727, 832 N.Y.S.2d 291 (2nd Dept. 2007) Additionally, the Defendant has not demonstrated any formal requirements for the taking of these individuals' alleged testimony sufficient to assure their accuracy. [Complete Orthopedic Supplies, Inc. v. State Farm Insurance Company](#), 16 Misc.3d 996, 838 N.Y.S.2d 861 (Civ.Ct. Queens Co. 2007) Notably absent from the transcripts submitted are certifications as to the transcripts' accuracy, executed by the Notary Public who purportedly took the testimony. cf. [Morchik v. Trinity School](#), 257 A.D.2d 534, 684 N.Y.S.2d 534 (1st Dept.1999); [Cox v. Jeffers](#), 222 A.D.2d 395, 634 N.Y.S.2d 519 (2nd Dept. 1995) Without such certification, the Defendant is asking the court to rely on transcripts which may be inaccurate. [Jacobs v. Herrera](#), 4 Misc.3d 1018(A), 798 N.Y.S.2d 345 (Dist.Ct. Nassau Co. 2004) Moreover, it has been recognized that while the transcripts of examinations under oath may be admissible to defeat a summary judgment motion, they "are nonetheless hearsay. As such, such statements are inadmissible at trial unless, for example, they are used for impeachment purposes upon cross-examination in the event such declarant/assignor testifies." [CPT Medical Service, P.C. v. Utica Mutual Insurance](#), 12 Misc.3d 237, 811 N.Y.S.2d 909 (Civ.Ct. Queens Co. 2006)

The above notwithstanding, even if the Defendant's supporting papers were in admissible form, while this documentation "demonstrate[s] to the court that [Defendant] had a 'founded belief' that the alleged accident was intentionally caused in order to survive a summary judgment motion by the plaintiff-provider . . . defendant-insurer's founded belief is usually not enough to obtain judgment on its own." [Universal Open MRI of the Bronx, P.C. v. State Farm Mut. Auto Ins.](#), 12 Misc.3d 1151, 819 N.Y.S.2d 852 (Civ. Ct. Kings Co. 2006) The papers presented by the Defendant raise a number of factual issues which are subject to the inferences to be drawn from the evidence presented, many of which involve an assessment of credibility, and all of which must be reserved for the trier of facts. [St. Luke's Roosevelt Hospital v. Allstate Insurance Company](#); 303 A.D.2d 743, 757 N.Y.S.2d 457 (2nd Dept. 2003); [Kolivas v. Kirchoff](#), 14 A.D.3d 493, 787 N.Y.S.2d 392 (2nd Dept. 2005); [Scott v. Long Island Power Authority](#), 294 A.D.2d 348, 741 N.Y.S.2d 708 (2nd Dept. 2002); [Lacagnino v. Gonzalez](#), 306 A.D.2d 250, 760 N.Y.S.2d 533 (2nd Dept. 2003); [Ocean Diagnostic Imaging P.C. v. State Farm Mutual Automobile Insurance Company](#), 9 Misc.3d 73, 803 N.Y.S.2d 333 (App. Term 2005)

Accordingly, for all of the foregoing reasons, the Defendant's motion is denied.

This constitutes the decision and order of this court.