

**Progressive Northeastern Ins. Co. v Arguelles Med.,
P.C.**

2009 NY Slip Op 32353(U)

October 9, 2009

Supreme Court, New York County

Docket Number: 600994/08

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 600994/2008
PROGRESSIVE NORTHEASTERN
 VS.
ARGUELLES MEDICAL
 SEQUENCE NUMBER : 001
 PARTIAL SUMMARY JUDGMENT

INDEX NO. 600994/08
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion is for declaratory judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
1
2
3

Cross-Motion: Yes No

Memo of Law M1

Upon the foregoing papers, It is ordered that this motion *is*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
 OCT 14 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10/9/09

[Signature]

 J.S.C.

MARCY S. FRIEDMAN
X NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

PROGRESSIVE NORTHEASTERN INSURANCE
CO, PROGRESSIVE PREFERRED INSURANCE
CO., PROGRESSIVE SPECIALTY INSURANCE
CO., PROGRESSIVE MAX INSURANCE CO. and
PROGRESSIVE DIRECT INSURANCE CO.,

Index No.:600994/08

Plaintiffs,

DECISION/ORDER

- against -

FILED
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NEW YORK

ARGUELLES MEDICAL, P.C.

Defendant.

x

In this declaratory judgment action, plaintiffs Progressive Northeastern Insurance Co., Progressive Preferred Insurance Co., Progressive Specialty Insurance Co., Progressive Max Insurance Co., and Progressive Direct Insurance Co. (collectively "Progressive") seek a judgment declaring that defendant Arguelles Medical, P.C. ("Arguelles") breached a condition of the Progressive Policy by not appearing for an examination under oath ("EUO"), and is therefore not entitled to the payment of assigned first-party no-fault benefits for certain claims, and may not seek to assert a lien against its assignors. Progressive moves for partial summary judgment on its declaratory judgment cause of action and to dismiss defendant's counterclaims for reimbursement of the no-fault benefits.

The relevant facts are as follows: Defendant was assigned no-fault motor vehicle insurance benefits from patients and submitted the claims to Progressive for reimbursement.

(Def.'s Opp., Ex. A.) By letter, dated October 5, 2007, Progressive requested that defendant submit to an Examination Under Oath ("EUO") on October 19, 2007, for verification of the claims for patients named Paul Bataille, Daison Bacchus, Jean Kernisant, Andre mere Milor, Tatiana Kernisant, Marie Pierre, Jules Medjine, Aprell Hobby, Margarita Fernandez, and Danny Hilaire. (Progressive's Motion, Ex. E.) Subsequently, by letter dated November 28, 2007, Progressive requested that defendant submit to an EUO on December 12, 2007, for verification of the claims for patients named Marcellyn Billy and Mattieu Maceno. (Id.) It is undisputed that defendant never appeared for an EUO on any of the scheduled dates and Progressive thereafter disclaimed coverage.¹

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Pursuant to the New York Administrative Code Section 65-1.1(d) (11 NYCRR), all minimum benefit insurance policies for motor vehicle personal injuries shall include a Mandatory Personal Injury Protection Endorsement ("Endorsement"), the form for which is

¹While Progressive's complaint alleges that it properly disclaimed coverage as to a total of 21 patients' claims, its motion seeks dismissal of only the claims for the twelve named patients, which it denied for defendant's failure to appear. (Aff. of Mark Puleo in Sup. of Progressive's Motion at 1-2.)

specified in the regulation. The subsection of the Endorsement entitled “Proof of Claim; Medical, Work Loss, and Other Necessary Expenses,” found within the “Conditions” section, states that any “eligible injured person or that person’s assignee or representative shall . . . (b) as may reasonably be required submit to examinations under oath by any person named by the [insurance] Company and subscribe the same.” (Emphasis added). Further, pursuant to 11 NYCRR § 65-3.5(e), which covers the claim procedure for these benefits, “[w]hen an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination.” (Emphasis added) (See also Unitrin Advantage Ins. Co. v Carothers, 17 Misc 3d 1121[a], *3 [Sup Ct, New York County 2007, Diamond, J.] [dismissing insurer’s claims that defendant breached the policy by failing to appear for an EUO, where insurer failed to allege any facts indicating an EUO was reasonably required or that it utilized any objective standards, and where “the record [was] devoid of any reasonable justification or explanation for Unitrin’s demands”].)

While Progressive raises a serious question as to whether defendant wilfully and deliberately failed to comply with the requests to submit to an EUO, the court need not reach that issue as Progressive fails to make a prima facie showing that an EUO was reasonably required. In support of its motion, Progressive submits the affidavit of Jennifer Michaels, a Personal Injury Protection Claims Investigator for Progressive, who reviewed the claim files for the patients who assigned their benefits to defendant. Ms. Michaels stated that, when Progressive receives a bill, it “review[s] the bill for certain indicators that an examination under oath may be appropriate.” (Aff. of Jennifer Michaels, ¶ 4.) Ms. Michaels further stated that Progressive had

[*5]
followed proper procedures in handling these claims, in scheduling EUOs, and that Progressive properly disclaimed coverage based on defendants failure to appear. (See *id.*, ¶¶ 19-85, 87.)

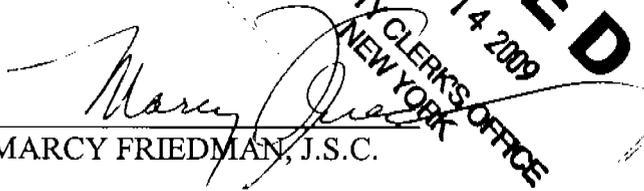
However, Ms. Michaels did not state that she personally handled the subject claims and made the determination, using objective standards, that an EUO was reasonably required for verification purposes. Moreover, while Ms. Michaels identified indicators for requesting an EUO,² she did not set forth any of the facts that Progressive considered in making its determination to request an EUO for the claims at issue. Nor did she provide any explanation for why Progressive requested the EUO in the instant matter. In addition, the record lacks any other evidence from anyone with personal knowledge as to Progressive's basis for concluding that an EUO of defendant was appropriate under the circumstances. On this record, therefore, Progressive does not make a prima facie showing that an EUO was reasonably required for verification of the twelve claims at issue, and thus fails to show that defendant breached the policy.

It is accordingly hereby ORDERED that the motion of plaintiffs Progressive Northeastern Insurance Co., Progressive Preferred Insurance Co., Progressive Specialty Insurance Co., Progressive Max Insurance Co., and Progressive Direct Insurance Co. for summary judgment is denied; and it is further

ORDERED that the parties shall appear in Part 57 of this Court on November 12, 2009 at 2:30 p.m. for a status conference.

This constitutes the decision and order of the court.

Dated: New York, New York
October 9, 2009



MARCY FRIEDMAN, J.S.C.

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NEW YORK

²According to Ms. Michaels, these indicators include "questionable standing to collect no-fault benefits, questionable medical treatment, questionable accidents and discrepancies between supplies or treatment billed and supplies or treatment rendered or received."