

Country-Wide Ins. Co. v Castro
2016 NY Slip Op 31505(U)
August 3, 2016
Supreme Court, New York County
Docket Number: 162542/14
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

-against-

DECISION/ORDER
Index No. 162542/14
Mot. Seq. No. 003

ELIZABETH CASTRO

("Eligible Injured Party Defendant"),

And

JEFFREY COHEN, M.D. & MARK KRAMER, M.D.,
P.C., and JAMES R. McGEE, D.C.,

Defendants.

-----X
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS PETITION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION IN SUPPORT	1, 2 (Exs. A-K)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE PETITION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Country-Wide Insurance Company moves, pursuant to CPLR 3212, for summary judgment against defendant James R. McGee, D.C., contending that eligible injured party defendant Elizabeth Castro, defendant McGee's assignor, failed to appear for an examination under oath ("EUO").¹ After a review of the motion papers, and after

¹Although the affirmation in support of the motion seeks relief as against all of the medical provider defendants, the notice of motion seeks relief solely as against defendant McGee. Plaintiff seeks a default judgment against defendants Jeffrey Cohen, M.D. and Mark Kramer, M.D. under motion sequence 002.

a review of the relevant statutes and case law, the motion, which is unopposed, is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND :

On or about December 19, 2014, plaintiff commenced the captioned no-fault insurance action by filing a summons and complaint with this Court. Ex. A. In its complaint, plaintiff alleged, inter alia, that it provided a policy of insurance to Castro (Policy No. RT7063058-13) (Ex. A, at par. 9); defendant Castro was injured an automobile accident on November 29, 2013 (Ex. A, at par. 11); that Castro made an assignment of benefits to medical providers, including, inter alia, Dr. McGee (Ex. A, at par. 14); and that Castro breached a condition precedent under the policy by failing to appear for independent medical examinations (“IMEs”)² (Ex. A, at pars. 27, 32). Dr. McGee joined issue by service of his answer dated April 13, 2015. Ex. C. Plaintiff now seeks a judgment declaring that, as a result of Castro’s failure to appear for the IMEs, Dr. McGee has no legal right to receive any no-fault reimbursement from plaintiff for the subject claim.

On or about July 3, 2014, plaintiff requested that Castro appear for IMEs on July 17, 2014. The letter was addressed to Castro and clearly indicated that her failure to appear could result in the denial of no-fault benefits. Ex. D. A copy of the letter was also mailed to Castro’s attorney. The letters were not returned to plaintiff. Ex. D.

When Castro failed to attend the IMEs on July 17, 2014, plaintiff sent her another notification, this time on July 22, 2014, scheduling IMEs for August 7, 2014. Ex. E. The July 22, 2014 letter was sent to the same address, was copied to Castro’s attorney, was not returned, and also

²Although the notice of motion alleges that Castro failed to appear for an EUO, the complaint and the remainder of the motion allege that she failed to appear for IMEs.

warned that a failure to appear could result in a loss of no-fault benefits. Ex. E. After Castro failed to appear for the IMEs on August 7, 2014, plaintiff issued a general denial on August 8, 2014 based on the said failure.

Plaintiff now moves for summary judgment seeking a declaration that it is entitled to a judgment declaring that it has no obligation to pay the bills it received from Dr. McGee arising from his treatment of Castro from January of 2014 through February of 2016 in the total amount of \$4,765.21. Ex. H. In support of its motion, plaintiff submits an attorney affirmation; the summons and complaint; the affidavit of service of the summons and complaint; Dr. McGee's answer; notices advising Castro to appear for her IMEs; the affidavit of Yesenia Fernandez of Country-Wide Management Services Medical Evaluations Unit, who generated IME appointment letters to Castro³; the affidavit of Fatima Zuhra of the Country-Wide Insurance Medical Evaluations Unit, who maintains a log of patients who fail to appear for IMEs, and who states that Castro failed to appear for scheduled IMEs on two occasions; bills and a verification form submitted to plaintiff by Dr. McGee; the affidavit of Jessica Mena-Sibrian, a no-fault litigation/arbitration supervisor for plaintiff, who states, inter alia, that a denial of claim form was mailed to Castro based on her failure to appear for IMEs; the denial of claim form; and a proposed judgment.

POSITIONS OF THE PLAINTIFF:

Plaintiff argues that it is entitled to summary judgment declaring that Castro has no right to bring a claim under the policy due to her failure to appear for IMEs and that, since she assigned her

³The Court notes that Fernandez also refers intermittently to an assignor named "Emma Bosch". Ex. F. This is evidently a typographical error.

claim to Dr. MCGee, he has no standing to bring a claim against plaintiff. It further asserts that it timely denied payment of Dr. McGee's bills.

LEGAL CONCLUSIONS:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If the movant fails to make this showing, the motion must be denied regardless of the sufficiency of the opposing papers. *Winegrad*, 64 NY2d at 853.

11 NYCRR 65-3.5 of New York's no-fault insurance regulations states, in relevant part, as follows:

a) Within 10 business days after receipt of the completed application for motor vehicle no-fault benefits' (NYS Form N-F 2) or other substantially equivalent written notice, the insurer shall forward, to the parties required to complete them, those prescribed verification forms it will require prior to payment of the initial claim.

b) Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms .

* * *

d) If the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms.

To satisfy its prima facie burden on summary judgment, an insurer must establish that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and the defendants' assignors did not appear (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). Even where an insurer establishes that the notices of the scheduled IMEs were properly mailed and defendants' assignor did not appear, on a motion for summary judgment, an insurer must show that IMEs are scheduled in compliance with Insurance Department Regulations (11 NYCRR) section 65-3.5(d) (*American Transit Ins. Co. v Vance*, 131 AD3d 849, 850 [1st Dept 2015]). The 30-day period within which the IME is supposed to be scheduled is measured from the date on which the plaintiff received the prescribed verification form from defendant (*American Transit Ins. Co. v Longevity Medical Supply, Inc.*, 131 AD3d 841, 842 [1st Dept 2016]).

Mapfre Ins. Co. of New York v Aubry, 2016 NY Misc LEXIS 2030, 2016 NY Slip Op 31017(U) (Sup Ct New York County 2016).

Here, although plaintiff established that the IME notices of the scheduled IMEs were properly mailed to Castro and that Castro did not appear for her IMEs (Exs. F and G), plaintiff failed to show that the scheduling of the IMEs complied with 11 NYCRR 65-3.5(d), which provides for a 30-day time period in which to conduct such examinations. *See American Transit Ins. Co. v Clark*, 131 AD3d 840 (1st Dept 2015). First, the affidavits submitted by plaintiff do not state when plaintiff received the verification from Castro. Additionally, although the earliest verification of treatment of Castro by Dr. McGee was stamped received by plaintiff on March 14, 2014 (Ex. H), plaintiff did not designate IMEs until July of 2014, thus violating the 30-day rule set forth in 11 NYCRR 65-3.5(d). Finally, the denial of claim form (form NF-10), is silent as to the date on which plaintiff received plaintiff's bill and as to any date on which final verification was requested, if ever. Ex. J.

Thus, this Court finds that plaintiff failed to make a prima facie showing that it complied

with the mandatory time requirements of insurance regulation 11 NYCRR 65-3.5 and denies plaintiff's motion for summary judgment.

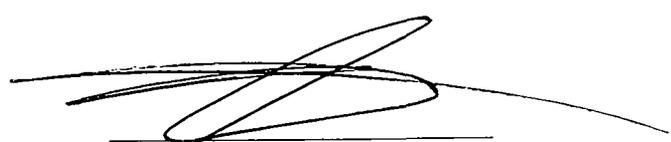
Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: August 3, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT