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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 104766/2009

MENOWITZ, HAROLD

VS.

NATIONAL UNION FIRE INSURANCE

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED
1
2, 3, 4
5

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

OCT 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/3/11

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 15

----------X

HAROLD MENOWITZ and LILA MENOWITZ,

Plaintiffs,

- against -

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, AIS AFFINITY INSURANCE AGENCY, BERKELY CARE, LTD., HARTFORD HOLIDAYS TRAVEL INC. and CRYSTAL CRUISES, INC.,

Defendants.

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Index No. 104766/09

DECISION and ORDER

Mot. Seq. 005

HON. EILEEN A. RAKOWER

Plaintiffs Harold Menowitz ("Harold") and Lila Menowitz ("Lila") (collectively "Plaintiffs") seek to recover the sum of $33,480.00 from Defendants pursuant to the cancellation provisions of a travel insurance policy issued to them as part of a cruise package purchased on July 9, 2007. Presently before the court is a motion by Plaintiffs for summary judgment pursuant to CPLR §3212; or alternatively, for a protective order pursuant to CPLR §3103 vacating and striking Defendants' April 26, 2011 notice to admit.

Plaintiffs state in their complaint that they purchased the cruise/vacation package through defendant Hartford Holidays Travel, Inc. ("Hartford") on the "Crystal Serenity" cruise, which was owned, operated, and managed by defendant Crystal Cruises, Inc. ("Crystal"). Plaintiffs paid $33,480.00. Included in the cruise package was a National Union Fire Insurance Company of Pittsburg, PA ("National") travel protection insurance policy issued by defendant National. Plaintiffs alternatively allege that the National Policy was issued by defendant Berkelycare, Ltd., AIS Affinity Insurance Agency, Crystal, and/or Hartford. Plaintiffs state that the National policy provided that, in the event of illness requiring cancellation of the cruise, they would receive a full refund. The cruise was scheduled to depart on

August 7, 2007.

Plaintiffs further state that, "subsequent to Plaintiffs' purchase of the aforesaid travel protection insurance ... [Lila] became ill prior to the August 7, 2007 scheduled departure date ... which required Plaintiffs to cancel their cruise." Plaintiffs alleged that, despite complying with any and all conditions of the policy, Defendants have failed to pay any part of the $33,480.00 which they claim they are entitled to under the National policy.

In support of their motion, Plaintiffs submit an attorney's affirmation. Annexed to the affirmation as exhibits are copies of the pleadings; the November 25, 2009 order (per Tolub, J.) denying Defendants' motion to dismiss; the court's April 2, 2010 denial of leave to renew/reargue; the National Policy; Berkelycare's February 19, 2008 denial of coverage letter; an affidavit from Lila; a brochure titled "Cruise Protection Program" ("the brochure"); and Defendants' request to admit.

According to Lila's affidavit, she was 79 and Harold was 93 at the time they purchased the cruise package. She states that she became "quite sick" in July 2007, "subsequent to [Plaintiffs'] purchase of the cruise and prior to [their] departure date. [She] had tremendous difficulty breathing and difficulty walking." She claims that Plaintiffs contacted an individual named Scott Kertes at Hartford and advised that they would not be able to go on the cruise due to her sickness. Plaintiffs "were advised that thankfully because [they] had purchased the travel protection insurance [their] entire trip cost in the sum of $33,480.00 would be reimbursed ...." However, their claim was subsequently denied. Plaintiffs contend that the denial letter from Berkely improperly relies on a definition of "sickness" that differs materially from the National policy, and instead is based upon the brochure's definition.

Defendants oppose the motion, and submit an attorney's affirmation, memorandum of law, and the affidavit of Debra Weinstein, Compliance Manager for Berkelycare. Annexed to the Weinstein affidavit is a Trip Cancellation Claim Form signed by Plaintiffs on October 22, 2007. On the form, Plaintiffs indicate that they cancelled the trip on July 25, 2007 due to Lila suffering from "illness" and "heart problems." Plaintiffs further listed the names of Lila's regular physician, and the doctor who treated Lila for the ailments which caused Plaintiffs to cancel. Defendants further provide correspondence sent by Berkelycare to the doctors mentioned on the claim form seeking Lila's medical records from May 9, 2007 through August 7, 2007

(which, according to the letters, were accompanied by authorizations for the release of the records sought). Defendants also submit letters sent from Berkelycare to Plaintiffs stating that they have not received any medical records from Lila's doctors for the relevant time period.

In the February 19, 2008 denial-of-coverage letter, Berkelycare states that "[t]he plan defines sickness as an illness or disease which is diagnosed or treated by a physician after the effective date and while you are covered under his plan."

On or around April 19, 2008, Harold sent a letter to Berkelycare, which stated the following:

> [Lila] was hospitalized on 6/21/2007. She was cleared but still did not feel great but on her two visits to Dr. Zullo on 6/29/2007 and 7/6/2007 he advised her that she was okay.
>
> Thereafter on 7/9/2007 we booked our trip. However after booking [Lila] continued to feel ill. We therefore cancelled our trip on 7/25/2007. As her condition worsened she decided to see a different doctor and in August 2007 she saw Dr. Orsher [one of the doctors listed on the claim form]. Dr. Orsher upon seeing her condition immediately sent her to the hospital for the placement of 3 stents.

By letter dated April 30, 2008, Berkelycare reaffirmed its denial of coverage, noting that "[f]rom the information provided, it appears there were no office visits with a physician confirming a new condition occurring between July 9, 2007 and August 7, 2007."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d

255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

As noted above, Plaintiffs contend that their claim was improperly denied based upon the definition of "sickness" contained in the brochure, which defines the term as "an illness or disease which is diagnosed or treated by a Physician after the effective date of coverage and while You are covered under this plan."

Under the National policy, "sickness" is defined as "an illness or disease which is diagnosed or treated by a physician." In addition, the policy's cancellation provisions provide, *inter alia*, as follows:

> We will pay benefits if the Insured is prevented from taking the Trip due to:
>
> (a) Sickness ... occurring prior to the Contracted Departure Date, of the
> (1) Insured; [or]
> (2) Traveling companion ....
>
> 'Prevented from taking the Trip' means:
>
> (i) With regard to Sickness ... of the Insured or Traveling Companion, a Physician has recommended that due to the severity of the Insured's or Traveling Companion's condition it is Medically Necessary that the Insured or Traveling Companion cancel the Trip....

Review of the National policy demonstrates that denial of coverage is appropriate where an insured cancelling his or her trip on the grounds of sickness fails to obtain medical treatment or a diagnosis during the period of coverage (*i.e.*, subsequent to purchasing the insurance and prior to the trip's commencement). While Berkelycare's denial letter cites the language of the brochure and not the National policy, that language accurately describes the relevant conditions of the National policy. Accordingly, inasmuch as it is unclear on the record whether Lila obtained

medical treatment or diagnosis in connection with the conditions prompting cancellation of the trip during the period of coverage, the court cannot grant summary judgment in Plaintiffs' favor.

As for Defendants' notice to admit, the First Department has observed that

> the purpose of a notice to admit is 'to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices *(Nader v General Motors Corp., 53 Misc 2d 515*, affd *29 AD2d 632*; *Johantgen v Hobart Mfg. Co., 64 AD2d 858*).' *(Berg v Flower Fifth Ave. Hosp., 102 AD2d 760.*) Clearly, the underlying purpose of such a notice 'is to eliminate from contention factual matters which are easily provable and about which there can be no controversy * * * to expedite the trial by eliminating as issues that as to which there should be no dispute *(Two Clinton Sq. Corp. v Friedler, 91 AD2d 1195*).' *(Berg v Flower Fifth Ave. Hosp., supra, p 760.*) Thus, a notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts *(Villa v New York City Hous. Auth., 107 AD2d 619, 620*; *Felice v St. Agnes Hosp., 65 AD2d 388, 395-396)*, which can only be resolved after a full trial. As stated, it may not be employed as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. *(Falkowitz v Kings Highway Hosp., 43 AD2d 696.*)

(*Taylor v. Blair*, 116 A.D.2d 204, 205-06 [1st Dept. 1986]).

The notice to admit herein seeks admissions that Lila failed to treat with a physician and/or obtain a medical diagnosis for the condition underlying her cancellation during the period of coverage. As these issues bear upon material issues in this matter that potentially dispose of the matter, such inquiries must be made through traditional disclosure devices such interrogatories or deposition testimony (*see id.; see also Askenazi v. City of New York*, 239 A.D.2d 186 [1st Dept. 1997]).

Wherefore it is hereby

ORDERED that Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's motion for a protective order is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 3, 2011

EILEEN A. RAKOWER, J.S.C.