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

PRESENT : DONNA M. MILLS PART 58
Justice

AMERICAN TRANSIT INSURANCE COMPANY,

INDEX NO. 100566/12

Plaintiff,

MOTION DATE

-v-

MOTION SEQ. NO. 002

DANIEL JOHNSON, ACTIVE CARE MEDICAL SUPPLY CORP., et al.,

Defendants.

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for a Default Judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits Exhibits	2
Replying Affidavits	3

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion for a default judgment in favor of the plaintiff and against the defendants, Daniel Johnson, BMB Medical, P.C., DovPhil Anesthesiology Group. PLLC, Five Boro Psychological and Licensed Master Social Work Services, PLLC, Forest Hills Orthopedic Group, P.C., golden Star Medical Diagnostics, P.C., Great Medical Services, P.C., New Millennium Medical Imaging, P.C., New Way Massage Therapy, P.C., New York Vein Center, LLC, Sheila Soman, M.D., P.C., SML Acupuncture, P.C., Star Medical & Diagnostic, PLLC Sunlight Medical Care, P.C., Ultimate Care Chiropractic, P.C., is granted.

All of the aforementioned defendants, have failed to answer the summons and complaint. As such, Plaintiff is entitled to a declaratory judgment in its favor that it is not obligated to honor or pay claims or future claims for reimbursement submitted by the providers named above, as assignees of Daniel Johnson for the motor vehicle accident that occurred on April 27, 2011.

Plaintiff seeks an order granting it summary judgment, pursuant to CPLR § 3212(b), against Active Care Medical Supply Corporation ("Active Care"), Queens Hospital Center, ordering that these defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on April 27, 2011, since Daniel Johnson failed to attend properly scheduled Examinations Under Oath ("EUO's") .

In its complaint, Plaintiff alleges that the incident that gave rise to the claim for payment for medical services that took place on April 27, 2011, is not an insurable event because the claimant, Daniel Johnson, allegedly failed to attend EUO'S. Plaintiff contends that on July 12, 2011 it sent Daniel Johnson at the address stated on the application for benefits a letter requesting that he attend an EUO on August 4, 2011, at the location set forth on the EUO scheduling letter. It is undisputed that Daniel Johnson failed to attend the duly scheduled EUO.

Plaintiff further contends that On August 12, 2011 it sent Daniel Johnson at the address stated on the application for benefits a letter requesting that he attend an EUO on Sept. 8, 2011, at the location set forth on the EUO scheduling letter. Daniel Johnson failed to attend the duly scheduled EUO once again and on Sept. 14, 2011, the claim was denied based upon the Claimant's failure to attend the duly scheduled EUO's.

In opposition to the motion for summary judgment counsel for Active Care

argues that the defense in question, being an issue of noncompliance with a policy condition, is not a defense that survives the failure to issue a timely denial of claim form.

A no-fault insurance carrier may request an eligible injured person or that person's assignee to submit to an examination under oath as may reasonably be required. 11 NYCRR 65–1.1. The examination under oath shall be conducted at time and place and time reasonably convenient for the applicant. 11 NYCRR 65–3.5(e). A request for an examination under oath "... must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination." 11 NYCRR 65–3.5(e). Appearance at a properly demanded EUO is a condition precedent to an insurance carrier's liability to pay no-fault benefits. Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co., 27 Misc.3d 141(A), 2010 WL 2293067 (App. Term 2nd, 11th and 13th Jud. Dists. 2010).

The plaintiff-insurer made a prima facie showing of entitlement to summary judgment dismissing the action for first-party no-fault benefits by establishing that it timely and properly mailed the notices for EUOs to the insured Daniel Johnson, and that he failed to appear (see Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 [2011]; cf. Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 AD3d 720, 721 [2006]). In opposition, plaintiff did not specifically deny the assignor's nonappearance or otherwise raise a triable issue with respect thereto, or as to the mailing or reasonableness of the underlying notices (see Unitrin at 560).

In the decision of Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy,

PLLC, 82 AD3d 559, 560 [2011), the First Department explicitly found that "the failure to appear for IMEs requested by an insurer ... is a breach of a condition precedent to coverage under the No–Fault policy, and therefore fits squarely within the exception to the preclusion doctrine (citing Central General Hosp. v Chubb, 90 N.Y.2d 195, 659 N.Y.S.2d 246, 681 N.E.2d 413 (1997)(defense that injured person's condition and hospitalization were unrelated to the accident was non precludable). The First Department justified its finding that an IME no show was a non-precludable defense on the ground that a "breach of a condition precedent to coverage voids the policy ab initio." Thus, the failure to appear for an IME cancels the contract as if there was no coverage in the first instance and the insurer has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely. Id.

In light of the afore-mentioned precedent, it is clear that the claimant's failure to comply with a condition precedent to coverage voids the contract ab initio and plaintiff is not obligated to honor or pay claims or future claims for reimbursement, regardless of whether it issued denials beyond the 30 day period.

Accordingly it is

ORDERED that the motion of plaintiff for a default judgment seeking a declaration that it is not obligated to honor or pay claims or future claims for reimbursement submitted by the providers named above, as assignees of Daniel Johnson for the motor vehicle accident that occurred on April 27, 2011, is granted; and it is further

ORDERED that motion of plaintiff for summary judgement seeking a declaration that it is not obligated to honor or pay claims or future claims for reimbursement

submitted by Active Care Medical Supply Corporation and Queens Hospital Center, as assignees of Daniel Johnson for the motor vehicle accident that occurred on April 27, 2011, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

Dated: 7/25/12

DONNA M. MILLS, J.S.C.

Check one: √ FINAL DISPOSITION NON-FINAL DISPOSITION