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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 111117/2011
AMERICAN TRANSIT INSURANCE
vs.
SAMUEL DENIS, ET AL.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies plaintiff's motion for summary judgment against defendant SP Orthotic Medical + Surgical Supply, Inc., pursuant to the accompanying decision. C.P.L.R. § 3212(b).

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

Dated: 2/7/14

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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AMERICAN TRANSIT INSURANCE COMPANY, Index No. 111117/2011

Plaintiff

- against - DECISION AND ORDER

SAMUEL DENIS, BEDFORD MEDICAL CARE, P.C., FEMA MEDICAL SUPPLY INC., MAGIC TOUCH PHYSICAL THERAPY, P.C., SP ORTHOTIC SURGICAL & MEDICAL SUPPLY, INC., and SUPERIOR HEALTH CHIROPRACTIC PC,

Defendants

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APPEARANCES:

For Plaintiff
Giovanna Tuttolomondo Esq.
Law Offices of James F. Sullivan, P.C.
52 Duane Street, New York, NY 10007

For Defendant SP Orthotic Medical & Surgical Supply, Inc.
Oleg Rybak Esq.
1810 Voorhies Avenue, Brooklyn, NY 11235

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves for summary judgment against defendant SP Orthotic Medical & Surgical Supply, Inc. (SP), C.P.L.R. § 3212(b), declaring that plaintiff owes no duty to compensate this defendant pursuant to New York Insurance Law § 5103 for medical expenses incurred from a collision June 10, 2009, involving defendant Denis and a motor vehicle for which plaintiff issued an insurance policy. C.P.L.R. § 3001. For the reasons explained below, the court denies plaintiff's motion.

Plaintiff bases its motion on Denis's nonappearance for a medical examination, to which plaintiff is entitled under the policy. See 11 N.Y.C.R.R. § 65-1.1. The policy's mandatory personal injury protection provisions condition the insurer's payment of a claim on "full compliance with the terms of this coverage." Id. Upon the insurer's request: "The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require." Id.

As plaintiff's claim representative and supervisor handling Denis's application, Cheryl Glaze, attests, defendant SP submitted claims that Denis assigned to it for reimbursement of medical expenses incurred from the June 2009 collision. Aff. of Giovanna Tuttolomondo Ex. E ¶ 17. This declaratory judgment action thus presents an actual controversy regarding Denis's noncompliance with the terms of coverage that would entitle plaintiff to deny or disclaim coverage of SP's claims. C.P.L.R. § 3001; Megibow v. Condominium Bd. of Kips Bay Towers Condominium, 38 A.D.3d 265, 266 (1st Dep't 2007); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253 (1st Dep't 2006); United States Fire Ins. Co. v. American Home Assur. Co., 19 A.D.3d 191, 192 (1st Dep't 2005).

II. PLAINTIFF'S SCHEDULING OF DENIS'S MEDICAL EXAMINATION

A. The Entity That Scheduled Denis's Medical Examination

The parties do not dispute that Independent Physical Exam Referrals, Inc., a corporation separate from plaintiff, scheduled

Denis's medical examination. Where a corporation, without the required licensure, hires physicians to conduct medical examinations and shares fees with those physicians, that separate entity engages in the illegal practice of medicine in conducting the medical examinations. N.Y. Educ. Law § 6512(1); Accident Claims Determination Corp. v. Durst, 224 A.D.2d 343 (1st Dep't 1996); Glassman v. ProHealth Ambulatory Surgery Ctr., Inc., 23 A.D.3d 522, 523 (2d Dep't 2005). Defendant SP seeks to defeat plaintiff's motion for summary judgment on the theory that, if plaintiff insurer contracted with such an illegal enterprise to perform medical examinations for plaintiff, it would preclude the insurer's reliance on those illegal examinations. Setting aside whether such a defense, which would impute an offense by plaintiff's independent contractor to plaintiff, ever may be viable, SP has not raised even a suggestion that Independent Physical Exam Referrals performed any service for plaintiff other than scheduling medical examinations and actually was involved in and derived revenue from the examinations themselves.

Without showing even that much, SP presents no basis to entitle SP to disclosure concerning Independent Physical Exam Referrals' business practices, to support a defense that the scheduled examination plaintiff claims Denis failed to comply with was illegal in the first instance. C.P.L.R. § 3212(f); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Griffin v. Pennoyer, 49

A.D.3d 341 (1st Dep't 2008); Global Mins. & Metal Corp. v. Holme, 35 A.D.3d 93, 103 (1st Dep't 2006). SP simply has not raised the "doubt" regarding the legality of the examination scheduled for Denis that would entitle SP to disclosure to support a defense of illegality before the court determines whether to grant plaintiff summary judgment. Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 74 n.3 (2006). See C.P.L.R. § 3212(f); W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 531 (1st Dep't 2012); Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010); MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010); Brown v. Bauman, 42 A.D.3d 390, 393 (1st Dep't 2007).

B. The Timeframe for Scheduling Denis's Medical Examination

Plaintiff also must request a medical examination according to the procedures and timeframes required by the applicable regulations under Insurance Law Article 51. Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556, 562-63 (2008); Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 317-18 (2007); Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 560 (1st Dep't 2011). Upon receipt of a prescribed verification form to establish a claim, plaintiff was required to request "any additional verification" needed to establish the claim within 15 days. 11 N.Y.C.R.R. § 65-3.5(b); Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 563. "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." 11 N.Y.C.R.R. § 65-3.5(d). When plaintiff sought additional verification, the 30 days within which plaintiff was to pay or deny the claim after receipt of the original verification was tolled until plaintiff received the information requested. 11 N.Y.C.R.R. § 65-3.8(a)(1); Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 563; Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 317.

11 N.Y.C.R.R. § 65-3.5(d) unambiguously defines "a medical examination" as "additional verification required by the insurer." Although plaintiff's attorney, without personal knowledge of this claim, points out that Denis's medical examination was not necessarily requested in response to a claim by a specific medical care provider such as SP, plaintiff does not present any admissible evidence of when plaintiff received any provider's claim or Denis's application. Coleman v. Maclas, 61 A.D.3d 569 (1st Dep't 2009); 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d 288, 289 (1st Dep't 2005); Figueroa v. Luna, 281 A.D.2d 204, 205 (1st Dep't 2001). See Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Beloff v. Gerges, 80 A.D.3d 460, 461 (1st Dep't 2011); Dorsey v. Les Sans Culottes, 43 A.D.3d 261 (1st Dep't 2007); Westchester Med. Ctr. v. Countrywide Ins. Co., 45 A.D.3d 676, 677 (2d Dep't 2007). Glaze attests only that

plaintiff received Denis's application dated June 26, 2009, not when plaintiff received the application, nor when plaintiff received any medical care provider's claim. Tuttolomondo Aff. Ex. E ¶ 12. The attached application, which she neither identifies nor authenticates, bears a stamp "RECEIVED JUL 2 2009." Id. Ex. F at 3. See IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Coleman v. Maclas, 61 A.D.3d 569; Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009). Even using this later date, however, Denis's medical examination was scheduled to be held August 10, 2009, more than "30 calendar days from the date of receipt of the prescribed verification forms," at least the only form for which the record reveals a date of receipt. 11 N.Y.C.R.R. § 65-3.5(d).

Although any one of Denis's medical care providers may have submitted a prescribed verification form to establish a claim well within 30 days before August 10, 2009, or afterward, plaintiff nowhere provides that evidence. Sound Shore Med. Ctr. v. New York Cent. Mut. Fire Ins. Co., 106 A.D.3d 157, 165 (2d Dep't 2013). Therefore plaintiff may not rely on Denis's noncompliance with an examination that is not shown to have been scheduled in compliance with the applicable rules. Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 562-63; Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 317-18; Unitrin Advantage Ins. Co. v. Bayshore Physical

Therapy, PLLC, 82 A.D.3d at 560.

III. PLAINTIFF'S DENIAL OF SP'S CLAIM

Assuming plaintiff did receive a claim within 30 days before Denis's medical examination was scheduled or afterward, the pending examination then tolled the 30 days for plaintiff to deny claims and allowed it to deny SP's claim retroactively when Denis failed to comply with the coverage requirement to submit to the examination. 11 N.Y.C.R.R. § 65-3.8(a)(1) and (c); Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 563; Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 317; American Tr. Ins. Co. v. Marte-Rosario, 111 A.D.3d 442 (1st Dep't 2013); Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d at 560. Nevertheless, once Denis failed to comply, plaintiff fails to show that it ever denied coverage or disclaimed liability for SP's claim.

A. The Consequences of a Breach of a Policy Condition

The only instances when an insurer that fails ever to issue a denial or disclaimer later may raise a defense to coverage is where the defense is an absence of coverage, so that "requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed." Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 563; Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 318; A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d 53, 66 (2d Dep't 2012). See Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d 195, 200-201 (1997); Sound Shore Med. Ctr. v. New

York Cent. Mut. Fire Ins. Co., 106 A.D.3d at 162-63. Such an instance would be where, for example, the policy under which SP or Denis was claiming did not in fact insure Denis or the vehicle or incident that caused his injury. Here, plaintiff does not establish the absence of an insured vehicle or of its involvement in a collision or with Denis. Neither the complaint nor any affidavit denies that Denis was injured in a motor vehicle collision involving a vehicle insured by plaintiff, for which he received treatment from SP. E.g., Tuttolomondo Aff. Exs. A ¶¶ 8-9, 15 and E ¶ 11. Thus "coverage legitimately came into existence," even though plaintiff may have requested the examination to verify the causal relationship between the collision and claimed injury or between the claimed injury and claimed treatment. Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 565; A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 66.

An "insurer's denial based on lack of coverage, such as where no contractual relationship exists with respect to the subject vehicle and incident," that is never subject to preclusion is distinct from an insurer's denial of a claim based both on "a policy exclusion" and on "a breach of a policy condition": precisely what plaintiff alleges here. Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co., 90 N.Y.2d 274, 283 (1997). See Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 200. Plaintiff would limit the requirement for a denial to when it is on the former basis, but a breach of a

policy condition falls in the same category for purposes of preclusion and not in the category reserved for a total absence of coverage. While an insured's compliance with a duly scheduled medical examination may be "a condition precedent to coverage," meeting that condition is not "an element of coverage." Morrisania Towers Hous. Co. LP v. Lexington Ins. Co., 104 A.D.3d 591, 592 (1st Dep't 2013). Noncompliance does not take the claim by the insured or his assignee outside the scope of his policy or transport it to an incident that is not a covered collision or a vehicle that is not a covered vehicle. Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 201; Mercury Cas. Co. v. Encare, Inc., 90 A.D.3d 475 (1st Dep't 2011).

Notably, 11 N.Y.C.R.R. § 65-3.8 recognizes this distinction. Once "an insurer has determined that benefits are not payable": "Failure by an insurer to notify the applicant of its denial of the claim" within the prescribed 10 business days after the determination "shall not preclude the insurer from asserting a defense to the claim" when based on narrowly specified reasons. 11 N.Y.C.R.R. § 65-3.8(e). They are limited to when no coverage was in place on the date of the collision, 11 N.Y.C.R.R. § 65-3.8(e)(1), and when the circumstances of the collision are outside Insurance Law Article 51's scope. N.Y. Ins. Law § 5103(b); 11 N.Y.C.R.R. § 65-3.8(e)(2) and (3).

"The failure to attend duly scheduled medical exams voids the policy ab initio," meaning a policy was in place to void, and meaning a claim under the policy may be denied retroactively to

when it was submitted, even to when the medical expenses were incurred, without the insurer being precluded by the 30 days for denial of claims. American Tr. Ins. Co. v. Lucas, 111 A.D.3d 423, 424 (1st Dep't 2013). See 11 N.Y.C.R.R. § 65-3.8(a)(1); Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d at 560. Therefore, when SP's assignor Denis "failed to appear for the requested medical exams, plaintiff had the right to deny all claims retroactively to the date of loss, regardless whether the denials were timely issued." American Tr. Ins. Co. v. Lucas, 111 A.D.3d at 424. See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d at 560. "There is no requirement to demonstrate that the claims were timely disclaimed," but they must be disclaimed or denied for plaintiff to maintain a defense to coverage. American Tr. Ins. Co. v. Lucas, 111 A.D.3d at 424-25. See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d at 560; A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 65; Westchester Med. Ctr. v. Countrywide Ins. Co., 45 A.D.3d at 677. In sum, plaintiff is not precluded from defending against coverage based on Denis's nonappearance for the examinations because plaintiff failed to deny coverage timely, but plaintiff may be precluded if it failed to deny coverage at all, because the latter failure may constitute a waiver of that particular defense. E.g., Morrisania Towers Hous. Co. LP v. Lexington Ins. Co., 104 A.D.3d at 592; Estee Lauder, Inc. v. OneBeacon Ins. Group, L.L.C., 62 A.D.3d 33, 35 (1st Dep't 2009); A.M. Med.

Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 65, 70; Westchester Med. Ctr. v. Countrywide Ins. Co., 45 A.D.3d at 677.

B. The Consequences of a Failure to Disclaim or Deny Coverage Based on a Breach of a Policy Condition

This distinction is critical, because plaintiff may waive an insured's compliance with a condition precedent and thus waive a coverage defense to which plaintiff was entitled. Morrisania Towers Hous. Co. LP v. Lexington Ins. Co., 104 A.D.3d at 592. See American Tr. Ins. Co. v. Lucas, 111 A.D.3d at 425. In fact, absent plaintiff's showing that plaintiff ever denied SP's claim, such a waiver may be inferred here, assuming Denis's medical examination was duly scheduled in compliance with 11 N.Y.C.R.R. § 65-3.5(d) in the first instance. Noncompliance with a condition precedent entitled plaintiff to deny SP's claim retroactively to when SP submitted the claim, even if well more than 30 days previously, but did not entitle plaintiff to ignore SP's claim completely. American Tr. Ins. Co. v. Marte-Rosario, 111 A.D.3d 442; Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d at 560. Once plaintiff knew that Denis, after two opportunities August 10 and 24, 2009, had not complied with the condition precedent, that basis for denying SP's claim was readily apparent to plaintiff and did not entitle it to withhold a denial indefinitely and to wait over two years to raise the basis for denial only in litigation. Nyack Hosp. v. Allstate Ins. Co., ___ A.D.3d ___, 2014 WL 444229 (2d Dep't Feb. 5, 2014); New York Hosp. Med. Ctr. of Queens v. QBE Ins. Corp., ___ A.D.3d ___, 2014 WL 444229 (2d Dep't Feb. 5, 2014); A.M. Med. Servs.,

P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 69-70.

Nonetheless, plaintiff has not shown that, before serving its complaint in this action, plaintiff ever denied SP's claim. Neither the complaint, nor Glaze, nor any affidavit or documentary evidence sets forth that, at any time since Denis's second nonappearance August 24, 2009, for his scheduled examination, plaintiff has denied SP's claim, even though Glaze does refer to "claims representatives . . . who issued denials in the instant matter." Tuttolomondo Aff. Ex. E ¶ 3. Plaintiff has offered no explanation for this silence. Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 564; Morrisania Towers Hous. Co. LP v. Lexington Ins. Co., 104 A.D.3d at 592; A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 69. No evidence indicates it was not reasonably feasible to deny coverage based on Denis's nonappearance for the examinations between Denis's second nonappearance August 24, 2009, and service of the complaint on SP November 9, 2011. See, e.g., Estee Lauder, Inc. v. OneBeacon Ins. Group, L.L.C., 62 A.D.3d at 35; A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 69. The explanation for plaintiff's silence as readily inferable as any is that plaintiff waived Denis's appearance for a medical examination and hence the defense based on his nonappearance.

IV. CONCLUSION

Plaintiff has failed to show its compliance with the governing regulation, 11 N.Y.C.R.R. § 65-3.5(d), in scheduling

the medical examination with which plaintiff claims Denis failed to comply, 11 N.Y.C.R.R. § 65-1.1, or that it ever denied coverage of a claim by defendant SP Orthotic Medical & Surgical Supply, Inc., let alone within any reasonable time. Absent such a showing, plaintiff has failed at this stage to present facts establishing its prima facie claim, C.P.L.R. § 3212(b); JMD Holding Corp. v. Congress Fin. Corp, 4 N.Y.3d 373, 384 (2005); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d 352 (1st Dep't 2006), and thus a basis for a summary declaratory judgment in plaintiff's favor as sought against defendant SP Orthotic Medical & Surgical Supply. Ahead Realty LLC v. India House, Inc., 92 A.D.3d 424, 425 (1st Dep't 2012); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 100-101 (1st Dep't 2009); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d at 254. See 319 McKibben St. Corp. v. General Star Natl. Ins. Co., 245 A.D.2d 26, 29-30 (1st Dep't 1997). Therefore the court denies plaintiff's motion for a summary declaratory judgment. C.P.L.R. §§ 3001, 3212(b). This decision constitutes the court's order.

DATED: February 7, 2014

LUCY BILLINGS, J.S.C.