

American Tr. Ins. Co. v Charles

2014 NY Slip Op 30406(U)

February 19, 2014

Supreme Court, New York County

Docket Number: 151599/2012

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 151599/2012
AMERICAN TRANSIT INSURANCE
vs
CHARLES, STEVEN
Sequence Number : 003
SUMMARY JUDGEMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

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

decided per the memorandum decision dated 2/19/14
which disposes of motion sequence(s) no.

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

Dated: 2/19/14

HON. SALIANN SCARPULLA, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No.: 151599/2012
Submission Date: 11/20/13

- against-

STEVEN CHARLES, ARNICA ACUPUNCTURE, P.C.,
CHARLES DENG ACUPUNCTURE, P.C., COMPAS
MEDICAL, P.C., CORTLAND MEDICAL SUPPLY,
INC., DELTA DIAGNOSTIC RADIOLOGY, P.C.,
EMPIRE STATE MEDICAL SUPPLIES, INC., GREAT
HEALTH CARE CHIROPRACTIC, P.C., MSB
MEDICAL OF NEW YORK, P.C., NEW WAY MEDICAL
SUPPLY, CORP., T & J CHIROPRACTIC, P.C.,
UNIVERSAL REHAB PT, P.C. and YOMAYRA
RODRIGUEZ, MT

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:
Law Offices of James F. Sullivan, P.C.
52 Duane Street, 7th Floor
New York, NY 10007

For Defendants:
The Ryback Firm PLLC
1810 Voorhies Avenue
Third Floor, Suite 7
Brooklyn, NY 11235

Papers considered in review of this motion for summary judgment (motion seq. no. 003):

Notice of Motion	1
Aff in Opp	2
Reply	3

HON. SALIANN SCARPULLA, J.:

In this action seeking a judgment declaring no entitlement to no-fault benefits,
plaintiff American Transit Insurance Company (“American”) moves for summary
judgment on its complaint asserted against defendants Charles Deng Acupuncture, P.C.,

Compas Medical P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., and New Way Medical Supply, Corp (“the Ryback defendants”).

American issued an automobile insurance policy to C & R Limousine MA under policy number CAP 604091 (“the policy”). On July 16, 2010, defendant Steven Charles (“Charles”) was allegedly involved in a motor vehicle accident and sought coverage under the policy. As a result of his injuries, Charles sought medical treatment at Arnica Acupuncture, P.C., Charles Deng Acupuncture, P.C., Compas Medical, P.C., Cortland Medical Supply, Inc., Delta Diagnostic Radiology, P.C., Empire State Medical Supplies, Inc., Great Health Care Chiropractic, P.C., MSB Medical of New York, P.C., New Way Medical Supply Corp., T & J Chiropractic, P.C., Universal Rehab PT, P.C., and Yomayra Rodriguez, MT (collectively referred to as “the medical provider defendants”). Charles completed an application for no-fault benefits under claim number 759319-04. He allegedly assigned the right to pursue reimbursement from American under New York no-fault laws to the medical providers defendants.

On April 5, 2013, American filed a summons and complaint. American seeks a judgment declaring that Charles was not an eligible injured person entitled to no-fault benefits under the policy because he failed to appear for independent medical examinations (“IMEs”) scheduled for September 1, 2010 and September 15, 2010, and an examination under oath (“EUO”) scheduled for December 13, 2011 and January 20, 2012.

American further seeks a declaration that the medical provider defendants are not entitled to first-party no-fault benefits.

Charles Deng Acupuncture, P.C., Compas Medical, P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., and New Way Medical Supply Corp. answered the complaint.

Steven Charles, Arnica Acupuncture, P.C., Cortland Medical Supply, Inc., Empire State Medical Supplies, Inc., MSB Medical of New York P.C., T & J Chiropractic, P.C., Universal Rehab PT, P.C., and Yomayra Rodriguez, MT (“the defaulting defendants”) did not answer the complaint. On April 29, 2013, I granted a default judgment against the defaulting defendants.

American now moves for summary judgment on its complaint against Charles Deng Acupuncture, P.C., Compas Medical, P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., and New Way Medical Supply Corp., on the ground that Charles failed to appear for two IMEs scheduled for September 1, 2010 and September 15, 2010 and an EUO scheduled for December 13, 2011 and January 20, 2012.

In support of its motion, American submits an affidavit from Leslie Aluisa, a supervisor at Support Claim Services (“SCS”), a company that handles scheduling of medical examinations for American. Aluisa states that, on August 17, 2010, SCS sent a letter to Charles requesting that he attend two medical examinations on September 1, 2010. Aluisa further states that, on September 2, 2010, SCS sent a second letter to

Charles requesting that he attend two medical examinations on September 15, 2010.

American submits copies of the letters that SCS sent to Charles dated August 17, 2010 and September 2, 2010.

American also submits affidavits from Dr. Michael Russ and Dr. Robert Snitkoff. Both Drs. Russ and Snitkoff state that Charles was scheduled to appear for medical examinations at their offices on September 1, 2010 and September 15, 2010, and that Charles “failed to comply with the request and did not appear.”

American further submits an affidavit from Angela Denny, a supervisor in American’s legal department that is responsible for generating and issuing EUO scheduling letters. Denny states that, on November 7, 2011, American sent a letter to Charles requesting that he attend an EUO on December 13, 2011. Denny further states that, on December 22, 2011, American sent a second letter to Charles requesting that he attend an EUO on January 20, 2012. American submits copies of the letters that it sent to Charles dated November 7, 2011 and December 22, 2011.

American further submits affidavits from Patrick Murphy of American Transit Insurance Company stating that Charles failed to appear for an EUO on December 13, 2011, and an affidavit from Gina M. DiGaudio of DeGuerre Law Firm, P.C. stating that Charles failed to appear for an EUO on January 20, 2012.

In opposition, the Rybeck defendants argue that: (1) this motion is premature because discovery is outstanding; and (2) American failed to demonstrate its entitlement

to judgment as a matter of law. The Rybeck defendants seek discovery concerning the basis for American's IME and EUO requests, the business practices of the company who scheduled the IMEs, and information to determine whether the EUO requests were reasonable. The Rybeck defendants further argue that no justiciable controversy exists because American never submitted a copy of the policy or any evidence of the claims submitted by the Ryback defendants.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Here, the Court grants American's motion for summary judgment seeking a declaration that defendants Charles Deng Acupuncture, P.C., Compas Medical P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., and New Way Medical Supply, Corp. are not entitled to first-party no-fault benefits. American meets its burden of demonstrating entitlement to judgment as a matter of law by establishing that it timely and properly mailed notices for medical examinations and an examination under oath, and that Charles failed to appear.

Contrary to the Ryback defendants' claims, the affidavits submitted by American are sufficient to establish that it sent notices to Charles scheduling his medical examinations and an examination under oath, and that Charles failed to appear. 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." *American Tr. Ins. Co. v. Johnson*, 2012 N.Y. Slip. Op. 32004(U) *4 (N.Y. Sup. Ct., July 31, 2012); *Unitrin Advantage Ins. Co. v. Bayshore Phys. Therapy, PLLC*, 82 A.D.3d 559 (1st Dep't 2011). In addition, American does not have the burden to produce the policy in order to establish the existence of a provision requiring the claimant to appear for an IME or EUO. *Gause v. 2011-1251 KC*, 2013 N.Y. Slip. Op. 51997(U) (App. Term 2d Dep't 2013); *Mega Supplies Billing, Inc. v. State Farm Mut. Auto Ins. Co.*, 33 Misc.3d 136(A) (App. Term. 2d Dep't 2011).

The Ryback defendants' contention that there is no justiciable controversy because American fails to provide proof that they made any claims under the subject policy is disingenuous given that they admitted, in their answer to the complaint, that they made claims under the policy. They fail to raise any additional triable issue of fact sufficient to defeat American's motion.

In accordance with the foregoing, it is hereby

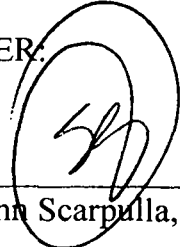
ORDERED that plaintiff American Transit Insurance Company's motion for summary judgment seeking a declaration that defendants Charles Deng Acupuncture, P.C., Compas Medical P.C., Delta Diagnostic Radiology, P.C., Great Health Care Chiropractic, P.C., and New Way Medical Supply, Corp. are not entitled to first-party no-fault benefits is granted.

Settle judgment.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 19, 2014

ENTER:



Saliann Scarpulla, J.S.C.