American Transit Ins. Co. v Jorge
2014 NY Slip Op 30720(U)
February 28, 2014
Sup Ct, New York County
Docket Number: 110050/2011
Judge: Lucy Billings
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SCANNED ON 3/25/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

AMERICAN TRANSIT INSURANCE COMPANY

-v-

DENNY JORGE, et al.

INDEX NO. 110050/2011

MOTION DATE

MOTION SEQ. NO. 002

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 Ultimate Health Products Inc., pursuant to the accompanying decision. C.P.L.R. § 3212(b).

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

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE NEW YORK

Dated: 2/28/14

[signature], 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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AMERICAN TRANSIT INSURANCE COMPANY, Index No. 110050/2011

Plaintiff

- against - DECISION AND ORDER

DENNY JORGE, MICHELL PALOMEQUE, ADVANCED MEDICAL DIAGNOSTICS OF QUEENS, P.C., AFFORDABLE CHIROPRACTIC CARE P.C., ALFA MEDICAL SUPPLIES, INC., ATLANTIC CHIROPRACTIC, P.C., HILLSIDE OPEN MRI P.C., I & E MASSAGE THERAPY, P.C., ALEX KHAIT, D.C., BILGIN KERISLI, D.C., KERISLI CHIROPRACTIC, P.C., NATIONAL MEDICAL & SURGICAL SUPPLY, INC., YONGMING MAO, MD, MARCOS PHYSICAL THERAPY, P.C., MOBILITY EXPERTS MEDICAL, P.C., MICHAEL M. MORGAN, PT, PERFECT POINT ACUPUNCTURE, P.C., ROM MEDICAL, P.C., SAS MEDICAL, P.C., SMQ MEDICAL, SUCCESS REHAB, PT, PC, KAMAL AZIZ TADROS, MD, ULTIMATE HEALTH PRODUCTS INC., URBAN WELL ACUPUNCTURE, P.C., YEVGENIY VOLOSHCHUK, LAC, WARREN MEDICAL, P.C., and WEST COAST, INC.,

Defendants

-------------------------------------x

FILED
MAR 25 2014
COUNTY CLERK'S OFFICE
NEW YORK

APPEARANCES:

For Plaintiff
Giovanna Tuttolomondo Esq.
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For Defendant Ultimate Health Products Inc.
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves for summary judgment against defendant Ultimate Health Products Inc., 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 November 21, 2010, involving defendants Jorge and Palomeque 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 the nonappearances of Jorge and Palomeque for medical examinations, 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 handling Jorge's and Palomeque's applications, Iris Hernandez, attests, defendant Ultimate Health Products submitted claims that Jorge or Palomeque assigned to it for reimbursement of medical expenses incurred from the November 2010 collision. Aff. of Giovanna Tuttolomondo Ex. D, V. Compl. ¶ 15. The Verified Answer of Ultimate Health Products also "admits that it provided medically necessary supplies to claimants [Jorge and Palomeque] and properly and timely submitted claim forms, verification of treatment forms and other documents to Plaintiff." Id. Ex. A, V. Answer ¶ 42. This

declaratory judgment action thus presents an actual controversy regarding noncompliance by Jorge and Palomeque with the terms of coverage that would entitle plaintiff to deny or disclaim coverage of Ultimate Health Products' 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 THE EXAMINATIONS

A. The Entity That Scheduled the Examinations

The parties do not dispute that National Claim Evaluations, Inc., a corporation separate from plaintiff, scheduled the examinations of Jorge and Palomeque. 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 Ultimate Health Products 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

[*5]

impute an offense by plaintiff's independent contractor to plaintiff, ever may be viable, Ultimate Health Products has not raised even a suggestion that National Claim Evaluations performed any service for plaintiff other than scheduling examinations. No evidence suggests that National Claim Evaluations actually was involved in and derived revenue from the examinations themselves.

Without showing even that much, Ultimate Health Products presents no basis to entitle Ultimate Health Products to disclosure concerning National Claim Evaluations' business practices, to support a defense that the scheduled examinations plaintiff claims Jorge and Palomeque failed to comply with were 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). Ultimate Health Products simply has not raised the "doubt" regarding the legality of the examinations scheduled for Jorge or Palomeque that would entitle Ultimate Health Products 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). In fact, as discussed below, the record does not even indicate that National Claim Evaluations hired a physician to engage in the practice of medicine in conducting the examination of Jorge or Palomeque, so that National Claim Evaluations might possibly have shared fees with a physician or engaged in the illegal practice of medicine in conducting a medical examination. See N.Y. Educ. Law § 6512(1); Accident Claims Determination Corp. v. Durst, 224 A.D.2d 343; Glassman v. ProHealth Ambulatory Surgery Ctr., Inc., 23 A.D.3d at 523.

B. The Person Scheduled to Conduct the Examinations

Plaintiff also must request medical examinations according to the procedures 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). As set forth above, upon the insurer's request: "The eligible injured person shall submit to medical examination by physicians." 11 N.Y.C.R.R. § 65-1.1 (emphases added).

National Claim Evaluations' scheduling coordinator Ronni McLaughlin mailed requests for "independent medical examinations," albeit admittedly on plaintiff's behalf, Tuttolomondo Aff. Ex. E ¶ 2, to Jorge and Palomeque "with Dr.

Ayman Hadhoud." Id. Ex. E ¶ 10, at 2-3. Nowhere, however, does either McLaughlin's affidavit or Dr. Hadhoud's own affidavit indicate that Dr. Hadhoud is a physician or a doctor of medicine or that the examination was a type that would have been performed only by a physician. The requests themselves do refer to an "Exam Type: PMR/ACUP," but it is not entirely decipherable and still does not demonstrate the type of examination that would have been performed. Id. Ex. E, at 5-10. Therefore plaintiff may not rely on Jorge's or Palomeque's noncompliance with scheduled medical examinations when plaintiff has not even shown that the scheduled examinations were medical examinations by a physician as the applicable rules require. 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.

C. The Timeframe for Scheduling the Examinations

Plaintiff similarly must request medical examinations according to the timeframes required by the applicable regulations. 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. Upon receipt of prescribed verification forms to establish claims, plaintiff was required to request "any additional verification" needed to establish the claims 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 claims 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, insists that the examinations of Jorge and Palomeque were not necessarily requested in response to claims by a specific medical care provider such as Ultimate Health Products, plaintiff does not present any admissible evidence of when plaintiff received any provider's claim or the application by Jorge or Palomeque. 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

[* 9]

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).

Hernandez attests only that plaintiff received Jorge's application dated December 3, 2010, and Palomeque's application dated December 7, 2010, not when plaintiff received the applications, nor when plaintiff received any medical care provider's claim. Tuttolomondo Aff. Ex. D ¶ 10. The attached applications, which she neither identifies nor authenticates, bear a stamp "RECEIVED DEC 16 2010." Id. Ex. C, at 1 and 4. 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, Jorge's and Palomeque's examinations were scheduled to be held January 27, 2011, more than "30 calendar days from the date of receipt of the prescribed verification forms," at least the only forms for which the record reveals a date of receipt. 11 N.Y.C.R.R. § 65-3.5(d).

Although any one of Jorge's or Palomeque's medical care providers may have submitted a prescribed verification form to establish a claim well within 30 days before January 27, 2011, 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 Jorge's

or Palomeque's noncompliance with examinations that are 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 ULTIMATE HEALTH PRODUCTS' CLAIMS

Assuming plaintiff did receive a claim within 30 days before the examinations were scheduled or afterward, and the pending examinations were by a physician, they then tolled the 30 days for plaintiff to deny claims and allowed it to deny Ultimate Health Products' claims retroactively when Jorge or Palomeque 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 Jorge and Palomeque failed to comply, plaintiff fails to show that it ever denied coverage or disclaimed liability for Ultimate Health Products' claims.

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 Ultimate Health Products and its assignors were claiming did not in fact insure Jorge or Palomeque or the vehicle or incident that caused their injuries. Here, plaintiff does not establish the absence of an insured vehicle or of its involvement in a collision with Jorge or Palomeque. Neither the complaint nor any affidavit denies that Jorge or Palomeque was injured in a motor vehicle collision involving a vehicle insured by plaintiff, for which Jorge and Palomeque received medical supplies from Ultimate Health Products. E.g., Tuttolomondo Aff. Exs. A, V. Compl. ¶¶ 29-31, 38-40 and D ¶¶ 4, 9. Thus "coverage legitimately came into existence," even though plaintiff may have requested the examinations to verify the causal relationship between the collision and claimed injuries or between the claimed injuries and claimed medical supplies. 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 claims by the insureds or their assignee outside the scope of the insurance 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

[* 13]

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 claims under the policy may be denied retroactively to when they were 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 Ultimate Health Products' assignors "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 the nonappearance by Jorge or Palomeque 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 insureds' 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 Ultimate Health Products' claims, such a waiver may be inferred here, assuming the examinations were duly scheduled in compliance with 11 N.Y.C.R.R. §§ 65-1.1 and 65-3.5(d) in the first instance. Noncompliance with a condition precedent entitled plaintiff *to deny* Ultimate Health Products' claims retroactively to when Ultimate Health Products submitted the claims, even if well more than 30 days previously, but did not entitle plaintiff *to ignore*

Ultimate Health Products' claims 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 Jorge and Palomeque, after final opportunities March 17, 2011, had not complied with the condition precedent, that basis for denying Ultimate Health Products' claims was readily apparent to plaintiff and did not entitle it to withhold a denial indefinitely and to wait almost six months to raise the basis for denial only in litigation. Nyack Hosp. v. Allstate Ins. Co., ___ A.D.3d ___, 979 N.Y.S.2d 835 (2d Dep't 2014); New York Hosp. Med. Ctr. of Queens v. QBE Ins. Corp., ___ A.D.3d ___, 979 N.Y.S.2d 694, 695 (2d Dep't 2014); A.M. Med. Servs., P.C. v. Progressive Cas. Ins. Co., 101 A.D.3d at 69-70.

In fact, Hernandez concedes that "DENNY JORGE's and MICHELL PALOMEQUE's breaches of the Policy entitle AMERICAN TRANSIT INSURANCE COMPANY to deny any claims submitted by the PROVIDERS." Tuttolomondo Aff. Ex. D ¶ 18. Yet neither the complaint, nor Hernandez, nor any affidavit or documentary evidence sets forth that, at any time since the second nonappearances by Jorge and Palomeque March 17, 2011, for their scheduled examinations, plaintiff ever has denied Ultimate Health Products' claims. 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 Jorge's or Palomeque's nonappearances for the examinations between each's second nonappearance March 17, 2011, and service of the complaint on Ultimate Health Products October 13, 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 the appearances by Jorge and Palomeque for a medical examination and hence the defense based on their nonappearances.

C. The Regulatory Requirements for Denying Claims

Just as plaintiff must request medical examinations according to the procedures required by the applicable regulations, so, too, must plaintiff deny claims according to regulatory procedures. If an insurer denies all or part of a claim, the insurer "shall notify the applicant or the authorized representative on the prescribed denial of claim form." 11 N.Y.C.R.R. § 65-3.8(c)(1). Even when the denial is based on the absence of coverage on the date of the collision, 11 N.Y.C.R.R. § 65-3.8(e)(1), or the circumstances of the collision falling 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), excusing the insurer's noncompliance with the timeframe for notifying the applicant of the denial, the insurer is not excused from issuing the denial on "the prescribed denial of claim form." 11 N.Y.C.R.R. § 65-3.8(e). The only exception is if an insurer

denies "a portion of a health provider's bill, the insurer may make such a denial on a form or letter approved by the department [of Financial Services] which is issued in duplicate." 11 N.Y.C.R.R. § 65-3.8(c)(1).

Just as plaintiff has failed to show that it scheduled medical examinations in compliance with the applicable rules, so, too, has plaintiff failed to show that it notified Ultimate Health Products, or Jorge, or Palomeque, or any of their authorized representatives of the denial of any of Ultimate Health Products' claims as prescribed. 11 N.Y.C.R.R. § 65-3.8(c)(1). The regulations do not contemplate any exceptions or alternative procedure for a denial, other than the form that may be used for a partial denial.

IV. CONCLUSION

Plaintiff has failed to show its compliance with the governing regulations, 11 N.Y.C.R.R. §§ 65-1.1 and 65-3.5(d), in scheduling examinations by a physician with which plaintiff claims defendants Jorge and Palomeque failed to comply, 11 N.Y.C.R.R. § 65-1.1, or that it ever denied coverage of claims by defendant Ultimate Health Products Inc. as prescribed. 11 N.Y.C.R.R. § 65-3.8(c)(1) and (e). 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 Ultimate Health Products. 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 28, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
MAR 25 2014
COUNTY CLERK'S OFFICE
NEW YORK