

Praetorian Ins. Co. v All Points Med. Supply, Inc.

2014 NY Slip Op 30862(U)

March 28, 2014

Sup Ct, New York County

Docket Number: 114215/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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PRAETORIAN INSURANCE COMPANY,

Index No. 114215/2010

Plaintiff

- against -

DECISION AND ORDER

ALL POINTS MEDICAL SUPPLY, INC.,
MICHAEL ALLEYNE MEDICAL DOCTOR, P.C.,
SOCRATES MEDICAL HEALTH, P.C.,
TRI-MOUNT ACUPUNCTURE, P.C., DR.
IBRAHIM FATIHA CHIROPRACTIC, P.C.,
PRECISION MEDICAL DIAGNOSTICS OF NY,
P.C., LINCOLN MEDICAL MENTAL HEALTH,
P.C. a/k/a LINCOLN MEDICAL & MENTAL
HEALTH CENTER, DIOMEDEZ PEREZ DELA
CRUZ, JOSE CHAVEZ, WILLIAM BALDEZ,
DAVID DELA CRUZ, MELODY RODRIGUEZ,
IRANSI MORENO, ADIGRLO GONZALEZ, and
RD ARIAS RODRIGUEZ a/k/a RUDDY RIAS,

Defendants

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APPEARANCES:

For Plaintiff

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For Defendants All Points Medical Supply, Inc., Michael
Alleyne Medical Doctor, P.C., Tri-Mount Acupuncture, P.C.,
and Dr. Ibrahim Fatiha Chiropractic, P.C.

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves for summary judgment against defendants All
Points Medical Supply, Inc., Michael Alleyne Medical Doctor,
P.C., Tri-Mount Acupuncture, P.C., and Dr. Ibrahim Fatiha

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Chiropractic, P.C. C.P.L.R. § 3212(b). Plaintiff seeks a declaratory judgment that plaintiff owes no duty to compensate these defendants under New York Insurance Law § 5103 for medical expenses incurred from a collision April 24, 2010, involving a limousine insured by plaintiff and occupied by the individual defendants and another motor vehicle near the intersection of Nelson Avenue and West 169th Street in Bronx County. C.P.L.R. § 3001. Consistent with this relief, plaintiff also seeks dismissal of the four defendant medical care providers' counterclaims for that compensation and for their attorneys' fees. C.P.L.R. §§ 3211(a)(7), 3212(b). These defendant medical care providers submitted to plaintiff claims that defendant passengers assigned to the providers for reimbursement of medical expenses incurred from the April 2010 collision. *Aff. of Lucia Silva* ¶¶ 10-13.

Plaintiff bases its motion on its "founded belief" that the injuries alleged by defendant passengers claiming under plaintiff's insurance policy were unrelated to the collision April 24, 2010; that they materially misrepresented the circumstances causing the collision; and that defendant providers' treatment of those injuries was medically unnecessary. *Id.* ¶ 14. For the reasons explained below, the court denies plaintiff's motion.

II. PLAINTIFF'S FAILURE TO DENY DEFENDANT MEDICAL CARE PROVIDERS' CLAIMS

A. Plaintiff's Defense to Coverage

Plaintiff fails to show that it ever denied coverage or disclaimed liability for defendants' claims. One of the limited instances when an insurer that fails ever to issue a denial or disclaimer later may raise a defense to coverage, however, 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 556, 563 (2008); Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 318 (2007); 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 157, 162-63 (2d Dep't 2013). As set forth above, plaintiff's defense to coverage is multifaceted. In sum, the complaint and the affidavit of Lucia Silva, a claims representative for plaintiff's authorized claims manager, supporting plaintiff's motion, deny that defendant passengers in fact were injured in a motor vehicle collision for which they needed medical treatment from defendant medical care providers. Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199, 201. See 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.

One component of this multifaceted position appears to be

that defendant medical care providers billed for services the providers never rendered. Such a claim of "fraudulent billing" is subject to the strict regulatory timeframes with which plaintiff admittedly failed to comply, thus precluding the claim now. N.Y. Ins. Law § 5106(a); 11 N.Y.C.R.R. § 65-3.8(a)(1) and (c); Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.2d 129, 141 (2d Dep't 2008). See Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 565; Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 319; Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199. Fraudulent billing claims, however, may challenge only the provision of medical services and not that a vehicle collision and injuries occurred. Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 565. Another component of plaintiff's position here is that, while a collision may have occurred, it was "deliberately caused . . . as part of a fraudulent scheme, . . . an intentional crash . . . not an 'accident' covered by the policy." Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 319 n.4. In essence, plaintiff maintains that, because of the circumstances of the collision, the insured passengers' claims, which the passengers assigned to the providers, derive from an incident that falls outside the policy's scope and not from an occurrence covered by plaintiff's insurance policy. N.Y. Ins. Law § 5103(b); 11 N.Y.C.R.R. § 65-3.8(e)(2) and (3); Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199, 201; Mercury Cas. Co. v. Encare, Inc., 90

A.D.3d 475 (1st Dep't 2011).

Plaintiff is "not barred from arguing that the injuries were unrelated to the accident because, if true, the treatment would not have been covered by the automobile liability policy."

Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 319. See Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199, 201. Similarly, if no injuries occurred at all, whatever injuries defendant medical care providers diagnosed are equally unrelated to the collision.

B. The Regulatory Requirements for Denying Claims

On the other hand, plaintiff must deny claims according to the procedures required by the applicable regulations. 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).

Since plaintiff has failed to show that it notified any of the four defendant medical care providers against which it seeks a judgment, or any of their assignors, or any of their authorized representatives of the denial of any of the providers' claims as prescribed, 11 N.Y.C.R.R. § 65-3.8(c)(1), the question remains whether plaintiff may posit its grounds for denial for the first time here. 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. Nevertheless, even if plaintiff's "founded belief" of a deliberate low-impact collision permits plaintiff now to maintain that defense to coverage, evidence contradicting that founded belief and defense precludes plaintiff from prevailing on that defense via summary judgment.

III. THE EVIDENCE

The driver operating plaintiff's insured limousine April 24, 2010, attests that, as he was proceeding along Nelson Avenue toward 169th Street, the Lincoln Town Car that was about to hit the limousine was waiting on 169th Street to the right of the limousine. When the limousine began a right turn onto 169th Street, the driver observed the Lincoln starting to move directly toward the limousine. Although the limousine driver honked horn, the Lincoln kept moving toward him, and its driver lowered his head and appeared to brace himself for an impact. The limousine driver further attests that the impact left his vehicle undamaged and caused only slight damage to the Lincoln's bumper.

The remaining evidence that plaintiff presents, however, regarding the collision, the circumstances leading up to it, and the passengers' medical treatment, is not in admissible form. A Police Accident Report of the collision April 24, 2010, is uncertified, C.P.L.R. §§ 4518(c), 4520, 4540(a) and (b); People v. Mertz, 68 N.Y.2d 136, 147-48 (1986); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Chandler v. Manocherian, 151 A.D.2d 432, 435 (1st Dep't 1989); People v. Huntsman, 96 A.D.3d 1387, 1388 (4th Dep't 2012), and lacks a foundation from a witness with personal knowledge for the report's admissibility as a business record or other exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471-72 (1st Dep't 2009); DeLeon v. Port Auth. of N.Y. & N.J., 306 A.D.2d 146 (1st Dep't 2003); JP Morgan Chase Bank, N.A. v. RADS Group, Inc., 88 A.D.3d 766, 767 (2d Dep't 2011). See People v. Ramos, 13 N.Y.3d 914, 915 (2010); People v. Vargas, 99 A.D.3d 481 (1st Dep't 2012); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415 (1st Dep't 2012). Plaintiff's photographs also are unauthenticated. Rivera v. GT Acquisition 1 Corp., 72 A.D.3d at 526; Hanley v. McClier Corp., 63 A.D.3d 453, 455 (1st Dep't 2009); Rivera v. New York City Tr. Auth., 22 A.D.3d 554, 555 (2d Dep't 2005). See People v. Nevado, 22 A.D.3d 383, 384 (1st Dep't 2005); Leventhal v. Forest Hills Gardens Corp., 308 A.D.2d 434, 435 (1st Dep't 2003); People v. Whiten, 306 A.D.2d 105, 106 (1st Dep't 2003); Kartychak v. Consolidated Edison of N.Y., 304 A.D.2d 487 (1st Dep't 2003).

Examinations under oath (EUOs) of four of the passengers, recounting their versions of the collision and the circumstances leading up to it, are unsigned by the witnesses and lack affidavits attesting to service of the transcripts on the witnesses for their signature and their failure to return the transcripts with signatures and any corrections.

Plaintiff relies on the police report's hearsay account that the passengers suffered no apparent injuries and the vehicles incurred only minor damage, also depicted by the photographs. Plaintiff further relies on the passengers' EUO testimony that expresses curious uncertainty regarding where the limousine picked them up and why and where they were travelling in it and denies receiving treatment for which defendant medical care providers claimed coverage. No medical evidence, in any form, supports plaintiff's claim that defendant providers' treatment of the passengers' alleged injuries was medically unnecessary. See, e.g., Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199, 202; Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 18-19, 22-23 (2d Dep't 2009). Even if plaintiff may use the unsworn and unauthenticated hearsay evidence to support its "founded belief" of a deliberate low-impact collision and escape the requirement to deny coverage, however, plaintiff may not rely on this inadmissible evidence to support the ultimate conclusion that the injuries and treatment of them did not result from the vehicle collision. Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d at 21-22; Bonetti v. Integon Natl.

Ins. Co., 269 A.D.2d 413, 414 (2d Dep't 2000).

On the other hand, since plaintiff relies on the unsubscribed testimony to support plaintiff's motion, defendants may rely on that testimony in opposition. Mitchell v. Calle, 90 A.D.3d 584, 585 (1st Dep't 2011); Ayala v. Douglas, 57 A.D.3d 266, 267 (1st Dep't 2008); Navedo v. Jaime, 32 A.D.3d 788, 789-90 (1st Dep't 2006); Thompson v. Abbasi, 15 A.D.3d 95, 97 (1st Dep't 2005). See Joseph v. Board of Educ. of the City of N.Y., 91 A.D.3d 528, 529 (1st Dep't 2012); Dembele v. Cambisaca, 59 A.D.3d 352 (1st Dep't 2009); Hernandez v. Almanzar, 32 A.D.3d 360, 361 (1st Dep't 2006). Despite the testimony suggesting that the limousine trip and the Lincoln Town Car's encounter with the limousine were staged to generate claims for medical treatment that never occurred or that was for injuries that never occurred, the testimony also contradicts plaintiff's only admissible evidence: the limousine driver's account of his actions and the vehicles' impact.

Defendants Diomedez Dela Cruz, who sat close to the limousine driver, Jose Chavez, and Adigrlo Gonzalez consistently testified that the limousine driver never honked his horn to alert the Lincoln of the limousine's approach, so that the Lincoln's driver may have been unobservant and hence negligent, but not deliberately heading into the oncoming vehicle. Chavez and Gonzalez consistently testified that the impact between the vehicles was heavy and hard, throwing Chavez across the vehicle.

IV. CONCLUSION

When plaintiff's evidence is reduced to the admissible evidence, its insured limousine driver's affidavit, the three witness' testimony contradicting two of his salient points raises factual issues whether the collision involving plaintiff's insured vehicle April 24, 2010, was unintended and caused injuries that defendant medical care providers claim to have treated. Therefore, even if plaintiff's failure to show its denial of defendant providers' claims in compliance with the governing regulations, 11 N.Y.C.R.R. § 65-3.8(c)(1) and (e), does not preclude its defense to coverage, the conflicting evidence regarding the circumstances of the collision precludes summary judgment. Insofar as plaintiff has presented facts establishing its prima facie claim, other evidence in the record, construed in the light most favorable to defendants, Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004), undermines that claim. C.P.L.R. § 3212(b); Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). Moreover, if as the facts unfold through disclosure or trial plaintiff's position is reduced to defendant medical care providers billing for services the providers never rendered, Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 565; Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d at 319; Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199; Globe Surgical Supply v. GEICO Ins. Co.,

59 A.D.2d at 141-42, or for medically unnecessary services, plaintiff's claim would be precluded. E.g., Central Gen. Hosp. v. Chubb Group Ins. Cos., 90 N.Y.2d at 199, 202; Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d at 18, 22.

Consequently the court denies plaintiff's motion for a summary declaratory judgment against defendants All Points Medical Supply, Inc., Michael Alleyne Medical Doctor, P.C., Tri-Mount Acupuncture, P.C., and Dr. Ibrahim Fatiha Chiropractic, P.C. C.P.L.R. §§ 3001, 3212(b). As these defendants ultimately may be entitled to coverage of expenses incurred for medical treatment of injuries from the April 2010 collision, the court also denies plaintiff's motion insofar as it seeks dismissal of these defendants' counterclaims for that reimbursement and their attorneys' fees. C.P.L.R. §§ 3211(a)(7), 3212(b); N.Y. Ins. Law § 5106(a). This decision constitutes the court's order.

DATED: March 28, 2014



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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