

**Unitrin Adv. Ins. Co. v D & H Rehabilitation Med.,  
P.C.**

2014 NY Slip Op 31231(U)

April 30, 2014

Supreme Court, New York County

Docket Number: 108549/2010

Judge: Lucy Billings

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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 : 108549/2010  
UNITRIN ADVANTAGE INSURANCE  
vs.  
D & H REHABILITATION MEDICAL  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion ~~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~~ and adjudged that:

*The court grants plaintiff's motion for summary judgment on its claims against defendant Brand Medical Supply, Inc. C.P.L.R. § 3212(b).*

**FILED**

MAY 13 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/30/14

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

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

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

UNITRIN ADVANTAGE INSURANCE COMPANY, Index No. 108549/2010

Plaintiff

- against -

DECISION AND ORDER

D & H REHABILITATION MEDICAL, P.C.,  
TARNOFF CHIROPRACTIC, P.C., OPTIMUM  
MEDICAL, P.C., MOVE FREE PHYSICAL  
THERAPY, P.C., ORANGE ACUPUNCTURE,  
P.C., BRAND MEDICAL SUPPLY, INC., FEMA  
MEDICAL SUPPLY, INC., N.Y. DIAGNOSTIC  
MEDICAL CARE, P.C., V&T MEDICAL P.C.,  
ZENA CARE P.T., P.C., DAMAR THOMPSON,  
ZIQUASHA WHITE, and KENELIE SAMPSON,

Defendants

**FILED**

MAY 13 2014

COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
APPEARANCES:

For Plaintiff

David F. Boucher Jr. Esq.  
Rubin, Fiorella & Friedman, LLP  
630 3rd Avenue, New York, NY 10017

For Defendant Brand Medical Supply, Inc.

Ilya Murafa Esq.  
Gary Tsirelman, P.C.  
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves for summary judgment against defendant Brand Medical Supply, Inc., C.P.L.R. § 3212(b), declaring that plaintiff owes no duty to compensate this defendant under New York Insurance Law § 5103 for medical expenses incurred from a collision November 20, 2009, involving a motor vehicle insured by plaintiff and occupied by the individual defendants in Queens

County. C.P.L.R. § 3001. Defendant passengers White and Sampson assigned to Brand Medical Supply claims that defendant medical care provider submitted to plaintiff for reimbursement of medical expenses incurred from the November 2009 collision. Aff. of Denise Winant ¶ 7.

Plaintiff bases its motion on the nonappearances by White and Sampson for an examination under oath (EUO), to which plaintiff is entitled under its insurance policy. See 11 N.Y.C.R.R. § 65-1.1(d). 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 or that person's assignee or representative shall . . . as may reasonably be required submit to examinations under oath . . ." *Id.*

## II. REQUIREMENTS GOVERNING EUOS

Plaintiff must request an EUO 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 an EUO, 11 N.Y.C.R.R. § 65-3.5(e) requires that an EUO be "held at a place and time reasonably convenient to the applicant" for insurance coverage.

Brand Medical Supply's opposition to plaintiff's motion focuses on the timeframe for rescheduling EUOs when defendants White and Sampson did not appear the first time plaintiff scheduled their EUOs. If "any requested verifications," such as an EUO,

has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call . . . or by mail.

11 N.Y.C.R.R. § 65-3.6(b).

### III. PLAINTIFF SCHEDULED THE EUOS WITHIN THE REQUIRED TIMEFRAMES.

Plaintiff establishes the following chronology through affidavits on personal knowledge, which Brand Medical Supply does not dispute. Initially, plaintiff scheduled EUOs of both White and Sampson for February 19, 2010, but, upon their attorney's request, both EUOs were rescheduled to March 24, 2010.

Plaintiff's request for each of these rescheduled EUOs thus supplanted plaintiff's "original request" for an EUO February 19, 2010. Id. On March 10, 2010, plaintiff mailed its requests to White and Sampson, as well as to their attorney, to appear for their EUOs March 24, 2010.

When neither White, nor Sampson, nor their attorney appeared for the EUOs scheduled March 24, 2010, on April 12, 2010, plaintiff mailed follow-up requests to White and Sampson, as well

as to their attorney, to appear for their EUOs May 6, 2010. Again, neither White, nor Sampson, nor their attorney appeared for the EUOs scheduled May 6, 2010.

Since plaintiff's "original request" to each defendant passenger was March 10, 2010, "30 days after the original request" ran April 9, 2010. Id. At that point, 11 N.Y.C.R.R. § 65-3.6(b) required that "the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested," here White and Sampson, from whom the EUOs were requested March 10, 2010. Within 10 days, in fact within three days, on April 12, 2010, plaintiff followed up with White and Sampson by mailing them second requests to appear for their EUOs.

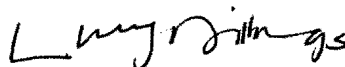
#### IV. CONCLUSION

Since plaintiff has demonstrated through admissible evidence that eligible injured persons, defendants White and Sampson, failed to appear for EUOs twice requested by plaintiff within the timeframes and according to the procedures required by 11 N.Y.C.R.R. §§ 65-3.5 and 65-3.6, plaintiff has established that these defendants failed to comply with the regulations and policy. 11 N.Y.C.R.R. §§ 65-1.1(d). Therefore the court grants plaintiff's motion for summary judgment. C.P.L.R. § 3212(b). The court declares and adjudges that plaintiff owes no duty to compensate defendant Brand Medical Supply, Inc., under New York Insurance Law § 5103 for medical expenses incurred from a collision November 20, 2009, involving a motor vehicle insured by plaintiff and occupied by defendants White, Sampson, and

Thompson. C.P.L.R. § 3001.

Although Brand Medical Supply has counterclaimed for attorneys' fees, plaintiff's notice of its motion omits any relief dismissing the counterclaim. Therefore the court denies any such relief without prejudice to a future motion seeking dismissal of Brand Medical Supply's counterclaim, in the event Brand Medical Supply does not stipulate to that relief in light of this disposition. See C.P.L.R. § 3217(b). This decision constitutes the court's order and its judgment on plaintiff's claims against defendant Brand Medical Supply, Inc.

DATED: April 30, 2014



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

**FILED**

MAY 13 2014

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NEW YORK