

American Tr. Ins. Co. v Moore
2014 NY Slip Op 31910(U)
July 7, 2014
Supreme Court, New York County
Docket Number: 100880/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Index Number : 100880/2012
AMERICAN TRANSIT INSURANCE
vs.
MOORE, JAQUAN
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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 *determined in accordance with the annexed decision, order and judgment.*

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: July 7, 2014

[Signature], 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----- X
AMERICAN TRANSIT INSURANCE COMPANY

INDEX NO. 100880/12

Plaintiff(s),
-against-

JAQUAN MOORE, ACTIVE CARE MEDICAL SUPPLY CORPORATION, BRONX CHIROPRACTIC SERVICES, P.C., DR. MINAL SHAH, M.D., EMPIRE ACUPUNCTURE, P.C., FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER SOCIAL WORK SERVICES PLLC., FOUNTAIN DIAGNOSTIC MEDICAL P.C., GENERAL ANESTHESIA SERVICES, LLP, INFINITE CHIROPRACTIC, PLLC, INTEGRITY MEDICAL SERVICES, P.C., MICHAEL CARNES, DC, MULTIPLE MEDICAL HEALTH SERVICES, P.C., NEW YORK MEDICAL OFFICE BASED SURGERY, P.C., PHC P.C.,

Defendant(s).
----- X

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JOAN A. MADDEN, J.:

Plaintiff American Transit Insurance Company ("American Transit") moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Active Care Medical Supply Corporation ("Active Care"), Bronx Chiropractic Services, P.C. ("Bronx Chiropractic"), Dr. Minal Shah, M.D. ("Dr. Shah"), Empire Acupuncture P.C. ("Empire"), General Anesthesia Services, LLP ("General Anesthesia"), Michael Carnes, DC ("Carnes") and New York Medical Office Based Surgery P.C. ("New York Medical") (collectively the "answering defendants").

Only defendants Active Care and Empire oppose the motion, and Empire cross-moves for summary judgment dismissing the complaint as against it.¹ The balance of the answering

¹Notwithstanding plaintiff's objections, the court has restored to the calendar for oral argument, Empire's prior "cross-motion" for summary judgment originally returnable October 26, 2012, and the cross-motion will be considered with plaintiff's motion for summary judgment.

defendants have defaulted on the motion.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp, 70 AD3d 508, 510 (1st Dept 2010). Once such showing is made, the opposing party must “show facts sufficient to require a trial of any issue of fact.” CPLR 3212(b); see Zuckerman v. City of New York, supra at 562.

Plaintiff has established prima facie entitlement to judgment as a matter of law against the answering defendants. In support of the motion, plaintiff submits an attorney’s affirmation; the pleadings; the affidavits of service; an Affidavit of Merit from plaintiff’s claim representative Alisha Sukhoo; defendant Jaquan Moore’s application for no-fault benefits dated August 10, 2011; an affidavit from Thomas J. Kelly, president of Comprehensive Medical Reviews, as to the procedures for scheduling the independent medical examinations (“IMEs”) and the mailing of the IME notices; copies of the notices from Comprehensive Medical Reviews and addressed to defendant Moore, scheduling IME appointments with Dr. Michael Russ for October 11, 2011 and October 25, 2011; an affidavit from Dr. Michael Russ stating that defendant Moore was scheduled to appear for an IME on October 11, 2011 and October 25, 2011 and that he “has personal knowledge that Jaquan Moore failed to appear for these two IMEs”; an affidavit from Joan Maier, an employee of Dr. Ronald G. Lanfranchi, that she personally mailed letters to defendant Moore scheduling IMEs with Dr. Lanfranchi for October 19, 2011 and November 1,

2011; and an affidavit from Dr. Lanfranchi stating that he was asked to conduct an IME of Moore on behalf of plaintiff, IMEs were scheduled for October 19, 2011 and November 2, 2011, he was present at the scheduled location and time “ready to conduct the IME, and he has “personal knowledge” that Moore “failed to appear for these two IMEs.”

The foregoing documents establish that notices of the IMEs were mailed to defendant Moore and he failed to appear on all four scheduled dates, October 11, 19, and 25, 2011 and November 2, 2011. The failure to appear for an IME is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such breach voids the policy ab initio. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept), lv app den 17 NY3d 705 (2011); Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co, 35 NY3d 720 (2nd Dept 2006). Since it is undisputed that defendant Moore failed to appear for all four scheduled IMEs, plaintiff had a right to deny the claims of the defendant medical providers, based on breach of a condition precedent to coverage. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, *supra*.

Plaintiff therefore has met its burden on the motion and is entitled to judgment as a matter of law against the defendants who have defaulted on the motion, Bronx Chiropractic, Dr. Shah, General Anesthesia, Carnes, and New York Medical. As to the defendants opposing the motion, Empire and Active Care, the burden shifts to them to raise a triable issue of material fact.

In opposing the motion and cross-moving for summary judgment, defendants Empire and Active Care do not dispute that Moore failed to appear for the IMEs on the four scheduled dates or that he never objected to the IME requests. Rather, Empire argues plaintiff has not established that: 1) the IME notices were generated and mailed to Moore; 2) Moore failed to appear for the

IMEs; and 3) Empire timely mailed the denials of the claims at issue.² Active Care argues that: 1) summary judgment is premature as discovery is outstanding; 2) plaintiff has not established justiciable controversy, since it has not shown that Active Care submitted claims pertaining to the underlying motor vehicle accident; 3) plaintiff fails to prove entitlement to judgment as a matter of law, as plaintiff has not established that in accordance with the no-fault regulations, it timely requested the IMEs or timely denied Active Care's claims; and 4) plaintiff has not submitted admissible evidence establishing that the IME appointment letters were timely and properly mailed to Moore, and that he failed to attend the IMEs.

Contrary to defendant Active Care's argument, plaintiff has identified a justiciable controversy, by submitting an affidavit from its claims examiner, Alisha Sukhoo, stating that plaintiff received an application for no-fault benefits dated August 10, 2011 "from and on behalf of defendant Jaquan Moore, claiming no-fault benefits" under plaintiff's policy issued to James A Leasing, Inc., and that plaintiff has received claims from all co-defendant medical providers named in this action, including Active Care. Plaintiff submits a copy of Moore's no-fault application. Sukhoo also states that defendant medical providers "purportedly provided medical treatment, therapy and/or medical supplies" to Moore and that they "received assignments of benefits" from Moore "for the right to recover no-fault benefits." Notably, in its answer, Active

²Empire's arguments in opposition are essentially identical to its arguments in support of its cross-motion for summary judgment, even though they may be directed at different affidavits or other proofs from plaintiff. It appears some confusion exists as to Empire's prior cross-motion. Plaintiff's counsel explains that they mistakenly mailed to Empire's counsel, an earlier motion for summary judgment which was never filed with the court. Empire, however, did file a cross-motion for summary judgment in response to that motion, objecting *inter alia* to an affidavit by Walter Distler, which was never argued or decided. Since plaintiff's instant motion for summary judgment no longer relies on the Distler affidavit, the court need not consider it or Empire's prior objections to it.

Care “admits upon information and belief” that it was “properly assigned the rights to collect [some] no-fault benefits for medically necessary supplies rendered to claimant [defendant Moore]” and also “admits upon information and belief” that it “timely submitted claim forms, verification of treatment forms and other documents to Plaintiff for such within the statutory period for medically necessary treatments.”

The affidavits of of Thomas J. Kelly and Joan Maier detailing the procedures for preparing and mailing the IME notices, are sufficient to show that such notices were mailed to defendant Moore. The affidavits of Dr. Russ and Dr. Lanfranchi, the physicians retained to perform the IMEs, are sufficient to show that Moore did not appear for the IMEs on any of the four scheduled dates. Both Russ and Lanfranchi specifically state that they were present at the IME locations at the scheduled times and locations, and have “personal knowledge” that Moore did not appear. While defendant Empire and Active Care object that plaintiff has not established that it timely denied the claims, a timely denial is not required. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra.

Active Care also objects that summary judgment is premature, since it has not had an opportunity to conduct discovery. The absence of discovery, however, does not require denial of plaintiff’s motion, as Active Care fails to show that facts essential to oppose the motion are in plaintiff’s exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d 418 (1st Dept 2009); Bank of America, N.A. v. Tatham, supra.

The court has considered the balance of defendants’ arguments, and finds that they are

not persuasive. Thus, in the absence of an issue of material fact warranting denial of plaintiff's motion, plaintiff is entitled to judgment as a matter of law against defendants Empire and Active Care, and Empire's cross-motion for summary judgment is denied. As determined above, in the absence of opposition, plaintiff is also entitled to summary judgment against defendants Bronx Chiropractic, Dr. Shah, General Anesthesia, Carnes and New York Medical Office. Plaintiff's motion is therefore granted in its entirety. In view of this court's May 6, 2013 decision and order granting plaintiff's prior motion for a default judgment against the balance of the defendants, this action is finally disposed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendants Active Care Medical Supply Corporation, Bronx Chiropractic Services, P.C., Dr. Minal Shah, M.D., Empire Acupuncture P.C., General Anesthesia Services, LLP, Michael Carnes, DC, and New York Medical Office Based Surgery P.C., is granted in its entirety; and it is further

ORDERED that cross-motion for summary judgment by defendant Empire Acupuncture P.C. is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff American Transit Insurance Company is not obligated to honor or pay claims for reimbursement submitted by defendants Active Care Medical Supply Corporation, Bronx Chiropractic Services, P.C., Dr. Minal Shah, M.D., Empire Acupuncture P.C., General Anesthesia Services, LLP, Michael Carnes, DC, and New York Medical Office Based Surgery P.C., as assignees of defendant Jaquan Moore, with respect to the alleged accident of August 9, 2011, nor is American Transit Insurance Company required to provide, pay, honor or reimburse any claims in any current or future proceedings,

including but not limited to arbitrations or lawsuits, seeking recovery of no-fault benefits arising under American Transit Insurance Company CAP 612236, Claim No. 763756-07, with respect to the alleged accident of August 9, 2011, involving defendant Jaquan Moore; and it is further

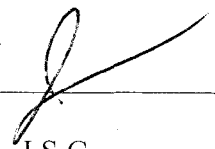
ORDERED ADJUDGED AND DECLARED that any and all pending and future no-fault lawsuits and arbitrations brought by defendants Active Care Medical Supply Corporation, Bronx Chiropractic Services, P.C., Dr. Minal Shah, M.D., Empire Acupuncture P.C., General Anesthesia Services, LLP, Michael Carnes, DC and New York Medical Office Based Surgery P.C., as assignees of defendant Jaquan Moore, with respect to the alleged accident of August 9, 2011, are permanently stayed.

DATED: July 7, 2013

ENTER:

UNFILED JUDGMENT

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J.S.C.