

American Commerce Ins. Co. v Thompson
2014 NY Slip Op 32061(U)
January 31, 2014
Supreme Court, New York County
Docket Number: 150219/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER
Justice

AMERICAN COMMERCE INSURANCE COMPANY,
Plaintiff,
-v-

INDEX NO. 150219/2012
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

JAMES THOMPSON, ACCELERATED REHABILITATION AND PAIN MANAGEMENT P.C., ACCELERATED SURGICAL CENTER, ACTIVE CARE MEDICAL SUPPLY CORPORATION, AEE MEDICAL DIAGNOSTIC P.C., ALEN OVEN CHIROPRACTIC CARE P.C., DOVPHIL ANESTHESIOLOGY GROUP P.L.L.C., EMPIRE CHIROPRACTIC SERVICE, P.C., EPIC PAIN MANAGEMENT AND ANESTHESIA CONSULTANTS P.L.L.C., FOUR2FOUR ORTHOPAEDICS P.L.L.C., AMIT GOSWAMI M.D., GREAT MEDICAL SERVICES P.C., HEALTHY PHYSIQUE PHYSICAL THERAPY P.C., METRO PSYCHOLOGICAL SERVICE P.C., MILABO ACUPUNCTURE P.C., MODERN CHIROPRACTIC P.C., NEW YORK VEIN CEINTER LLC, QUALIFIED MEDICAL P.C., SALEM P.T. P.C., SMQ MEDICAL P.C., DIANA VAVIKOVA D.C., ANY MEDICAL SUPPLY INC., ARCADIA IMAGING P.C., CENTRAL CITY CHIROPRACTIC P.C.,

Defendants.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C. The following papers, numbered 1 to were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and values 1-7, 8, 9, 10-11

Cross-Motion: [] Yes [X] No

This case arises from an automobile accident on May 20, 2011, where defendant James Thompson ("Thompson") allegedly received personal injuries. Plaintiff American Commerce Insurance Company ("Plaintiff") commenced this action by Summons and Complaint, seeking a declaration that Thompson is not an eligible insured person entitled to no-fault benefits under Plaintiff's claim number 1098132, due to alleged breach of contract by Thompson's failure to appear for properly requested and scheduled examinations under oath.

Defendants Active Care Medical Supply Corp. interposed an Answer.

Defendant SMQ Medical, P.C., interposed Answers, along with a First Counterclaim which seeks attorneys' fees against Plaintiff in the event that SMQ prevails in this action. Defendant AEE Medical Diagnostic, P.C., interposed an Answer with counterclaims for attorneys' fees in the event that AEE prevails, negligence against Plaintiff for failure to detect the alleged fraud, and negligence in Plaintiff's hiring and retention of employee agents.

Plaintiff now moves for an Order, pursuant to CPLR §3212,¹ granting Plaintiff summary judgment as a matter of law against defendants Active Care Medical Supply Corp., SMQ Medical, P.C., and AEE Medical Diagnostic, P.C., based upon Thompson's failure to attend his respective duly scheduled EUOs; pursuant to CPLR 3212, dismissing SMQ and AEE's Counter-Claims against Plaintiff, and pursuant to CPLR 3211(a)(7), dismissing Defendants SMQ and AEE's Counter-Claims. Active Care submits opposition. SMQ and AEE also submits opposition.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

¹ On April 17, 2013, the Court granted Plaintiff's motion for leave to enter default judgment against the following defendants: Accelerated Rehabilitation and Pain Management, P.C., Accelerated Surgical Center, Dovphil Anesthesiology Group P.L.L.C., Epic Pain Management and Anesthesia Consultants P.L.L.C., Amit Goswami M.D., Great Medical Services P.C., Healthy Physique Physical Therapy P.C., Metro Psychological Services P.C., Modern Chiropractic P.C., New York Vein Center LLC, Any Medical Supply Inc., and Arcadia Imaging P.C.

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to attend duly scheduled medical exams voids the policy ab initio. *See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 (1st Dep't 2011).

Plaintiff submits the Affidavit of Edward Kurathowski, a Supervisor in Plaintiff's Special Investigation Unit, which attests to investigation of the no-fault claims submitted on Thompson's behalf and Thompson's failure to appear for the scheduled examinations under oath, a breach of a condition precedent to coverage.

More specifically, Kurathowski avers that Plaintiff conducted an investigation to verify the investigation received by Thompson as two of the medical providers, Metro Psychological Service, P.C., and Qualified Medical, P.C., were under investigation. Plaintiff thereafter conducted a recorded statement of Thompson on August 19, 2011, and found discrepancies between the billing received by Plaintiff and Thompson's statement. Based on these discrepancies, Plaintiff retained counsel to conduct an EUO of Thompson to confirm the facts and circumstances of the loss and treatment received by Thompson. Thompson failed to appear for properly requested and scheduled medical examinations on October 3, 2011, October 24, 2011, and November 16, 2011.

Plaintiff further submits the affidavit of Ali Cregan, a Claims Representative, and the affidavit of Kimberly Serrenho, attesting to the Plaintiff's handling of Thompson's claim.

Plaintiff submits the affirmation of Vincent F. Gerbino, which attests to the mailing of the EUO requests letters to Thompson and Thompson's failure to appear, as well as an affidavit of James Thompson, in which he admits having received the EUO request letters.

Here, through the affidavits and exhibits thereto, Plaintiff has demonstrated prima facie entitlement to summary judgment. As appearance for examinations under oath was a condition precedent to payment under the policy, Thompson breached the requirement by failing to appear and as such, there is no basis for coverage to defendants Active Care, SMQ, and AEE, as Thompson's assignees. Furthermore, Plaintiff has demonstrated prima facie entitlement to summary judgment as to the dismissal of SMQ, and AEE's counterclaims for attorneys' fees in the event they prevail and of AEE's additional counterclaims alleging negligence on Plaintiff's part with respect to their investigation of the subject claim and hiring of their employees.

In its opposition, defendant Active Care fails to raise a triable issue of fact. Defendants submit the attorney affirmation of Oleg Rybak, which states that the motion is premature in light of the fact that Defendants' outstanding discovery demands pertaining to Plaintiff's alleged investigation that formed the basis for the purported EUO requests. However, an insurer need not demonstrate that an EUO request was reasonable to satisfy its *prima facie* burden on a motion for summary judgment. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dep't 2011); *Bath Ortho Supply, Inc. v New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A) (N.Y. App. Term 2012). SMQ and AEE further fail to raise any triable issues of fact in their opposition.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment against defendants Active Care Medical Supply Corp., SMQ Medical, P.C., and AEE Medical Diagnostic, P.C., is granted; and it is further

ORDERED and ADJUDGED that Plaintiff owes no duty to defendants Active Care Medical Supply Corp., SMQ Medical, P.C., and AEE Medical Diagnostic, P.C., to pay No-Fault claims submitted in relation to the May 20, 2011 collision referenced in the complaint; and it is further

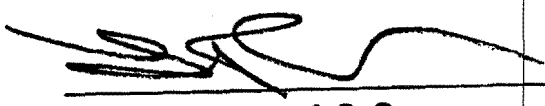
ORDERED that any and all pending no-fault suits or arbitration proceedings brought by Active Care Medical Supply Corp., SMQ Medical, P.C., and AEE Medical Diagnostic, P.C., in relation to the May 20, 2011 collision referenced in the complaint are permanently stayed; and it is further

ORDERED that SMQ and AEE's Counter-Claims asserted against Plaintiff

are dismissed.

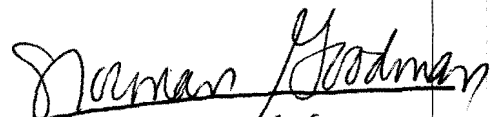
This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 31, 2014



HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION
NON-FINAL DISPOSITION


CLERK

Check if appropriate: DO NOT POST

REFERENCE

FILED

APR 15 2014

COUNTY CLERK'S OFFICE
NEW YORK