

Ameriprise Ins. Co. v Michaud

2014 NY Slip Op 32247(U)

August 20, 2014

Supreme Court, New York County

Docket Number: 152187/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

AMERIPRISE INSURANCE COMPANY,

INDEX NO. 152187/2012
MOTION DATE May 23, 2013
MOTION SEQ. NO. 003
E-FILED

Plaintiff,

-against-

KENNY MICHAUD et al.,

Defendants.

The following papers, numbered 1, were read on this motion for summary judgment:

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	2
Reply Affidavits	3
Cross-Motion X No	

Plaintiff moves for summary judgment on its Fourth Cause of Action against defendants Psychology YME, P.C., Orthoplus Products, Inc., Comprehensive Psychological Evaluation, P.C., Benoit Chiropractic, P.C., Shirom Acupuncture, P.C., and Sky Acupuncture, P.C., alleging breach of a material condition precedent to coverage under plaintiff's no-fault insurance policy. Defendants Psychology YME, P.C., Orthoplus Products, Inc. and Comprehensive Psychological Evaluation, P.C. fail to oppose the motion. As to these defendants, the motion is granted on default.

Plaintiff also seeks summary judgment on its First Cause of Action for a declaratory judgment that the underlying incident was a staged accident and therefore not the product of a covered event under the subject insurance policy, and for summary judgment on its Third Cause of Action declaring that plaintiff is not required to pay pursuant to the policy terms. In addition, plaintiff seeks to remove Defendants Maria Arno, Yersain Chuzhegulov, Temirlan Zhylykybek, Omega Diagnostic Imaging, P.C. and AP Orthopedic & Rehabilitation, P.C. as parties to this action, as they have entered into a stipulation of discontinuance with plaintiff.

The court rejects the contention of defendants Benoit

Chiropractic, P.C. (Benoit) and Shirom Acupuncture, P.C. (Shirom) that issues of fact exist regarding whether the underlying accident was staged, thereby precluding summary judgment. That is not the issue before the court. Instead, the court focuses on whether plaintiff has demonstrated sufficient facts to show that there was an objective and reasonable basis to warrant its requesting Examinations Under Oath (EUOs) of the healthcare providers to the occupants of the vehicle. Those facts included that the incident occurred in Brooklyn, New York, while the policy was obtained with an address located in Rotterdam, New York; the incident was within the first 90 days after issuance of the policy; Kenny Michaud, Kareem Richards and Goldens Beauvais had a prior history of being involved in motor vehicle incidents; Kenny Michaud and Goldens Beauvais had both previously sought treatment at the same no-fault clinic; the testimony of Michaud, Beauvais and Richards was conflicting; and the treatment billed to plaintiff which was allegedly rendered to Michaud, Beauvais and Richards did not correspond with the testimony they gave at their EUOs. In light of all of these facts, the court finds that plaintiff had an objective and reasonable basis to warrant its request for EUOs of the healthcare providers.

Moreover, here Benoit and Shirom failed to respond to plaintiff's request for an EUO. Thus, they are estopped from contesting the reasonableness of the request. (*Natural Therapy Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 42 Misc 3d 137(A) [App Term 2d Dept 2014]).

Defendant Sky Acupuncture, P.C. (Sky) also failed to respond to plaintiff's initial request for it to submit to an EUO. However, upon plaintiff's issuance of a second letter requesting an EUO on a new date, Sky replied, requesting that plaintiff set forth its good faith reason for demanding Sky's EUO. Plaintiff responded by letter, noting the No-Fault regulation providing that "[u]pon request by the [carrier], the eligible injured person or that person's assignee...shall...as may reasonably be required submit to examinations under oath by any person named by the [carrier] and subscribe the same..." (11 NYCRR 65-1.1(d)). Plaintiff also stated in its response that it was questioning whether the injured person was ever involved in the subject incident, as well as the medical services that were allegedly rendered. (Letter of Michael A. Callinan dated December 16, 2011; Ex II to the Affidavit of Michael A. Callinan, sworn to February 28, 2014). Sky failed to reply to the Callinan letter and did not appear for the second scheduled date for EUO.

It is well settled that an insurance company is within its rights to request an EUO of a provider where the insurer can

demonstrate a valid and necessary reason for doing so. (*W&Z Acupuncture, P.C. v Ames Assur. Co.*, 24 Misc 3d 142(A) [App Term 2d Dept 2009]; *Natural Therapy Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 41 Misc 3d 1230(A) [Civ Ct, Kings County 2013]). Sky fails to establish a material issue of fact as to the propriety of plaintiff's demand for an EUO. (*Interboro Ins. Co. v Clennon*, 113 AD3d 596 [2d Dept 2014]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]).

The affidavit of Michael A. Callinan sets forth the standard office procedures of Bruno, Gerbino & Soriano, LLP, for the creation and mailing of letters scheduling EUOs. A presumption that proper mailing occurred may be created by proof of a standard office practice or a procedure designed to ensure that items are properly addressed and mailed. (*American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013]).

Mr. Callinan's affidavit also establishes the nonappearance of defendants Benoit, Shirom and Sky. He alleges that he was present at his office on each of the days when said defendants failed to appear. He further alleges that he would have handled the depositions had the defendants appeared. This establishes his personal knowledge of their non-appearance.

Significantly, defendants Benoit, Shirom and Sky offer only an attorney's affirmation in opposition to this motion and fail to deny that they received the notices for EUO or their failure to appear on the scheduled dates. Since these defendants do not specifically deny their nonappearance or raise a triable issue with respect to the mailing of the notices of the EUOs, summary judgment is granted to plaintiff as to them. (*Seacoast Med., P.C. v Praetorian Ins. Co.*, 38 Misc 3d 127 (A), *1 [App Term 1st Dept 2012]; *Dowd v Praetorian Ins. Co.*, 36 Misc 3d 126(A), *1 [App Term 1st Dept 2012]; *Continental Med., P.C. v New York Cent. Mut. Fire Ins. Co.*, 35 Misc 3d 138(A), *1 [App Term 1st Dept 2012]).

Defendants' contention that plaintiff should have denied their claims via an NF-10 form is unavailing. Where, as here, there is a breach of a condition precedent to coverage, the carrier is entitled to deny the claims retroactively to the date of loss. (*American Tr. Ins. Co. v Lucas*, 111 AD3d at 424-425; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d at 560).

Defendants fail to show by way of affidavit from someone with knowledge of the facts that facts essential to justify their

opposition to this motion may exist but cannot then be stated. Accordingly, to the extent that they seek to invoke CPLR 3212(f), they have failed to provide a basis for its invocation.

Moreover, to the extent that defendants claim that they require discovery in order to support their cross-claims, they have not cross-moved for relief.

It is hereby ORDERED that the motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants Psychology YME P.C., Orthoplus Products, Inc., Comprehensive Psychological Evaluation, P.C., Benoit Chiropractic, P.C., Shirom Acupuncture, P.C., and Sky Acupuncture, P.C. on plaintiff's Fourth Cause of Action; and it is further

ORDERED that the caption be amended to reflect the discontinuance of this action as against defendants Maria Arno, Yersain Chuzhegulov, Temirlan Zhylybek, Omega Diagnostic Imaging, P.C., and AP Orthopedic & Rehabilitation, P.C.; and it is further

ORDERED that the action is severed and continued against defendants Kenny Michaud, Goldens Beauvais, Kareem Richards, Clarence Wade and Laura Milach L.M.T. and the cross-claims are severed and continued; and it is further

ORDERED that the balance of the motion is denied.

Settle judgment on notice to all parties.

This constitutes the decision and order of the Court.

Dated: August 20, 2014



Ellen M. Coin, A.J.S.C.

Non-final disposition