American Commerce Ins. Co. v Poitevien
2014 NY Slip Op 32420(U)
September 16, 2014
Supreme Court, New York County
Docket Number: 150600/12
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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AMERICAN COMMERCE INSURANCE COMPANY,

Plaintiff,

-against-

CARL POITEVIEN, et al.,

Defendants.

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DECISION AND ORDER

Index No. 150600/12

HON. ANIL C. SINGH, J.:

Plaintiff in this no-fault automobile insurance matter moves pursuant to CPLR 3212 for an order: 1) awarding summary judgment against defendants Active Care Medical Supply Corporation, Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro"), and Health Needles Acupuncture, P.C., based upon the failure of defendants' assignor Carl Poitevien to attend EUOs; and 2) awarding summary judgment against defendants Active Care Medical Supply Corporation and Health Needles Acupuncture, P.C., based upon the failure of defendants Active Care Medical Supply Corporation and Health Needles Acupuncture, P.C. to attend their respective EUOs.[1] Defendants

[1]A default judgment was entered on August 30, 2013, against defendants Carl Poitevien, AAAMG Leasing Corp., Advanced Medical Care, P.L.L.C., Alen Oven Chiropractic, P.C., Forest Hills Medical, P.C., Fyz Acupuncture, P.C., Elaine Fleurette Harris, Harshad C. Bhatt,

oppose the motion.

Plaintiff exhibits two affidavits in support of the motion.

Vincent F. Gerbino, Esquire, states in a sworn affidavit that he is a member of the law firm that represents plaintiff American Commerce Insurance Company. Further, he states that assignor Carl Poitevien, Active Care Medical Supply Corporation, and Health Needles Acupuncture, P.C., failed to appear for their respective EUO appointments at the law firm's office.

In addition, plaintiff exhibits the sworn affidavit of Anthony D'Gracia, who states that he is employed as an investigator by plaintiff's Special Investigation Unit. D'Gracia states that the matter was referred to the Special Investigation Unit based upon the fact that the assignor was treating with a provider that was under investigation. According to D'Gracia, claim database searches revealed six previous losses in which the assignor sustained injury and sought medical treatment. D'Gracia states that, as a result of inconsistencies between the billing received by plaintiff and the EUO of Ronald Toler, a friend of the assignor who borrowed the car, plaintiff requested the EUOs of Active Care Medical Supply,

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M.D., In Line Chiropractic, P.C., New Century Medical Diagnostics, P.C., New Millenium Medical Imaging, Premier Surgical Services, P.C., Prestige Medical Care, P.C., Pugsley Medical, P.C., Queens Medical and Diagnostic Services, P.C., Queens Surgi-Center, Sophora Diagnostic Laboratory, LLC, Star Medical and Diagnostic, P.L.L.C., and Xeron Clinical Laboratory, Inc.

Prestige Medical Care, P.C., Advanced Care Medical Care, P.L.L.C., and Health Needles Acupuncture, P.C.

Defendant Five Boro has not submitted an affidavit in opposition to the motion. Instead, Five Boro relies on the affirmation of its counsel, who contends that the affidavit of plaintiff's attorney is defective as based on hearsay information and not the law firm's custom and usage; the signatures of plaintiff's affidavits were not notarized; plaintiff did not provide the required notice to have held the EUOs; plaintiff's affidavits fail to corroborate the evidence asserted therein as to the purported EUO no-shows; the EUO transcript of Ronald Toler is neither signed by the witness nor notarized; and the transcript of the EUO is not evidentiary proof in admissible form as the certification had not been signed by the court reporter, and the transcript is inadmissible hearsay.

Likewise, defendants Active Care Medical Supply Corporation ("Active Care") and Health Needles Acupuncture, P.C. ("Health Needles") have not submitted an affidavit in opposition to the motion. Like Five Boro, defendants Active Care and Health Needles rely upon the affirmation of their counsel, who asserts a plethora of arguments. Defendants contend that plaintiff did not, and cannot, establish that it issued a timely denial or a timely request for EUOs. Further, they contend that plaintiff has failed to meet its burden to prove that a

justiciable controversy exists.

Discussion

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (See Id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion could should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]). The court's role is "issue-finding, rather than issue-determination" (Sillman v.

Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

In Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559 [1st Dept, 2011], the First Department explicitly found that "the failure to appear for IMEs requested by an insurer ... is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine" (id. at 560, citing Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195 [1997] (defense that injured person's condition and hospitalization were unrelated to the accident was non-precludable)). The First Department justified the finding that an IME no-show was a non-precludable defense on the basis that a "breach of a condition precedent to coverage voids the policy *ab initio*." Accordingly, the failure to appear for an IME cancels the contract as if there was no coverage in the first instance, and the insurer has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely (id.).

Based on the reasoning of Unitrin Advantage, it is clear that a claimant's failure to comply with a condition precedent to coverage voids the insurance contract *ab initio*, and the insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the thirty-day period. Further, since the contract

has been nullified, the insurer may deny all claims retroactively to the date of loss.

Defendants assert that the holding in Unitrin Advantage conflicts with applicable insurance law, no-fault regulations, public policy, and is in derogation of binding and controlling Court of Appeals precedent. Irrespective of defendants' position, the Court finds that plaintiff's reliance upon the principles set forth in Unitrin Advantage is neither misplaced nor mistaken, for the First Department's holding is the law.

"Independent medical examinations and examinations under oath of an insured injured party are part of a no-fault automobile insurer's entitlement to additional verification following receipt of statutory claim forms for reimbursement for medical services provided to the insured" (70A N.Y.Jur.2d Insurance, section 2013). "An examination under oath can be used as a shield by an insurer against payment of a claim under a no-fault automobile insurance policy where an assignor has failed to comply with a properly noticed examination under oath request" (id.).

Here, the Court finds that the sworn affidavits of Vincent F. Gerbino, Esq., and Anthony D'Gracia make out a prima facie case in favor of plaintiff that defendants' breached a material condition precedent to coverage. The Court finds further that the defendants have failed to show the existence of a genuine issue of

material fact or otherwise rebutted plaintiff's prima facie case.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on its second and fifth causes of action seeking a declaration that it is not obligated to provide any coverage, reimbursements or pay any invoices, sums or funds to defendants Active Care Medical Supply Corporation, Five Boro Psychological and Licensed Master Social Work Services, P.L.L.C., and Health Needles Acupuncture, P.C., is granted; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to provide any coverage, reimbursements or pay any invoices, sums or funds to defendants Active Care Medical Supply Corporation, Five Boro Psychological and Licensed Master Social Work Services, P.L.L.C., and Health Needles Acupuncture, P.C., for any and all no-fault related services.

The foregoing constitutes the decision and order of the court.

Date: 9/16/14
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

SEP 16 2014