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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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HERTZ VEHICLES, LLC,

Plaintiff,

-against-

NEW UTRECHT SERVICES, INC., et al.,

Defendants.

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DECISION AND ORDER

Index No. 151559/12

HON. ANIL C. SINGH, J.:

Plaintiff in the instant no-fault automobile insurance action moves: 1) pursuant to CPLR 3212 for summary judgment declaring that there is no coverage for the claims of defendant Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro"), contending that the owner of Five Boro signed a general release of all claims for Five Boro pursuant to his guilty plea to charges of healthcare fraud, and Five Boro violated a condition precedent to coverage by failing to appear for duly scheduled examinations under oath ("EUOs"); and 2) for sanctions, including attorneys' fees, pursuant to CPLR 3126 and 22 NYCRR 130-1.1, based on Five Boro's refusal to abandon its claims after its owner pled guilty to insurance fraud and money laundering and signed the general release of claims. Defendant opposes the motion.

The instant action arises out of an automobile accident that occurred on July 10, 2011. Claimants Dawn Mosby, Tiffany Mosby and Mildred Atkinson were occupants of a

2010 Chevrolet self-insured by plaintiff, which was allegedly involved in a collision with another vehicle at the intersection of Merrick Boulevard and Liberty Avenue in Queens. According to the police report, the Hertz vehicle was rear-ended by another vehicle that fled the scene, and the claimants rejected medical assistance. Subsequently, claimants reported to have sustained significant bodily injuries. Defendant Five Boro allegedly provided medical treatment to claimants.

Plaintiff exhibits the sworn affidavit of Robert Kelly, who states that he is the Director of plaintiff's Special Investigations Unit. Kelly contends that the sheer amount of claims submitted; the absence of reported injuries at the accident scene; the minor damage to the vehicle; and the fact that claimants were treated heavily and received elaborate and nearly identical treatment with many of the same medical providers raised concerns as to the claims' legitimacy. Claimants appeared for EUOs; however, their testimony was conflicting and suspicious. Plaintiff then sought EUOs of the medical provider defendants.

Kelly asserts that the owner of Five Boro, Vladimir Grinberg, had been indicted by the United States District Attorney for participation in a no-fault insurance fraud scheme. Grinberg pled guilty to the charges. Finally, Kelly states that, despite due notice, Five Boro failed to appear for an EUO.

Plaintiff exhibits the General Release signed by Vladimir Grinberg. It states as follows:

> Vladimir Grinberg, an officer and shareholder of Five Boro Psychological and Licensed Master Social Work Services PLLC ("Five Boro"), hereby releases and discharges his interest in any and all outstanding, pending and unpaid insurance claims filed by any patients of Five Boro or any assignment of rights by patients to Five Boro against any and all insurance companies, including, but not limited to no-fault insurance claims. This release is provided in connection with a resolution to United States v. Grinberg, S14 12 Cr. 171 (JPO), in the United States District Court for the Southern District of New York.
>
> In addition, Grinberg agrees not to serve as an officer, shareholder, employee, or agent of Five Boro, or to associate with Five Boro in any way. Grinberg agrees that any insurance company may present a copy of this release to the American Arbitration Association or arbitrator, or to any other forum in which a claim for reimbursement of insurance benefits is pending or has been filed in connection with claims being pursued on behalf of Five Boro, or by anyone or any entity acting on their behalf.
>
> Grinberg is represented by attorneys and has discussed the contents of this release with his attorneys. By signing below, Grinberg is executing this release voluntarily, with full knowledge of its consequences.
>
> By: ________/s/___________
> Vladimir Grinberg, individually and as an Officer of Five Boro

(Motion, exhibit I).

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 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.

Here, the Court finds that plaintiff has made a prima facie showing of entitlement to summary judgment on the complaint by demonstrating that defendant failed to appear for a duly-noticed EUO, thereby breaching a condition precedent to coverage under the no-fault regulations.

Defendant asserts that the motion should be denied for four reasons. First, defendant contends that plaintiff failed to sufficiently establish proper mailing and timing of the EUO requests to Five Boro. Second, plaintiff's affidavit of "no show" by plaintiff's counsel is insufficient and also supports that plaintiff's counsel firm be disqualified as a witness. Third, plaintiff failed to respond fully to defendant's discovery demands, so the summary judgment motion is premature.

Finally, defendant contends that Five Boro, now owned solely by Dr. John Braun, is entitled to wind up its affairs and to continue collecting on claims, in spite of the fact that the former co-owner Grinberg pled guilty to conspiracy to commit insurance fraud. According to defendant, Dr. Braun was never implicated, and is entitled to compensation for his corporation's work. Further, the former co-owners's plea and release of his own personal interest in the corporation occurred after the alleged EUO requests by plaintiff in the instant case.

In short, the Court finds that defendant's conclusory assertions are insufficient to demonstrate the existence of a genuine issue of fact or otherwise rebut plaintiff's prima facie case.

Plaintiff's request for sanctions and attorneys' fees is denied as the Court in its discretion finds that the conduct alleged does not rise to a level that would justify sanctions.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on the complaint seeking a declaration that it is not obliged to provide coverage for the claims of defendant Five Boro Psychological and Licensed Master Social Work Services, PLLC, is granted; and it is further

ADJUDGED and DECLARED that plaintiff is not obliged to provide coverage for the claims of defendant Five Boro Psychological and Licensed Master Social Work Services, PLLC.

The foregoing constitutes the decision and order of the court.

Date: 10/21/14
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE