

National Liab. & Fire Ins. Co. v Joseph

2014 NY Slip Op 32833(U)

October 14, 2014

Supreme Court, New York County

Docket Number: 151174/14

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

PRESENT: MANUEL J. MENDEZ PART 13
Justice

NATIONAL LIABILITY & FIRE INSURANCE COMPANY,

Plaintiff

- Against -

INDEX NO. 151174/14

MOTION DATE 10-08-2014

MOTION SEQ. NO. 004

TATIANNA JOSEPH,
NEW MILLENIUM MEDICAL IMAGING PC,
TAM MEDICAL SUPPLY CORP.,
JGG MEDICAL CARE PC,
CHARLES DENG ACUPUNCTURE PC,
ACTION POTENTIAL CHIROPRACTIC, PLLC,
MAIGA PRODUCTS CORPORATION,
PIERRE J. RENELIQUE, MD,
MARIA MASIGLIA PT,
GENTLE CARE AMBULATORY ANESTHESIA SERVICES,
Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion for Default and Summary Judgment.

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
_____	<u>1-2</u>
_____	<u>3-4</u>
_____	<u>5</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that the motion by plaintiff for a default judgment against the defendants Tatianna Joseph, New Millenium Medical Imaging, P.C., and JGG Medical Care, P.C., is granted on default. The motion for Summary Judgment against the remaining defendants is denied.

Plaintiff moves for a default judgment against defendants Tatianna Joseph, New Millenium Medical Imaging, P.C., and JGG Medical Care, P.C., for their failure to appear, plead or move (despite having been served with process in this case) and their time to appear, plead or move has expired and they are in default.

Defendant Tatianna Joseph was served with a copy of the summons and complaint on May 9, 2014. Defendants New Millenium Medical Imaging, P.C., and JGG Medical Care P.C., were served on February 27, 2014. The defendants have not answered, appeared or moved and are in default.

Accordingly, it is ADJUDGED and DECLARED that the defaulting defendants have no rights under 11 NYCRR. 65-1.1 for their failure to answer and appear in this action. Plaintiff has no duty to pay their No-Fault claims with respect to the

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

September 28, 2012 collision referenced as claim number 9MNL09215-03 under policy of insurance NLF50200715202.

Plaintiff seeks an order of summary judgment against the remaining defendants declaring that it has no duty to pay No-fault claims with respect to the September 28, 2012 Vehicular collision referenced as claim number 9MNL09215-03. Plaintiff contends that Tatianna Joseph, defendants' assignor failed to comply with policy conditions by failing to appear at two scheduled and noticed Examinations Under Oath. The failure to appear at these Examinations violated the policy ab-initio and preclude payment of any claims.

In support of its motion plaintiff submits the affidavit of Renato Pedro, a claims adjustor in charge of the Assignee's file. He states that the assignor was scheduled on two occasions for Examinations Under Oath (EUO), one on December 26, 2012 and another on January 15, 2013 (see Moving papers exhibit 4). She failed to appear at each scheduled Examination, this is a breach of a policy condition voiding the policy and payment of No-fault benefits was denied on this basis.

The failure to appear for EUO's requested by an insurer when, and as often as, it may reasonably require 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 and plaintiff has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (Unitrin Advantage Insurance Company v. Bayshore Physical Therapy, PLLC, 82 A.D. 3d 559, 918 N.Y.S. 2d 473 [1st. Dept. 2011]; American Transit Insurance Company v. Lucas, 111 A.D.3d 423, 974 N.Y.S.2d 388 [1st. Dept. 2013]; American Transit Insurance Company v. Leon, 112 A.D.3d 441, 975 N.Y.S.2d 875[1st. Dept. 2013]). However, plaintiff must establish that it requested the Examinations Under Oath" in accordance with the procedures and time frames set forth in the no-fault implementing regulations" (see Unitrin Advantage Insurance Co., v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, Supra).

An Insurer must pay or deny a claim within 30 calendar days after proof of claim is received (see 11 NYCRR § 65-3.8 (a)). An insurer may within 15 calendar days of receipt of the claim request additional verification (see Nyack Hospital v. General Motors Acceptance Corp., 27 A.D.3d 96, 808 N.Y.S.2d 399 [2nd. Dept.]). An initial timely request for verification tolls the 30 day rule to pay or deny the claim until verification is received (Infinity Health Products, Ltd., v. Eveready Insurance Co., 67 A.D.3d 862,890 N.Y.S.2d 545 [2nd. Dept. 2009]). If verification is not received within 30 calendar days after an additional verification request is made, then the insurer has 10 calendar days to again request the additional verification from the party from whom the verification was originally requested (see 11 NYCRR §65-15(e)(2)), and the insurer does not have to pay the claim until the verification requested is received, that is payment is tolled. The provision requiring the insurer to wait 30 calendar days prior to sending a second request for verification when the first request is not complied with does not apply to medical examination requests or examinations under oath.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. Although Plaintiff has demonstrated that Tatianna Joseph, defendants' assignor, failed to appear at two duly scheduled Examinations Under Oath, it has failed to prove that the additional verification requests were made in accordance with the procedures and time frames set forth in the no-fault implementing regulations. That is, that they were made within 15 days from plaintiff's receipt of the assignor's claim form.

There is no proof as to when plaintiff received proof of claim in order to establish that the first request for additional verification in the nature of an Examination Under Oath mailed December 10, 2012, and the second request for additional verification mailed on December 31, 2012 were made in accordance with the time frames set forth in the no-fault regulations.

Accordingly, it is ordered that the motion for a default judgment is granted, and it is further

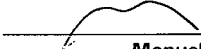
ORDERED, ADJUDGED and DECLARED that the defaulting defendants have no rights under 11 NYCRR. § 65-1.1 for their failure to answer and appear in this action. Plaintiff has no duty to pay their No-Fault claims with respect to the September 28, 2012 collision referenced as claim number 9MNL09215-03 under policy of insurance NLF50200715202, and it is further

ORDERED, that plaintiff's motion for summary judgment against the remaining defendants is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 14, 2014


Manuel J. Mendez
J.S.C.

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**