

Nordstrom v Nationwide Mut. Fire Ins. Co.
2014 NY Slip Op 32914(U)
November 12, 2014
Supreme Court, Suffolk County
Docket Number: 7737/12
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
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INDEX NO.: 7737/12
MOTION DATE: 12/12/13
MOTION NO.: 001 MD

JOHN NORDSTROM,
Plaintiff,

PLAINTIFF'S ATTORNEY:
JEENA R. BELIL, P.C.
150 Motor Parkway, Suite 401
Hauppauge, New York 11788

-against-

NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY,
Defendant.
-----X

DEFENDANT'S ATTORNEY:
EPSTEIN, GIALLEONARDO,
FRANKINI & GRAMMATICO
330 Old Country Rd., Suite 200
Mineola, New York 11501-4143

Upon the following papers numbered 1 to 45 read on this motion for partial summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-14; ~~Notice of Cross Motion and supporting papers~~ ___; Answering Affidavits and supporting papers 15-33; Replying Affidavits and supporting papers 34-45; ~~Other~~ ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 001) of plaintiff John Nordstrom for an order pursuant to CPLR R. 3212 granting partial summary judgment deeming defendant's denial of coverage invalid and declaring any and all of defendant's defenses in this action waived as a result is denied.

On February 9, 2006, plaintiff John Nordstrom ("Nordstrom"), an employee of non-party Clever Closets, Inc., was allegedly injured in a motor vehicle accident while in the course of his employment. Nordstrom subsequently made a claim for workers' compensation benefits and, on February 16, 2006, notified defendant Nationwide Mutual Fire Insurance Co. ("Nationwide") of his additional claim for no-fault lost wage benefits under his employer's policy of liability insurance with Nationwide. On June 21, 2006, Nationwide issued a denial of benefits to Nordstrom based on his failure to appear for an examination under oath ("EUO"). On March 9, 2012, Nordstrom commenced the instant action for breach of the policy of insurance. Issue was joined on May 16, 2012. Plaintiff now moves for an order deeming defendant's denial of coverage invalid and granting partial summary judgment in favor of plaintiff. Plaintiff seeks a total of \$125,000.00 plus statutory interest, attorney's fees and costs.

In support of his motion for summary judgment, plaintiff has submitted the affirmation of his attorney, Jeena R. Belil, Esq., dated August 28, 2013, and his affidavit, sworn to July 21, 2013, together with copies of the pleadings, plaintiff's verified bill of particulars dated July 18, 2012, various discovery demands and responses, and documents pertaining to plaintiff's claim for no-fault benefits.

In opposition to the motion, Nationwide has submitted the affidavits of its employees Jessica Jones, Claims Specialist II, sworn to November 19, 2013; Evelyn Webb, No-Fault Claims Manager in the Personal Injury Protection Unit, sworn to November 18, 2013; Cynthia Fitzpatrick, Administrative Team Supervisor, sworn to November 18, 2013; and Robert Divagno,

Senior Investigator. In addition, defendant has annexed numerous exhibits including documents and materials contained in the no-fault claim file designated by claim number 66 31 BA 627717-51.

Pursuant to Insurance Law §5106(a) and the appurtenant regulations, an insurer is required to either pay or deny an insured's claim for no-fault benefits within thirty days from the date of receipt of proof of the claim (11 NYCRR §65-3.8). Within ten business days after receipt of the completed application for no-fault benefits (NYS Form NF-2), the insurer must forward, to those parties required to complete them, the verification forms it will require prior to determination of the insured's claim (11 NYCRR §65-3.5(a)). If any requested verification has not been provided to the insurer within 30 calendar days after the original request, the insurer must, within ten calendar days (*i.e.*, within 40 days of the original verification request), follow up by telephone or by mail with the party from whom the verification was requested (11 NYCRR §65-3.6(b)). At the same time, the insurer must inform the applicant in writing of the reason(s) the claim is delayed and identify the missing verification and the party from whom it is requested (*id.*).

Upon receipt of one or more of the completed verification forms, the insurer has 15 business days to request any additional verification required to establish proof of the insured's claim (11 NYCRR §65-3.5(b)). "The insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested" (11 NYCRR §65-3.5(c)). No-fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of the insured's claim, which includes receipt of all relevant verification information requested such as medical reports, wage verification, employment verification, etc. (11 NYCRR §65-3.8(a)(1)). As noted by the Court of Appeals, the language of the no-fault regulations (11 NYCRR §§65-3.8(a)(1), 65-3.8(b)(3)) contemplates that "an insurer must pay or deny only a verified claim – that is, a claim that has been verified to the extent compliance with section 65-3.5 dictates in the particular case – within 30 calendar days of receipt; and, conversely, is not obligated to pay any claim until it has been so verified" (*Nyack Hospital v General Motors Acceptance Corp.*, 8 NY3d 294 [2007]). Any deviation in the insurer's compliance with the time frames set forth in the regulations reduces the 30-calendar-day period by a corresponding period (11 NYCRR §65-3.8(l)), provided that the insurer sought the additional verification within the prescribed 30 calendar days (*Keith v Liberty Mutual Fire Ins. Co.*, 118 AD2d 151 [2d Dept 1986]; *Inwood Hill Medical, P.C. v Allstate Ins. Co.*, 3 Misc 3d 1110(A) [Civ Ct 2004]). Overdue payments bear interest at the rate of 2% per month (11 NYCRR §65-3.9(a), and the claimant is also entitled to recover attorney's fees (Insurance Law §5106(a); 11 NYCRR §65-4.6).

The insurer may require that the insured attend an examination under oath ("EUO") to establish proof of claim, which examination must be held at a time and place reasonably convenient to the insured. The insured must be informed that reimbursement will be provided for loss of earnings and reasonable transportation expenses incurred in connection with the EUO (11 NYCRR §65-1.1, §65-3.5(e)). A request for a EUO "must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination" (11 NYCRR §65-3.5(e)). "The no-fault regulations treat the EUO as a form of verification" (*Dynamic Medical Imaging, P.C. v State Farm Mutual Auto Ins.*, 29 Misc 3d 278 (Dist Ct Nassau Cty) [date]; 11 NYCRR 65-3.8(a)(1)). Failure to appear for a EUO, a condition precedent to coverage, is a basis for denial of coverage (*IDS Prop. Cas. Ins. Co. v Stracar Med. Servs., P.C.*, 116 AD3d 1005 [2d Dept 2014]).

The submissions reflect that on February 16, 2006, Nationwide received telephone notification of Nordstrom's claim for no-fault lost wage benefits. In response thereto, Nationwide's employee Jessica Jones, the claim representative assigned to Nordstrom's no-fault claim, sent plaintiff various required documents and forms, including an application for no-fault benefits (NYS Form NF-2). The affirmation of Ms. Jones reflects that she advised plaintiff of the need for, *inter alia*, a disability statement, a signed authorization for information regarding his workers compensation claim, and a wage verification form from his employer. Thereafter, on March 2, 2006, defendant Nationwide sent a Wage Verification Report form (NYS Form NF-6) to plaintiff's employer, Clever Closets, Inc., and issued a "general denial" of plaintiff's entire claim to the extent that workers' compensation coverage is primary for medical payments and loss of earnings. On March 6, 2006, Nationwide sent plaintiff a verification of self-employment (NYS NF-7) form to complete and return, together with a no-fault additional PIP subrogation agreement form (NYS NF-11). On March 9, 2006, Nationwide received Nordstrom's written application for no-fault lost wage benefits (NYS Form NF-2).¹ On March 27, 2006, Nationwide received the completed NF-7 and the NF-11 from plaintiff, along with tax records for 2002 and 2003, but without earnings records for 2004 or 2005 as requested.

On April 6, 2006, within 40 days after it first requested wage verification information from plaintiff's employer, Nationwide sent a timely follow-up request for the verification to plaintiff's employer (11 NYCRR §65-3.6(b)).² On April 14, 2006, having learned in the interim that plaintiff's employment had been terminated, Nationwide sent a further follow-up request to plaintiff's former employer requested the NF-6 form and the reason for plaintiff's termination. Also on April 14, 2006, and within 40 days of its receipt of the completed NF-7 and NF-11 forms, Nationwide notified Nordstrom in writing that in order to process his claim it required the following additional verification: completed wage verification form NF-6 from his employer; statement of disability from his primary physician; copies of plaintiff's federal individual and business income tax returns for the last two years; and the date and reason for his termination from employment from Clever Closets, Inc., in writing from the employer. The letter advised plaintiff that his claim for lost earnings was "formally delayed" pending receipt of the additional verification, and further advised him that upon receipt of the verification, "additional verification may be requested" (11 NYCRR §65-3.6(b)).

The submissions reflect that on April 20, 2006, Nationwide finally received the completed wage verification form from Nordstrom's employer together with the employer's statement regarding the circumstances and timing of plaintiff's termination of employment. Accordingly, Nationwide had 15 business days thereafter to seek further verification, or until May 11, 2006. Nationwide also received copies of a Workers Compensation Board "C-7" form dated April 19, 2006 and two "C-4" forms dated April 27, 2006 and May 3, 2006, respectively. These documents

¹ The Court notes that the plaintiff's signature on the application is erroneously dated February 1, 2006 – prior to the date of the accident.

² The Court notes that although the April 6, 2006 follow-up request for verification from plaintiff's employer was timely, Nationwide did not provide plaintiff with written notice of the follow-up request "at the same time" as required by §65-3.6(b), but did so eight days later, on April 14, 2006. Assuming, *arguendo*, that the delayed notification itself provides a basis for reducing the insurer's time to pursuant to §65-3.8(l), the 30-day time period to pay or deny the claim would be reduced by eight days. As reflected by the submissions, however, all of the requested verification was not provided and accordingly plaintiff's claim never became complete before coverage was denied based on plaintiff's failure to comply with a condition precedent of the policy.

reflected the existence of a question regarding the causal relationship between plaintiff's injuries and the accident. On May 8, 2006, 12 business days after receipt of the initial verification from plaintiff's employer, Nationwide sent plaintiff a reservation of rights letter advising him of the potential coverage questions and requesting a recorded statement. On May 9, 2006, 13 business days after receipt of the initial verification, Nationwide made a further written demand for an examination under oath of plaintiff to be held on May 23rd.

The submissions reflect that plaintiff failed to appear for his scheduled examination under oath on May 23, 2006, or on the rescheduled date of June 13, 2006. The submissions further reflect that on June 21, 2006, Nationwide denied Nordstrom's claim based on his failure to appear for an examination under oath.

In his motion for summary judgment, plaintiff alleges that defendant did not take any action to properly toll the 30-day time limit until April 14, 2006, when it mailed an allegedly untimely first request for additional verification (which plaintiff alleges – incorrectly – was approximately 65 days after receipt of plaintiff's claim).³ Plaintiff alleges that a second follow-up request dated May 25, 2006 for the additional verification previously requested also failed to successfully toll the claim as it was untimely and did not specify that the claim was being delayed pending an examination under oath. Plaintiff further argues that the March 2, 2006 "general denial" of plaintiff's claim was an unequivocal denial of his claim which effectively negated his obligation to comply with any further verification requests, including defendant's request for an examination under oath. Finally, plaintiff alleges that the examination under oath was not scheduled at a reasonable time and place.

Contrary to plaintiff's argument, the March 2, 2006 "general denial" issued by Nationwide did not deny plaintiff's claim for no-fault benefits. Although inartfully worded, it is clear from the document that it is intended to apprise plaintiff that workers' compensation coverage, if applicable, is primary for plaintiff's loss of earnings claim, and that any no-fault benefits would be excess to workers' compensation benefits. Moreover, the denial of claim form specifically advised plaintiff that in accordance with the Insurance Law and the applicable regulations, Nationwide would afford basic PIP benefits to the extent that it is excess over the workers' compensation benefits (11NYCRR §65-3.2). Accordingly, it is not such a complete and unequivocal denial of plaintiff's claim as would cut off defendant's rights to further verification of his claim for no-fault benefits (*cf. State Farm Ins. Co. v Domotor*, 266 AD2d 219 [2d Dept 1999]).

The submissions reflect that Nationwide's requests for additional verification were timely. The affidavits of Nationwide's employees are sufficient to establish the mailing practices and procedures in effect at Nationwide (*St. Vincent's Hosp. of Richmond v Government Employees Ins. Co.*, 50 AD3d 1123 [2d Dept 2008]), and the affidavit of Jessica Jones, the Nationwide claims representative who handled plaintiff's claim, establishes that the initial verification requests and follow up verification requests, as described above, were properly and timely mailed in accordance with Nationwide's standard practices and procedures and within the time frames contemplated by the regulations.

³ April 14, 2006 is 64 days from the date of plaintiff's accident.

The submissions reflect that the verification information Nationwide received regarding plaintiff's no-fault lost wages claim raised reasonable questions regarding the facts underlying plaintiff's termination from his employment and his workers' compensation claim. Although plaintiff alleged that he was unable to return to work as a result of the serious injuries he sustained in the accident on February 9, 2006 and that his employment was terminated as a result of his injuries, the statement of his employer reflects that plaintiff's employment was to have been terminated on February 11, 2006. The employer stated that after the accident on February 9, 2006, plaintiff returned to work for one full day, on February 10, 2006, and then did not show up for work on February 11, 2006, and that his employment was terminated by telephone on February 17, 2006 after plaintiff refused to meet with his employer. The verification regarding plaintiff's workers compensation claim reflected that plaintiff's claimed shoulder injury may have been unrelated to work and not causally related to the accident, and further reflected that the plaintiff's treating physician did not examine him until March 17, 2006, more than a month after the accident. Nationwide thus had a reasonable, objective basis for demanding further verification of plaintiff's claims, including an examination of plaintiff under oath.

The submissions reflect that plaintiff did not object to the basis of Nationwide's request for an EUO, and accordingly any such objection is waived (*Crescent Radiology, PLLC v American Tr. Ins. Co.*, 31 Misc 3d 134(A) [App Term 2011]). There is no merit to plaintiff's assertion that the time and place of the examination under oath was unreasonable, and that defendant should have provided transportation for plaintiff or held the EUO at a location more convenient and accessible to plaintiff. The submissions reflect that the EUO was scheduled at the Nationwide office in Woodbury, approximately 30 miles from plaintiff's home, which the Court finds is not an unreasonable distance. Moreover, the submissions reflect that plaintiff was informed, as required by the regulations, that he would be reimbursed for any reasonable transportation costs incurred in connection with the EUO. There is no requirement – contractual, statutory, regulatory or otherwise – that an insurer provide its insureds with transportation to an examination under oath.

Plaintiff concedes that he failed to appear for the EUO on May 23, 2006 or the rescheduled date of June 13, 2006. In light of the foregoing, defendant's issuance of a denial of plaintiff's no-fault claim on June 21, 2006 for breach of the policy condition was proper and timely. Accordingly, plaintiff's motion for summary judgment is denied.

Dated: November 12, 2014

HON. PAUL J. BAISLEY, JR.

J.S.C.