

Hertz Vehs, LLC v EMV Med., P.C.
2014 NY Slip Op 33304(U)
December 17, 2014
Supreme Court, New York County
Docket Number: 159196/12
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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HERTZ VEHICLES, LLC,

Plaintiff,

-against-

EMV MEDICAL, P.C., et al.,

Defendant.

-----X

DECISION AND
ORDER

Index No.
159196/12

HON. ANIL C. SINGH, J.:

Plaintiff in this no-fault automobile insurance matter moves pursuant to CPLR 3212 for summary judgment in favor of plaintiff and against defendant Silver Lotus Acupuncture, P.C. (“Silver Lotus”), on the grounds that Silver Lotus and claimant Shavar Conyers, who assigned no-fault claims to Silver Lotus, failed to appear for EUOs. Defendant opposes the motion.

Plaintiff exhibits the sworn affidavit of Karen Layne, who states that she is a Senior No-Fault Examiner employed by Hertz Vehicles, LLC, the self-insured owner of the motor vehicle involved in this action. She states that claimants Niquelle Spencer, Nickele Spencer, and Shavar Conyers were occupants of a 2010 Nissan automobile, owned by Hertz, that was allegedly involved in a collision with another motor vehicle on June 20, 2011, on Broadway between West 80th and West 81st Streets in Manhattan. According to Ms. Layne, plaintiff denied the claims based on the failure

of claimant Conyers and defendant Silver Lotus to appear for duly-scheduled EUOs.

Defendant has not submitted an affidavit in opposition to the motion. Instead, defendant asserts that Ms. Layne's affidavit does not adequately establish that pertinent documents were even mailed to the correct addresses, or that the defendant failed to appear at purportedly scheduled EUOs. Further, defendant contends that plaintiff fails to demonstrate that it has good reasons to request EUOs of defendant.

Contrary to defendant's contention, the Court finds that the record in this matter establishes that letters were mailed by plaintiff to the correct addresses; defendant failed to appear for an EUO; and plaintiff has demonstrated ample justification for EUOs.

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]). 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 (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]).

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.

Here, the Court finds that the sworn affidavit of Karen Layne makes out a prima facie case in favor of plaintiff that defendant breached a material condition precedent to coverage. The Court finds further that defendant has failed to show the existence of a genuine issue of material fact or otherwise rebutted plaintiff's prima facie case.

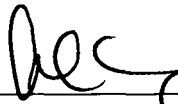
Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on its first, second, third and fourth causes of action seeking a declaration that there is no coverage for the no-fault claims of defendant Silver Lotus 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 defendant Silver Lotus Acupuncture, P.C., for any and all no-fault related services.

The foregoing constitutes the decision and order of the court.

Date: 12/17/14
New York, New York



Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**