

Hertz Vehs., LLC v Active Care Med. Supply, Corp.
2014 NY Slip Op 33970(U)
November 25, 2014
Supreme Court, New York County
Docket Number: 109393/2011
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

HERTZ VEHICLES, LLC,

INDEX NO. 109393/2011

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

ACTIVE CARE MEDICAL SUPPLY, CORP., IN-LINE CHIROPRACTIC, P.C., ALEN OVEN CHIROPRACTIC CARE, P.C., METROPOLITAN MEDICAL & SURGICAL, P.C., PRESTIGE MEDICAL CARE, P.C., STAR MEDICAL & DIAGNOSTIC, PLLC, FYZ ACUPUNCTURE, P.C., NEW MILLENNIUM MEDICAL IMAGING, P.C., HEALTH NEEDLES ACUPUNCTURE, P.C., ADVANCED MEDICAL CARE, P.C., NEW CENTURY MEDICAL DIAGNOSTICS, P.C., HARSHAD BHATT, M.D., AVANGUARD MEDICAL GROUP, PLLC, FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER SOCIAL WORK SERVICES, PLLC, NAIM MOORE, FABIAN RICHARDS and ALLISON RICHARDS, Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1-4	_____
5	_____
6-7	_____

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C. Plaintiff, Hertz Vehicles ("Plaintiff"), seeks a declaration that it has no obligation to pay any No-Fault benefits to the defendants in this action arising out of an alleged vehicular collision on February 16, 2011 in which defendants Naim Moore, Fabian Richards, and Allison Richards (collectively, "Claimants") allegedly sustained personal injuries and assigned their rights to collect no-fault benefits to defendants, medical providers. Plaintiff seeks this declaration based upon Claimants' failure to appear for properly requested examinations under oath.

By Order dated May 2, 2012, Plaintiff obtained default judgment against all defendants except Active Care Medical Supply Corp. ("Active Care"), Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro"), Health Needles Acupuncture, P.C. ("Health Needles"), and Naim Moore. Active Care, Five Boro, and Health Needles interposed answers to Plaintiff's Complaint. Plaintiff states that it was unable to locate and effect service on Naim Moore.

Five Boro interposed cross claims against claimants, Naim Moore and Allison Richards, seeking judgments against them "in the amount of the sums of the claims submitted to Plaintiff by the answering Defendant(s) pursuant to the assignment of no-fault benefits executed by the assignor in lieu of the promised of monetary

payment for treatment/services.” Five Boro interposed a counter-claim against Plaintiff for attorneys’ fees incurred by Five Boro in the event that Five Boro “prevails in the instant action” “pursuant to the insurance contracts and pursuant to the Court of Appeals decision in *US Underwriters Ins. Co., v. City Club Hotel, LLC, et al.*, 3 N.Y. 3d 693, 822 NE 2d 777 (2004).”

Plaintiff moves, pursuant to CPLR §3212, for summary judgment against Active Care, Five Boro, and Health Needles, and for an Order declaring that there is no coverage for Defendants’ claims on the grounds that Claimants, who assigned their No-Fault Claims to Defendants, violated a condition precedent to coverage by failing to appear for duly scheduled examinations under oath on two occasions. Plaintiff’s motion also seeks to dismiss Five Boro’s counterclaim, which seeks a judgment in the amount of its bills and attorneys’ fees, based on Claimants’ failure to appear for the EUOs and on the grounds that Vladimir Grinberg, co-owner of Five Boro, signed a general release of all claims for Five Boro pursuant to his guilty plea to criminal charges of healthcare fraud. Lastly, Plaintiff seeks, pursuant to CPLR §3126 and 22 NYCRR 130-1.1., sanctions, attorneys’ fees and costs against Five Boro for refusing to abandon its claims after Grinberg signed the release.

Plaintiff provides: the attorney affirmation of Aaron F. Fishbein; the affirmation of Joseph R. Federici, Esq., and the affidavit of Maureen Stromberg, a claims representative. Mr. Federici, an attorney retained by Plaintiff to take the EUOs of the Claimants, avers to his office’s regular office procedures with respect to the mailing and scheduling of EUOs and that Claimants’ EUOs were mailed and scheduled in accordance with those procedures. Mr. Federici also attests to Claimants’ failure to appear for their scheduled EUOs on March 31, 2011 and April 21, 2011. Annexed to Federici’s affirmation are copies of the letters sent by Plaintiff to Claimants scheduling their EUOs, along with affidavits of service attesting to the mailing of those documents.

Ms. Stromberg, a claims representative employed by Plaintiff, avers that Plaintiff received claims from Defendants in connection with the February 16, 2011 motor vehicle accident, and sought to verify the alleged injuries through EUOs of the Claimants. Stromberg further avers that Plaintiff denied Defendants’ claims based on Claimants’ failure to appear for their scheduled EUOs, a violation of a condition precedent to coverage for the no-fault claims submitted.

Plaintiff exhibits the General Release signed by Vladimir Grinberg, individually and as an Officer of Five Boro, on June 28, 2013, which 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.

Five Boro opposes Plaintiff’s motion for summary judgment and submits the attorney affirmation of Ilya Murafa in opposition.

Active Care and Health Needles oppose Plaintiff’s motion for summary judgment and cross move for an Order pursuant to CPLR 3124 compelling Plaintiff to supplemental responses to Defendants’ demands for discovery and inspection of Plaintiff’s Special Investigations Unit file and demands for an examination before trial of a representative of Plaintiff. Defendants submit the attorney affirmation of Oleg Rybak, Esq.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to

satisfy this requirement. (*Zuckerman, supra*).

The No-Fault Regulations provide that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to appear for a scheduled examination under oath is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dep't 2011]; *Hertz Corp. v. V.S. Care Acupuncture, P.C.*, 2013 NY Slip Op 30895(U), *3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A), *1 [N.Y. App. Term 2012]. Accordingly, when the claimants or the assignors fail to appear for the requested exams, "the defendant insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the 30 day period . . . Since the contract has been vitiated, defendant may deny all the claims retroactively to the date of loss." See *LK Health Care Prods. Inc. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1230(A), *5 [N.Y. Civ. Ct. 2013]. An insurer need not demonstrate that a EUO request was reasonable to satisfy its *prima facie* burden on a motion for summary judgment. See *Unitrin*, 82 A.D.3d at 560; *Bath Ortho Supply*, 34 Misc. 3d 150(A) at *1.

"[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." *American Transit Insurance Company v. Lucas*, 111 A.D. 3d 423, 424 [1st Dept 2011]. A presumption of mailing "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed." *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D. 679, 680 [2nd Dept 2001]).

Here, through the affidavits provided and exhibits thereto, Plaintiff has demonstrated prima facie entitlement to summary judgment, and an Order declaring that Defendants are not entitled to No-Fault Coverage for the assigned claims arising from the alleged collision in the Complaint based on Claimants' to appear for their duly noticed and scheduled examinations under oath, thereby breaching a condition precedent to coverage under no-fault regulations.

Five Boro fails to raise a triable issue of fact in opposition to Plaintiff's motion for summary judgment. In opposition, Five Boro submits the attorney affirmation of Ilya Murafa. Five Boro asserts the Plaintiff's motion should be denied for the following reasons: Plaintiff has not established proper notice of its EUO requests, Plaintiff's counsel should be disqualified because he is a material witness in the dispute, and Plaintiff has not established proper denial of Five Boro's claim. Five Boro further contends that Plaintiff's request for sanctions against Five Boro based on Grinberg's Release is unwarranted; Five Boro argues that "[t]he release discharges Mr. Grinberg's interest in Five Boro's outstanding claims, not Five Boro proper." Five Boro's conclusory assertions are insufficient to demonstrate the existence of a genuine issue of fact or otherwise rebut plaintiff's prima facie case.

Active Care and Health Needles fail to raise a triable issue of fact in opposition to Plaintiff's motion for summary judgment. Active Care and Health Needles submit the attorney affirmation of Oleg Rybak. Defendants argues that Plaintiff's motion should be denied because Plaintiff has failed to show that it timely issued denials and that the EUOs were warranted here. However, as stated above, the failure to appear for a scheduled examination under oath is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. Furthermore, an insurer need not demonstrate that an EUO request was reasonable to satisfy its *prima facie* burden on a motion for summary judgment. *See Unitrin*, 82 A.D.3d at 560.

Active Care and Health Needles also contend that the motion is premature in light of the fact that discovery has not been completed. However, "[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212(f), for postponing a decision on a summary judgment motion." *Kennerly v. Campbell Chain Co.*, 133 A.D. 2d 669, 670 [2nd Dept 1987]).

Lastly, Plaintiff's request for sanctions and attorneys' fees against Five Boro is denied as the alleged conduct does not rise to a level that would justify such sanctions against Five Boro.

Wherefore, it is hereby,

ORDERED that plaintiff, Hertz Vehicles LLC's motion for summary judgment against defendants Active Care Medical Supply, Corp., Five Boro Psychological and Licensed Master Social Work Services, PLLC, and Health Needles Acupuncture, P.C., is granted; and it is further

ORDERED and ADJUDGED that defendants Active Care Medical Supply, Corp., Five Boro Psychological and Licensed Master Social Work Services, PLLC, and Health Needles Acupuncture, P.C. are not entitled to no-fault coverage for the motor vehicle accident that occurred on February 16, 2011 involving Claimants as referenced in the Complaint; and it is further

ORDERED and ADJUDGED that defendant Five Boro Psychological and Licensed Master Social Work Services, PLLC's counterclaim against Plaintiff is dismissed; and it is further

ORDERED that defendants Active Care Medical Supply, Corp., and Health Needles Acupuncture, P.C.'s cross motion is denied; and it is further

ORDERED that defendant Five Boro Psychological and Licensed Master Social Work Services, PLLC's cross claims against Naim Moore and Allison Richards are severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: NOVEMBER 25, 2014

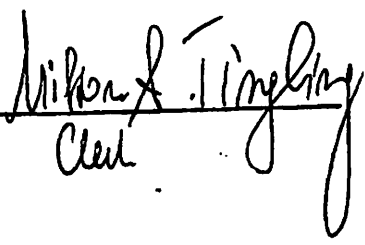


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
OCT - 3 2016
COUNTY CLERK'S OFFICE
NEW YORK



Clerk