Kemper Independence Ins. v Bell Chiropractic, P.C.
2015 NY Slip Op 30064(U)
January 14, 2015
Supreme Court, New York County
Docket Number: 152301/12
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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KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-against-

BELL CHIROPRACTIC, P.C., et al.,

Defendants.

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DECISION AND ORDER

Index No. 152301/12

HON. ANIL C. SINGH, J.:

Plaintiff in this no-fault automobile insurance matter moves: 1) for an order pursuant to CPLR 3215 entering a default judgment against defendant Healthy Way Acupuncture, P.C. ("Healthy Way"); and 2) in the alternative, for an order pursuant to CPLR 3212 granting partial summary judgment against defendant Healthy Way declaring that there is not coverage for the claims of Healthy Way assigned to it by defendant/claimants Carlos Torres and Maria Alvares. Defendant opposes the motion.

Plaintiff alleges that on January 5, 2011, claimants Wilbur Soto, Carlos Torres, and Maria Alvares were the occupants of a 2001 Dodge, insured by plaintiff in the name of claimant Soto, that was involved in a collision with another vehicle on the Cross-Bronx Expressway in the Bronx. Defendant Healthy Way allegedly provided medical treatment to claimants.

Plaintiff exhibits the sworn affidavit of Denise Winant, who states that she is

employed by Merastar Insurance Company. Ms. Winant contends that claimants Carlos Torres and Maria Alvares failed to appear for EUOs on two occasions.

Defendants have not submitted an affidavit in opposition to the motion. Instead, they assert that plaintiff's affidavit of the alleged no-show is insufficient as a matter of law and that plaintiff's attorneys should be disqualified as counsel.

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 (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 (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]).

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.

Defendants assert that the holding in Unitrin Advantage conflicts with applicable insurance law, no-fault regulations, public policy, and is in derogation of binding and controlling Court of Appeals precedent. Irrespective of defendants' position, the Court finds that plaintiff's reliance upon the principles set forth in Unitrin Advantage is neither misplaced nor mistaken, for the First Department's holding remains the law. Defendants do not cite any case stating explicitly that Unitrin Advantage is no longer good law.

Here, the Court finds that the sworn affidavit of Denise Winant makes out a prima facie case in favor of plaintiff that claimants breached a material condition precedent to coverage. The Court finds further that Healthy Way 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 partial summary judgment in favor of plaintiff and against defendant Healthy Way Acupuncture, P.C., declaring that there is no coverage for the no-fault claims of Healthy Way Acupuncture, P.C., assigned to it by defendant/claimants Carlos Torres and Maria Alvares is granted; and it is further

ADJUDGED and DECLARED that plaintiff is not obliged to provide coverage for the claims of defendant Healthy Way Acupuncture, P.C., assigned to it by defendant/claimants Carlos Torres and Maria Alvares.

The foregoing constitutes the decision and order of the court.

Date: 1/14/15
New York, New York

Anil C. Singh