

Hertz Vehs., LLC v Innovative View Med., P.C.

2015 NY Slip Op 32090(U)

August 4, 2015

Supreme Court, New York County

Docket Number: 113117/2011

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
HERTZ VEHICLES, LLC,

Plaintiff,

-against-

INNOVATIVE VIEW MEDICAL, P.C., NR
ACUPUNCTURE, P.C., LMK PSYCHOLOGICAL
SERVICES, P.C., PHYSICAL THERAPY REHAB, P.C.,
LAWRENCE E. AUGUST, D.C., ALL ABOUT
REHABILITATION & P.T., P.C., UNITED MEDICAL
OFFICES OF LONG ISLAND, P.C., PERFECT POINT
ACUPUNCTURE, P.C., PREMIER SURGICAL SERVICES,
P.C., UPPER EASTSIDE SURGICAL, PLLC, WESTCAN
CHIROPRACTIC, P.C., ANDREW J DOWD, M.D.,
COMPREHENSIVE ANESTHESIA ASSOCIATES, PLLC,
MED HELPSUPPLY, INC., STAND UP MRI OF
BROOKLYN, P.C., HEAL ME MEDICAL, P.C., DI
MASSI CHIRO, P.C., CLEVELAND WILLIAMS,
TYRONE HARRISON and LORRAINE HARRISON,

Defendants.

-----X
KATHRYN E. FREED, J.S.C.

DECISION AND ORDER
Index No. 113117/2011
Mot. Seq. No. 004

FILED

AUG 10 2015

COUNTY CLERK'S OFFICE
NEW YORK

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1, 2 (Exs. A-P), 3, 4
ANSWERING AFFIDAVIT.....	5
REPLY AFFIDAVIT.....	6
MOVANT'S MEMORANDUM OF LAW.....	7

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this declaratory judgment action, plaintiff Hertz Vehicles, LLC ("Hertz") moves for an order, (1) pursuant to CPLR 3212, for summary judgment declaring that there is no coverage for the No-Fault claims of NR Acupuncture, P.C. ("NR") and Perfect Point Acupuncture, P.C. ("Perfect

Point”) because they violated a condition precedent to coverage by failing to appear for duly scheduled examinations under oath (“EUOs”); (2) to dismiss the counterclaims of NR and Perfect Point for judgment in the amount of their bills and for attorneys’ fees; and (3) for such other and further relief as this Court deems just and proper. NR and Perfect Point oppose the motion, arguing that plaintiff’s requests for an EUO were untimely, that plaintiff failed to prove non-appearance at said EUOs, and that plaintiff failed to establish its prima facie entitlement to summary judgment. After oral argument, and a review of the relevant case law and statutes, plaintiff’s motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

The captioned action arises from an alleged automobile accident that occurred on December 6, 2010, in which defendants Cleveland Williams, Tyrone Harrison, and Lorraine Harrison allegedly sustained personal injuries. Ex. A.¹ Claimants allege they were the occupants of a 2010 Toyota owned by plaintiff, a No-Fault insurer, which was involved in a collision with another vehicle at the intersection of Saratoga Avenue and Chauncey Street in Brooklyn, New York. Exs. A, M. Subsequently, claimants received medical treatment from medical providers (collectively the “medical provider defendants”), including NR and Perfect Point, and assigned the rights to collect No-Fault benefits to the medical provider defendants, which have submitted over \$90,000 of No-Fault claims to date. Plaintiff assigned claim number 02-2010-28029 to all No-Fault claims relating to the December 6, 2010 motor vehicle accident.

Several factors, including that the lessee of the Hertz vehicle, Christopher Brookings, was

¹Unless otherwise noted, all references are to exhibits annexed to plaintiff’s moving papers.

not in the vehicle at the time of collision, the damage to the Hertz vehicle was minor as the vehicle was driveable after the collision and did not require repair, and the heavy boilerplate courses of treatment that all claimants had received from the same medical provider defendants, raised concerns as to the legitimacy of the claim at issue. Plaintiff sought to verify that claimants were actually injured and received the medical treatment for which claims were submitted, and duly requested EUOs of claimants. Exs. N, O. Despite plaintiff's due demand, claimant Tyrone Harrison failed to appear for the properly requested EUO. Claimants Cleveland Williams and Lorraine Harrison appeared for their respective EUOs held on March 1, 2011 and May 17, 2011, but their testimony raised issues as to legitimacy and medical necessity of the purported medical treatment. *See* Exs. N, O.

Plaintiff, pursuant to its rights under the No-Fault Regulations, duly sought verification of the medical provider defendants' claims by requesting EUOs of the medical provider defendants, including NR and Perfect Point. Exs. I, K. In his affidavit in support of plaintiff's motion, Mr. Joseph R. Federici, Jr., an attorney retained by plaintiff to take the EUOs of NR and Perfect Point, attested to his office's regular procedures with respect to the mailing and scheduling of EUO requests, specifically that the requests for EUOs were mailed to NR and Perfect Point, and scheduled in accordance with those procedures. By letter dated and mailed to NR on March 30, 2011, an EUO was scheduled for April 13, 2011 at 11:00 a.m. at the office of Rubin, Fiorella & Friedman LLP, then located at 292 Madison Avenue, 11th Floor, New York, New York 10017. Ex. I. The letter was not returned by the Postal Service as undeliverable. Federici Aff. ¶ 8. Federici averred that, on April 13, 2011, he waited from 10:00 a.m. until 12:00 p.m. at the scheduled location for the EUO and that no representative from NR arrived for the EUO. *Id.* ¶ 9. Further, NR neither contacted his office

regarding its failure to appear nor attempted to reschedule the EUO. *Id.* Also, by letter dated and mailed to Perfect Point on May 13, 2011, an EUO was scheduled for May 27, 2011 at 10:00 a.m. at the same office of Rubin, Fiorella & Friedman LLP. Ex. K. That letter, too, was not returned by the Postal Service as undeliverable. Federici Aff. ¶ 12. Federici averred that, on May 27, 2011, he waited from 9:00 a.m. until 11:00 a.m. at the scheduled location for the EUO and that no representative from Perfect Point arrived for the EUO. *Id.* ¶ 13. Further, Perfect Point never contacted his office regarding its failure to appear nor attempted to reschedule the EUO. *Id.*

By correspondence dated May 2, 2011, plaintiff rescheduled NR's EUO for May 17, 2011 at 11:00 a.m. at the same location. Ex. J. The letter was not returned by the Postal Service as undeliverable. Federici Aff. ¶ 10. Federici averred that, on May 17, 2011, he waited from 10:00 a.m. to 12:00 p.m. and again NR failed to appear or contact plaintiff's counsel to reschedule. *Id.* ¶ 11. By correspondence dated May 31, 2011, plaintiff rescheduled Perfect Point's EUO for June 14, 2011 at 11:00 a.m. at the same location. Ex. L. The letter was not returned by the Postal Service as undeliverable. Federici Aff. ¶ 14. Federici averred that, on June 14, 2011, he waited from 10:00 a.m. to 12:00 p.m. and again Perfect Point failed to appear or contact plaintiff's counsel to reschedule. *Id.* ¶ 15.

Ms. Karen Layne, a claims representative employed by plaintiff, averred that plaintiff received claims from NR and Perfect Point in connection with the December 6, 2010 motor vehicle accident, and sought to verify the alleged injuries through EUOs of claimants. Layne Aff. ¶¶ 1, 3-4, 13-16. On June 24, 2011, plaintiff denied the claims pertaining to NR and Perfect Point based on their failures to appear for their duly scheduled EUOs. Ex. P.

Plaintiff commenced the captioned action by filing a summons and verified complaint on

November 18, 2011. Ex. A. Issue was joined by NR and Perfect Point by service of their respective answers on March 23, 2012, in which they asserted a counterclaim against plaintiff for attorneys' fees. Exs. B, C.

On or about April 24, 2012, plaintiff executed a stipulation of discontinuance with regard to defendant Stand Up MRI of Brooklyn, P.C. Ex. F.

On or about May 22, 2012, plaintiff moved for a default judgment against all defendants except NR, Perfect Point, and Williams. By order dated September 24, 2012 and entered on March 13, 2014, this Court (York, J.) severed and discontinued this action against Williams,² and granted plaintiff's motion for a default judgment against all remaining defendants except Lawrence E. August, D.C., Andrew J. Dowd, M.D., and Tyrone Harrison ("August, Dowd, and Harrison") because the Court could not determine whether they were active military members. Ex. G. By order dated July 17, 2014 and entered on July 22, 2014, this Court (York, J.) granted plaintiff's motion to renew its motion for a default judgment against August, Dowd, and Harrison on the basis that plaintiff submitted nonmilitary affidavits, establishing that the foregoing defendants were not serving in the United States military. Ex. H. Upon renewal, the July 22, 2014 order granted a default judgment as to August, Dowd, and Harrison. Ex. H.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against NR and Perfect Point, for a declaration that there is no coverage for the No-Fault claims of NR and Perfect Point on the ground that they each violated a condition precedent to coverage by failing to appear for duly scheduled EUOs on two occasions, and therefore, they have no right to collect No-Fault benefits with

²It is noted in Justice York's March 13, 2014 order that plaintiff intended to discontinue as to Williams due to its inability to locate and serve him. Ex. G, at 1-2.

respect to the December 6, 2010 accident pursuant to No-Fault Regulation 11 NYCRR 65-1.1. Additionally, plaintiff moves for an order dismissing the counterclaims of NR and Perfect Point, which seek judgment in the amount of their bills and attorneys' fees.

In support of its motion, plaintiff provides, *inter alia*, the initial pleadings; the police accident report regarding the December 6, 2010 collision; NF-10 New York Motor Vehicle No-Fault Insurance Law Denial of Claim forms; the deposition transcripts of claimants Williams and Lorraine Harrison; a stipulation of discontinuance, as referenced above; copies of Justice York's prior orders; copies of EUO scheduling letters for NR and Perfect Point with contemporaneous affidavits of service; the attorney affirmation of Aaron F. Fishbein, the affirmation of Federici, and the affidavit of Layne.

In opposition to the motion, NR and Perfect Point submit the attorney affirmation of Daniel Grace.

POSITIONS OF THE PARTIES:

Plaintiff argues that it is entitled to summary judgment on its complaint declaring that there is no coverage for the claims of NR and Perfect Point because they each failed to appear for duly scheduled EUOs on two separate occasions, which is a material breach of a condition precedent to coverage. Further, NR and Perfect Point have provided no excuse for their failures to appear. Finally, plaintiff argues that NR's and Perfect Point's counterclaims for attorneys' fees should be dismissed regardless of whether judgment is granted on the complaint because the counterclaims fail to state a cause of action since they are premised on the assertion that plaintiff is required to provide coverage for the No-Fault claims in the captioned action.

NR and Perfect Point oppose the instant motion on several grounds. In opposition, NR and Perfect Point argue that plaintiff's requests for EUOs were untimely since nothing establishes that the EUO letters were ever mailed, no affiant with personal knowledge describes the procedures for mailing EUO letters, and there is no testimony regarding how the addresses for NR and Perfect Point were obtained. NR and Perfect Point assert that the attorney affirmation submitted by plaintiff is insufficient to demonstrate personal knowledge of non-appearance at the purportedly scheduled EUOs because an attorney cannot become a witness in the case he is advocating, and thus his testimony should be stricken.

Further, NR and Perfect Point argue that the attorney affirmation demonstrating non-appearance does not assert the procedures for noting appearance or non-appearance. Also, NR and Perfect Point urge that there is no good reason as required for plaintiff to schedule the requested EUOs and that the purported suspicions raised by plaintiff are "blind assertions." Grace Aff. in Opp. ¶ 19. Additionally, assuming that NR and Perfect Point failed to appear, such failure was not the result of "willful and avowed obstruction" involving a "pattern of non cooperation for which no reasonable excuse was offered." *Ingarra v General Acc./PG Ins. Co. of N.Y.*, 273 AD2d 766, 767-768 (3d Dept 2003). Moreover, NR and Perfect Point argue that the instant summary judgment motion must be denied because plaintiff has failed to meet its prima facie burden of entitlement to judgment by failing to tender sufficient evidence to eliminate all material issues of fact.

In reply, plaintiff argues that its EUO requests were timely and that NR and Perfect Point have failed to prove otherwise. Plaintiff also maintains that the argument by NR and Perfect Point in this respect is without merit because there is no strict time limitation to request an EUO, instead EUOs must only be requested within a reasonable time. Specifically, contrary to NR and Perfect

Point's position, plaintiff argues that an EUO is not a form of verification, it is instead a condition precedent to coverage and breach of such a condition precedent voids the policy ab initio. However, plaintiff argues, even if an EUO is a form of verification, an insurer is not required to request an EUO within thirty days of receipt of the claim. Instead, the thirty day requirement only applies to a request for an independent medical exam ("IME"). Plaintiff makes this argument based on the fact that the Insurance Department promulgated an emergency First Amendment to Regulation 68 on April 11, 2002, which deleted the phrase "an examination under oath or" from Regulation 68-C, and subsequent amendments have purposely not reinstated the deleted language.

Plaintiff also argues that NR and Perfect Point's argument that there is nothing that establishes that the EUO letters were ever mailed is incorrect because Federici's affirmation and the contemporaneous affidavits of service prove when the EUO scheduling letters were mailed and to whom they were sent. Further, plaintiff urges that proof of proper mailing gives rise to a presumption that the item was received by the addressee. Additionally, plaintiff argues that it has clearly established a reasonable basis for requesting EUOs of NR and Perfect Point. Plaintiff also urges that NR and Perfect Point have not actually challenged the grounds for the EUO demands and merely make ambiguous arguments.

LEGAL CONCLUSIONS:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If the movant fails to make this showing, the motion must be denied

regardless of the sufficiency of the opposing papers. *Id.* Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v City of New York*, 49 NY3d 557 (1989); *People ex rel Spitzer v Grasso*, 50 AD3d 535 (1st Dept 2008). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation.” *Morgan v New York Telephone*, 220 AD2d 728 (2d Dept 1985).

Plaintiff’s Motion For Summary Judgment

Plaintiff’s application is granted insofar as it seeks judgment against NR and Perfect Point, declaring that there is no coverage for their claims.

“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.” *Hertz Vehicles, LLC v Delta Diagnostic Radiology, P.C.*, 2015 WL 708610, 2015 NY Slip Op 30242(U), *3 (Sup Ct, NY County, Feb. 18, 2015, No. 158504/12) (Rakower, J.). In particular, 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 at 11 NYCRR 65-1.1 also mandates 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.”

In *Hertz Vehicles, LLC v Delta Diagnostic Radiology, P.C.*, 2015 WL 708610, 2015 NY Slip Op 30242(U) (Sup Ct, NY County, Feb. 18, 2015, No. 158504/12), this Court (Rakower, J.), based upon an analogous set of facts, stated that:

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 . . . 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, [the insurer] 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[n] 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.

Id., *3 (second alteration in original); see also *Hertz Vehicles, LLC v New Utrecht Servs., Inc.*, 2014 WL 5426997, 2014 NY Slip Op 32767(U), *2-3 (Sup Ct, NY County, Oct. 27, 2014, No. 151559/12) (Singh, J.).

Further, an EUO need not be scheduled within thirty days of the insurer's receipt of the claim, but rather only within a reasonable time frame. *Dover Acupuncture, P.C. v State Farm Mutual Auto Insurance Co.*, 28 Misc3d 140(A), 2010 NY Slip Op 51605(U) (App Term, 1st Dept 2010); *Eagle Surgical Supply, Inc. v Progressive Casualty Insurance Co.*, 21 Misc3d 49, 50-51 (App Term, 2d Dept 2008).

In regard to proof of timely mailing in compliance with the No-Fault Regulations, this Court stated:

"[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].

Hertz Vehicles, LLC, 2015 WL 708610, *supra* at *4.

Here, plaintiff has demonstrated, through the affidavits it submitted and the exhibits thereto, its prima facie entitlement to summary judgment as against NR and Perfect Point, and for an order declaring that those defendants are not entitled to No-Fault coverage for the assigned claims arising from the alleged motor vehicle accident in the complaint. This entitlement is based on each of their failures, to twice appear for duly noticed and scheduled EUOs, thereby breaching a condition precedent to coverage under No-Fault Regulation 11 NYCRR 65-1.1.

NR and Perfect Point fail to raise a triable issue of fact in opposition to plaintiff’s motion for summary judgment. They argue that plaintiff’s motion should be denied because plaintiff has failed to show that the EUOs were timely requested and that the EUOs were requested for good reason. However, as stated above, their failures to appear for scheduled EUOs breached 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, plaintiff need not demonstrate that an EUO request was reasonable to satisfy its prima facie burden on a motion for summary judgment. *See Unitrin*, 82 AD3d, *supra* at 560. Additionally, plaintiff, the insurer, is not obligated to pay the claim regardless of whether it issued denials beyond the thirty-day period. *Hertz Vehicles, LLC*, 2014 WL 5426997, *supra* at *3.

Moreover, an EUO is not the same as an IME and is a condition precedent to coverage, not an affirmative defense. *See Hertz Vehicles, LLC*, 2015 WL 708610, *supra*. An EUO has different

requirements than an IME, such that an EUO must be requested within a reasonable time period. See *Dover Acupuncture P.C.*, 2010 NY Slip Op 51605(U), *supra*; *Eagle Surgical Supply, Inc.*, 21 Misc3d, *supra* at 50-51. Here, plaintiff requested EUOs of NR and Perfect Point within thirty days after the EUOs of two claimants were completed and only after those EUOs raised questions of possible insurance fraud. As such, the EUOs of NR and Perfect Point were requested within a reasonable time period. Additionally, Federici's affirmation, from a person who had actual knowledge of NR's and Perfect Point's failures to each appear at two scheduled EUOs and averring that the request letters were mailed in a timely manner and in the regular course of business, set forth all the requirements for having validly scheduled the said EUOs. Plaintiff also submitted contemporaneous affidavits of service that establish that the letters were timely mailed, which created a presumption that the letters were received by the moving defendants. NR and Perfect Point do not even dispute that they never received the EUO scheduling letters. Accordingly, plaintiff's motion for summary judgment is granted.

Plaintiff's Motion To Dismiss NR's And Perfect Point's Counterclaims

Plaintiff's application is granted insofar as it seeks to have the counterclaims by NR and Perfect Point for attorneys' fees dismissed. As plaintiff asserts, the counterclaims are premised on the assumption that plaintiff is required to provide coverage for the No-Fault claims in this action. In the event that NR and Perfect Point prevail, they assert counterclaims for attorneys' fees. However, this Court has awarded plaintiff summary judgment, and thus NR and Perfect Point are not entitled to attorneys' fees. *American Commerce Ins. Co. v Thompson*, 2014 NY Misc LEXIS 3515, 2014 NY Slip Op 32061(U), *5 (Sup Ct, NY County, April 15, 2014, No. 150219/12)

(Rakower, J.). Additionally, No-Fault coverage is regulatory in nature and independent of liability coverage. *See Dover Acupuncture, P.C.*, 2010 NY Slip Op 51605(U). Further, the provisions for attorneys' fees are strictly prescribed by the No-Fault Regulations in 11 NYCRR 65-4.6.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Hertz Vehicles, LLC's motion for summary judgment on the complaint seeking a declaration that it is not obliged to provide coverage for the claims of defendants NR Acupuncture, P.C. and Perfect Point Acupuncture, P.C. is granted; and it is further,

ORDERED and ADJUDGED that plaintiff Hertz Vehicles, LLC is not obliged to provide coverage for the claims of defendants NR Acupuncture, P.C. and Perfect Point Acupuncture, P.C.; and it is further,

ORDERED that defendant NR Acupuncture, P.C.'s counterclaim against plaintiff Hertz Vehicles, LLC for attorneys' fees is dismissed; and it is further,

ORDERED that defendant Perfect Point Acupuncture, P.C.'s counterclaim against plaintiff Hertz Vehicles, LLC for attorneys' fees is dismissed; and it is further,

ORDERED that plaintiff Hertz Vehicles, LLC is to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support

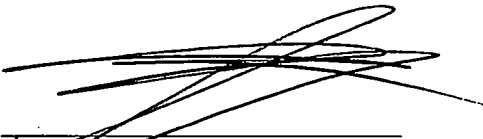
Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED that the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: August 4, 2015

ENTER:



KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED
AUG 10 2015
COUNTY CLERK'S OFFICE
NEW YORK