

**American Commerce Ins. Co. v Poitevien**

2016 NY Slip Op 30066(U)

January 15, 2016

Supreme Court, New York County

Docket Number: 150600/2012

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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AMERICAN COMMERCE INSURANCE  
COMPANY,

Plaintiff,

-against-

CARL POITEVIEN, et al.,

Defendants.

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DECISION AND  
ORDER

Index No.  
150600/2012

HON. ANIL C. SINGH, J.:

Defendants Active Care Medical Supply Corporation, and Health Needles Acupuncture, P.C., move pursuant to CPLR 2221(d) and (e) for leave to reargue/renew the order dated September 16, 2014, granting plaintiff's motion for summary judgment. Plaintiff opposes the motion.

Plaintiff American Commerce Insurance Company commenced the instant action seeking a declaratory judgment declaring that plaintiff has no obligation to pay claims submitted for medical treatment provided by the assignees.

The rule that "a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for

the failure to submit the additional facts on the original motion” (Grantat v. Walbaum’s Inc., 289 AD2d 289, 290 [2<sup>nd</sup> Dept. 2001] (other citations omitted)).

Defendants move to renew based upon the recent decision of the Appellate Division, First Department in American Transit Ins. Co. v. Jaga Medical Services, P.C., 128 A.D.3d 441 (1<sup>st</sup> Dept., 2015).

In short, the Court in its discretion finds that leave to renew is appropriate in light of Jaga.

In Jaga, the trial court granted an insurance company’s motion for summary judgment, declaring that the medical providers were not entitled to no-fault benefits as a result of a motor vehicle accident due to the claimant’s failure to appear for scheduled examinations under oath (EUOs). On appeal, the First Department reversed, stating:

The reason for the EUO request is a fact essential to justify opposition to plaintiff’s summary judgment motion, and such fact is exclusively within the knowledge and control of the movant. Further discovery on plaintiff’s handling of the claim so as to determine whether, inter alia, the EUOs were timely and properly requested is also essential to justify opposition.

(Jaga, 128 A.D.3d at 441 (internal citation omitted)).

The case of National Liability & Fire Insurance Co. v. Tam Medical Supply Corp., 131 A.D.3d 851 (1<sup>st</sup> Dept., 2015), is instructive. There, plaintiff no-fault

insurer moved for summary judgment declaring that its policy does not provide coverage to the individual defendant for the subject accident based on her failure to appear for scheduled EUOs. The First Department held that plaintiff's motion for summary judgment was properly denied, writing:

Although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage, here defendants-respondents, assignees of the defaulting individual defendant, opposed plaintiff's summary judgment motion on the ground that plaintiff had not established that it had requested the EUO within the time frame set by the no-fault regulations (*see* 11 NYCRR section 65-3.5[b]). In its reply plaintiff failed to supply evidence bearing on whether the EUO had been requested within the appropriate time frame.

(Tam, 131 A.D.3d at 851 (internal citations omitted)).

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]). 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 court 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 [1<sup>st</sup> Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1<sup>st</sup> Dept., 1989]). The court’s role is “issue-finding, rather than issue-determination” (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

In their opposition papers to the motion for summary judgment in the instant action, defendants point out that Insurance Department Regulation 11 NYCRR 65-3.5(b) requires insurers to request additional verification, including requests for an EUO, within 15 days of receipt of a claim or NF-2 form<sup>1</sup> (NYSCEF Doc. No. 14, p. 3, paras. 6 and 7). Defendants contend that plaintiff failed to show that it requested a timely and proper verification request in the form of an EUO within 15 days of receipt of the claim forms or the NF-2 (id.).

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<sup>1</sup>Insurance Regulation 11 NYCRR 65-3.5(b) states in pertinent part as follows: “Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms.”

In its reply (NYSCEF Doc. No. 18), plaintiff fails to supply evidence bearing on whether EUOs had been requested within the appropriate time frame. Accordingly, the Court finds that plaintiff has not established a prima facie showing of entitlement to summary judgment (see, for example, American Transit Ins. Co. v. Vance, 131 A.D.3d 849 [1<sup>st</sup> Dept., 2015] (stating that no-fault insurer's motion for summary judgment was denied because "although plaintiff established that the notices of the scheduled IMEs were properly mailed and that [defendant] did not appear, plaintiff failed to show that the scheduling of the IMEs complied with Insurance Department Regulations (11 NYCRR) section 65-3.5(d), which prescribes a 30-calendar-day time frame for the holding of IMEs"))).

Accordingly, it is

ORDERED that defendants' motion to renew is granted; and it is further

ORDERED that, upon renewal, plaintiff's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

Date: January 15, 2016  
New York, New York

  
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Anil C. Singh