Unitrin Direct Ins. Co. v A.C. Med., P.C.
2016 NY Slip Op 30822(U)
May 3, 2016
Supreme Court, New York County
Docket Number: 161490/13
Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

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UNITRIN DIRECT INSURANCE COMPANY,

Index No. 161490/13

Plaintiff,

- against -

A.C. MEDICAL, P.C., AFFINITY ACUPUNCTURE HEALTH CARE, PLLC, ARIS DIAGNOSTIC MEDICAL, PLLC, DAILY MEDICAL EQUIPMENT DISTRIBUTION CENTER, INC., EMPIRE STATE MEDICAL, P.C., FAST CARE MEDICAL DIAGNOSTICS, PLLC, INTEGRITY PSYCHOLOGY, P.C., LENCO DIAGNOSTIC LABORATORY, INC. a/k/a LENCO DIAGNOSTIC LABORATORIES, INC., LONGEVITY MEDICAL SUPPLY, INC., MAJESTIC ACUPUNCTURE, P.C., MANALAPAN SURGERY CENTER, MOON LIGHT PT, P.C., OCEAN VIEW MEDICAL CARE, P.C., PROFESSIONAL CHIROPRACTIC CARE, P.C., PROFESSIONAL MEDICAL HEALTHCARE, P.C., PUGSLEY MEDICAL CARE, P.C., R.E. CHIROPRACTIC SERVICES, PLLC, REHAB MEDICAL & DIAGNOSTIC, P.C., SGK CHIROPRACTIC, P.C., THERAPEUTIC CHIROPRACTIC SERVICES, P.C., ULTIMED HEALTH CARE, P.C., VITAL CHIROPRACTIC, P.C., YORK ACUPUNCTURE HEALTH CARE, P.C., TEMEL CLARKE, RALPH DURANDIS, SHANEEN REID and JUNEEVA RYAN,

Defendants.

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HON. ELLEN M. COIN, J.:

Plaintiff Unitrin Direct Insurance Company ("Unitrin") moves, pursuant to CPLR 3212, for summary judgment declaring that there is no coverage for the No-fault claims of defendants A.C. Medical, P.C. ("A.C. Medical"), Daily Medical Equipment Distribution Center, Inc. ("Daily Medical"), and Longevity Medical Supply, Inc. ("Longevity") (collectively, "Assignees"), and dismissing the counterclaims of A.C. Medical and Daily Medical.

BACKGROUND

This action arises from a motor vehicle accident that occurred on March 19, 2013, during which defendants Temel Clarke, Ralph Durandis, Shaneen Reid, and Juneeva Ryan (collectively, "Claimants") allegedly sustained personal injuries. Claimants were occupants of a 1999 Mercury vehicle (the "insured vehicle"), which was insured by Unitrin under Policy No. 4172268 (the "Policy"), in the name of Barrington Holness. The insured vehicle was reportedly involved in a collision with another motor vehicle near the intersection of Avenue S and 29th Street in Brooklyn, New York. The Policy, which took effect on March 7, 2013, contained a New York State No-fault endorsement.

The police accident report includes the following account of the collision. Temel Clarke, the driver of the insured vehicle, was traveling eastbound on Avenue S when the other vehicle pulled out from a stop sign heading southbound on East 29th Street, causing the collision (Police Accident Report, Not of Mot, Exh A). Carrie Cairns, the driver of the other vehicle, reported pulling her vehicle slowly into the intersection when it was struck by the subject vehicle (*id.*). None of the passengers had any visible injuries, complained of pain, or received medical treatment at the scene, and the vehicles sustained only minor damage (*id.*).

Claimants allegedly received medical treatment from Assignees, and assigned their rights to receive No-Fault benefits

to them. Specifically, Reid assigned her rights to A.C. Medical, Reid and Ryan assigned their rights to Daily Medical, and Durandis assigned his rights to Longevity. Assignees submitted over $79,000 in No-Fault claims relating to the March 19, 2013 motor vehicle accident to Unitrin, and Unitrin assigned claim number A004778NY13 to said No-Fault claims.

Denise Winant, the claims representative assigned to the No-Fault claims arising from the March 19, 2013 automobile accident, asserted that the facts presented in this case raise a strong possibility that the treatments submitted by Assignees were not medically necessary or causally related to the collision (*see* Winant Affid). In particular, she questioned the magnitude of the claims; the fact that the policy took effect less than two weeks before the date of loss; the failure of the named insured to cooperate with Unitrin or provide access to the insured vehicle for inspection; the multiple unrelated occupants in the insured vehicle; the history of prior losses claimed by Durandis; the fact that the police accident report states that there was minor damage to the vehicles, but yet, Claimants received elaborate and nearly identical courses of treatment from many of the same providers; and the previous questionable claims submitted by Assignees (*id.*). Thus, Unitrin, pursuant to its rights under the No-Fault Regulations, sought verification of the claims by requesting examinations under oath ("EUOs") of Claimants (*see* Not of Mot, Exhs K, L, N, P, Q, R, S).

Attached to the motion are copies of the EUO scheduling letters and corresponding affidavits of service. Letters dated April 30, 2013, scheduled EUOs of Reid (Not of Mot, Exh K), Ryan (Not of Mot, Exh N), and Durandis (Not of Mot, Exh R) for May 14, 2013, at the offices of Rubin, Fiorella & Friedman LLP, 639 Third Avenue, 3rd Floor, New York, New York. Durandis was scheduled to appear at 1:00 p.m. (Not of Mot, Exh R), Reid at 2:30 p.m. (Not of Mot, Exh K), and Ryan at 4:00 p.m. (Not of Mot, Exh N). The EUO scheduling letters notified Claimants that they would be reimbursed for lost earnings and reasonable transportation expenses. The affidavits of service state that the scheduling letters were mailed on April 30, 2013 (Not of Mot, Exhs K, N, R).

In his affirmation in support of Unitrin's summary judgment motion, Harlan R. Schreiber, Esq., the attorney assigned by Unitrin to take the EUOs of Clarke, Durandis, Reid, and Ryan, set forth his office's regular business practices with respect to scheduling and mailing requests for EUOs (Schreiber Affirm). He also asserts that the requests for EUOs were scheduled and mailed to Claimants and their attorneys in accordance with those practices, and that the requests were not returned as undeliverable by the post office (*id.*). He further states on May 14, 2013, he waited at the appointed location from 12:00 p.m. to 3:30 p.m., but that Claimants failed to appear for the EUOs or attempt to reschedule (Schreiber Affirm).

By letters dated and mailed May 15, 2013, the EUOs of Reid and Durandis were rescheduled for May 30, 2013, at 12:00 p.m. and 1:00 p.m., respectively (Not of Mot, Exhs L, S). On May 15, 2013, at Ryan's request, her EUO was rescheduled for May 23, 2013 at 1:00 p.m (Schreiber Affirm). A letter confirming the rescheduled EUO was mailed the same day (Not of Mot, Exh O). In addition, a letter dated and mailed May 28, 2013, rescheduled the EUO of Ryan for June 11, 2013, at 1:00 p.m. (Not of Mot, Exh P). The follow up EUO scheduling letters did not contain any language notifying Claimants that they would be reimbursed for lost earnings and reasonable transportation expenses. In any event, Mr. Schreiber alleges that on May 30, 2013, he waited from 11:00 a.m. to 1:00 p.m., at the appointed location, but that Reid and Durantis failed to appear or attempt to reschedule their EUOs (Schreiber Affirm).

On June 11, 2013, at Ryan's request, her EUO was rescheduled for June 21, 2013, at 11:00 a.m (Schreiber Affirm). A letter confirming the rescheduled EUO was mailed the same day (Not of Mot, Exh Q). Also on June 11, 2013, at the request of counsel for Reid, her EUO was rescheduled for June 21, 2013, at 1:00 p.m. (Schreiber Affirm). A letter confirming the rescheduled EUO was mailed that same day (Not of Mot, Exh M). Here, too, the follow up EUO scheduling letters failed to notify Claimants that they would be reimbursed for lost earnings and reasonable transportation expenses. Mr. Schreiber states that on June 21,

2013, he waited at the appointed location from 10:00 a.m. to 2:00 p.m., but that Claimants failed to appear for the EUOs or to contact his office to reschedule (Schreiber Affirm).

Unitrin denied the claims based, in part, on the failure of Claimants to appear for scheduled EUOs (Denial of Claim Forms, Not of Mot, Exh H). Unitrin also determined that the medical treatments claimed were not medically necessary (*id.*).

Unitrin then commenced this action seeking a judgment declaring that no insurance coverage exists between the parties for the March 19, 2013 accident. The Complaint alleges that Claimants breached the policy by failing to appear for EUOs, thereby relieving Unitrin of any obligation to pay said claims (first cause of action); that the alleged injuries were not causally related to the March 19, 2013 incident (second cause of action); that defendants have no standing to recover claims for the March 19, 2013 incident (third cause of action); and that it will suffer irreparable harm if the Court does not issue a permanent stay of all arbitrations, lawsuits, or claims by defendants (fourth cause of action).

A.C. Medical, Daily Medical, Longevity, and Reid filed separate answers, generally denying the allegations in the Complaint and asserting numerous affirmative defenses. A.C. Medical and Daily Medical also allege a counterclaim for attorneys' fees and other expenses incurred in defending this action.

Unitrin filed a reply to the counterclaim, asserting affirmative defenses. Unitrin also moved for default judgments against all defendants except A.C. Medical, Daily Medical, Longevity, and Reid. By order, dated August 21, 2014, this Court denied the motion, stating, in part:

> "Pursuant to the Federal and State Soldiers' and Sailors' Civil Relief Acts, plaintiff is required to submit an affidavit of an individual defendant's non-military status on a motion for default judgment .... Here, plaintiff fails to offer proof of non-military service pursuant to a post-default investigation as to defendants Temel Clark, Ralph Durandis and Juneeva Ryan.
>
> Plaintiff fails to submit an affidavit by someone with personal knowledge of the non-appearance by the claimants at the Examination Under Oath"

(Order, Not of Mot, Exh E).

By order dated February 20, 2015, the Court granted Unitrin's motion to reargue and renew its motion for default judgments and, upon reargument and renewal, granted Unitrin's motion for a default judgment against all defendants except A.C. Medical, Daily Medical, Longevity, and Reid, and severed and continued the action against A.C. Medical, Daily Medical, Longevity, and Reid (Order, Not of Mot, Exh F). The February 20, 2015 order mistakenly stated "case disposed" when, in fact, the case remained pending against A.C. Medical, Daily Medical, and Longevity (*see id.*). Thus, by order dated June 9, 2015, the Court restored the action to the active calendar (Order, Not of Mot, Ext T).

Unitrin now seeks summary judgment declaring that there is no coverage for A.C. Medical, Daily Medical, and Longevity for the no-fault claims arising from the March 19, 2013 collision, and dismissing the counterclaim of A.C. Medical and Daily Medical.

DISCUSSION

It is well settled that 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 demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, Unitrin seeks summary judgment declaring that there is no coverage for A.C. Medical, Daily Medical, and Longevity for the no-fault claims arising from the March 19, 2013 automobile accident. Unitrin asserts that claimants Shaneen Reid, Juneeva Ryan, and Ralph Durandis each breached a condition precedent to No-Fault recovery by failing to appear for duly

scheduled EUOs on two occasions. Thus, Unitrin asserts that it has no obligation to pay the claims of their assignees, A.C. Medical, Daily Medical, and Longevity.

"[T]he Legislature enacted the Comprehensive Automobile Insurance Reparations Act [Insurance Law §5101 *et seq.*] (*see* L 1973, ch 13), which supplanted common-law tort actions for most victims of automobile accidents with a system of no-fault insurance" (*Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]). "Under the no-fault system, payments of benefits 'shall be made as the loss is incurred'" (*id.*, quoting Insurance Law §5106[a]). The primary aims of the No-Fault system are to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts, and to provide substantial premium savings to New York motorists (*id.*, citing Governor's Mem approving L. 1973, ch 13, 1973 McKinney's Session Laws of N.Y., at 2335).

Responsibility for administering the Insurance Law rests with the Superintendent of Insurance (*see* Insurance Law §301), who has "broad power to interpret, clarify, and implement the legislative policy" (*Ostrer v Schenck*, 41 NY2d 782, 785 [1977]). The Superintendent has adopted regulations establishing the requirements pertaining to No-Fault claims (*see* 11 NYCRR part 65).

Under 11 NYCRR 65-1.1, the "Mandatory Personal Injury Protection Endorsement," insurers must provide No-Fault benefits

to persons injured in the use or operation of vehicles in New York State, subject to certain terms and conditions. In addition,

> "The[] regulations require an accident victim to submit a notice of claim to the insurer as soon as practicable and no later than 30 days after an accident (*see* 11 NYCRR 65-1.1, 65-2.4[b]). Next, the injured party or the assignee ... must submit proof of claim for medial treatment no later than 45 days after services are rendered (*see* 11 NYCRR 65-1.1, 65-2.4[c]). Upon receipt of one or more of the prescribed verification forms used to establish proof of claim, ... an insurer has 15 business days within which to request 'any additional verification required by the insurer to establish proof of claim' (11 NYCRR 65-3.5[b]). An insurer may also request 'the original assignment or authorization to pay benefits form to establish proof of claim' within this time frame (11 NYCRR 65-3.11[c]). Significantly, an insurance company must pay or deny the claim within 30 calendar days after receipt of the proof of claim (*see* Insurance Law §5106[a]; 11 NYCRR 65-3.8[c]). If an insurer seeks additional verification, however, the 30-day window is tolled until it receives the relevant information requested (*see* 11 NYCRR 65-3.8[a][1])"

(*Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 317 [2007]).

A No-Fault insurer may request that an eligible injured person or that person's assignee submit to an EUO as may reasonably be required (*see* 11 NYCRR 65-1.1). 11 NYCRR 65-3.5(e) states, in part:

> "All examinations under oath and medical examinations requested by the insurer shall

> be held at a place and time reasonably convenient to the applicant ...The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with this request."

A request for an EUO "must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination" (*id.*).

Appearance at a properly demanded EUO is a condition precedent to an insurer's liability to pay No-fault benefits (see *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). No liability exists on the part of the No-Fault insurer unless there has been full compliance with the conditions precedent to coverage (*see* 11 NYCRR 65-1.1; *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.]). The denial of coverage premised on the breach of a condition precedent to coverage voids the No-Fault policy ab initio (see *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, supra*).

Unitrin, as the proponent of the summary judgment motion, had the initial burden of showing its prima facie entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form from someone with personal knowledge that valid notices of the EUOs were mailed to claimants, and that claimants failed to appear for the EUOs (*see Stephen Fogel Psychological,*

P.C. v Progressive Cas. Ins. Co., 35 AD3d 720, 721 [2d Dept 2006]). At the very least, however, triable issues of fact exist as to the validity of the EUO scheduling letters that were mailed to Claimants, precluding summary judgment at this time.

It is well established that "[e]ach notice scheduling an EUO issued by an insurer must include requisite language advising the person required to appear at the EUO of that person's right to reimbursement for lost earnings and transportation costs incurred in attending the EUO, in order for such notice to be deemed effective under the regulation" (*Encompass Ins. Co. v Rockaway Family Med. Care, P.C.*, 2013 WL 8149430 [Arbitration Award][Sup Ct, NY County 2013]; *see also* Opinion Letter by Ins. Dept, Betancourt Aff in Opp, Exh B). Here, as stated, although the initial EUO scheduling letters notified Claimants that they would be reimbursed for lost earnings and reasonable transportation expenses, the follow-up scheduling letters did not. Thus, the Court concludes that Unitrin fails to meet its initial burden of showing its entitlement to judgment as a matter of law, and the branch of the motion that seeks summary judgment declaring that there is no coverage for the no-fault claims of A.C. Medical, Daily Medical, and Longevity is denied.

The branch of the motion that seeks to dismiss the counterclaim of A.C. Medical and Daily Medical for attorneys' fees and other expenses is denied. An insured who is "cast in a defensive posture by the legal steps an insurer takes in an

effort to free itself from its policy obligations" and who prevails on the merits may recover an attorney's fee incurred in defending against the insurer's action (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 598 [2004]). However, in the event that these defendants prevail in the action, the amount of attorneys' fees that they may recover will be strictly prescribed by the No-Fault Regulations in 11 NYCRR 65-4.6.

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

Dated: May 3, 2016

ENTER:

Ellen M. Coin, A.J.S.C.