Unitrin Advantage Ins. Co. v Better Health Care Chiropractic, P.C.
2016 NY Slip Op 30837(U)
May 4, 2016
Supreme Court, New York County
Docket Number: 158463/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff, INDEX NO. 158463/12

-against-

BETTER HEALTH CARE CHIROPRACTIC, P.C., BRONX ACUPUNCTURE THERAPY, P.C., GARDEN MEDICAL DIAGNOSTICS, P.C., GREEN HEIGHTS PHYSICAL THERAPY, P.C., LONGEVITY MEDICAL SUPPLY, INC., MRJA RADIOLOGY, P.C., PARK AVENUE MEDICAL CARE, P.C., SK PRIME MEDICAL SUPPLY, INC., MERCEDES BEATO and SABRINA JIMENEZ,

Defendants.

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JOAN A. MADDEN, J.:

In this action for declaratory relief as to no-fault insurance coverage, defendants Longevity Medical Supply, Inc. ("Longevity") and SK Prime Medical Supply, Inc. ("SK" or collectively "defendants"), move for an order pursuant to CPLR 2221(d) and (e) granting leave to reargue and renew the decision, order and judgment of this court dated January 22, 2015, which granted plaintiff's motion for summary judgment and denied defendants' cross-motion to compel discovery. Plaintiff opposes.

In support of reargument, defendants contend that the court misapprehended or overlooked plaintiff's failure to demonstrate by admissible evidence that it requested the EUOs within the time frame required by the no-fault insurance regulations, which according defendants is part of plaintiff's prima facie case. Defendants also contend that substantial discovery was outstanding which precluded the granting of summary judgment. In support of renewal,

defendants contend that the applicable law was subsequently clarified in two recent decisions that are binding on this court, the Court of Appeals decision issued on June 10, 2015, Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co, 25 NY3d 498 (2015) and an Appellate Division First Department decision issued on May 7, 2015, American Transit Insurance Co v. Jaga Medical Services, PC, 128 AD3d 441 (1st Dept 2015).

In opposition, plaintiff argues that reargument is untimely, since notice of entry of the court's decision, order and judgment was served on March 12, 2015, and the instant motion was not made until June 24, 2015. Plaintiff also argues that an EUO is a condition precedent to coverage, and therefore is not a request for "additional verification" within the meaning of the no-fault regulations. Alternatively, plaintiff argues that even assuming an EUO is a "form" of verification, an insurer need not request an EUO under any "strict time limit" and cites two Appellate Term decisions. Plaintiff asserts that an EUO need "only be scheduled within a reasonable time frame," and that the 30-day requirement applies only to the scheduling of an IME. As to the discovery issue and whether defendants are entitled to plaintiff's investigation file, plaintiff argues that its prior motion papers were sufficient to establish that it had a reasonable basis to request EUOs of defendants Longevity and SK, and claimant Jimenez. Plaintiff also argues that renewal is improper, as defendants raise "absolutely no new facts" and are attempting to re-litigate the identical issues litigated in the underlying motion, based on the same arguments and case law.

At the outset, the court will address the issue of whether defendants' motion is untimely, and even if it is, whether the court can still consider it. Defendants essentially acknowledge that

reargument is untimely. Their motion papers rely on case law holding that regardless of statutory time limits for motions to reargue, courts retain continuing jurisdiction to reconsider prior interlocutory orders during the pendency of an action. See Profita v. Diaz, 100 AD3d 481 (1st Dept 2012). That rule, however, is not applicable to the instant action, as the court's decision, order and judgment is not an interlocutory or intermediate determination. Rather, on January 22, 2015, this court granted plaintiff's motion for summary judgment, and issued a decision, order and judgment declaring that defendants were not entitled to no-fault coverage, and which finally disposed of the action.

Renewal is also untimely. Although a motion to renew based on new facts may be made at any time, where as here, defendants rely on a change or clarification in the law, the motion must be made prior to entry of a final judgment or before the time to appeal has expired. See CitiMortgage Inc v. Espinal, 136 AD3d 857 (2nd Dept 2016); Dinallo v. DAL Elec, 60 AD2d 620 (2nd Dept 2009); Glicksman v. Board of Education/Central School Board of Comsewogue Union Free School District, 278 AD2d 364 (2nd Dept 2000).

Notwithstanding the foregoing conclusions, the untimeliness of the motion does not serve as a complete bar to its consideration, as the court retains inherent discretionary power to "vacate its own judgment for sufficient reason and in the interests of substantial justice." Woodson v. Mendon Leasing Corp, 100 NY2d 62, 68 (2003) (citing Ladd v. Stevenson, 112 NY 325, 332 [1889]); see Goldman v. Cotter, 10 AD3d 289, 293 (1st Dept 2004); Weinstein-Korn-Miller, NY Civ Prac ¶¶ 5015.01, 5015.12.

Here, the issue is what proof plaintiff non-fault insurer must advance to make a prima facie showing of entitlement to summary judgment in an action seeking a judgment declaring that

defendant medical providers are not entitled to non-fault coverage. When defendants initially made the instant motion for relief from the judgment on June 24, 2015, they relied on two recent decisions, the June 10, 2015 Court of Appeals decision in Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co, supra, and the May 7, 2015 decision of the Appellate Division First Department in American Transit Insurance Co v. Jaga Medical Services, P.C., supra. By the time the parties appeared before this court for oral argument on the motion, the Appellate Division First Division had issued three additional decisions on September 15, 2105, which further clarify the law and directly impact the determination of plaintiff's underlying motion for summary judgment, and defendants' underlying cross-motion to compel discovery, American Transit Insurance Co v. Longevity Medical Supply, Inc, 131 AD3d 841 (1st Dept 2015), American Transit Insurance Co v. Vance, 131 AD3d 849 (1st Dept 2015), and National Liability & Fire Insurance Co v. Tam Medical Supply Corp, 131 AD3d 851 (1st Dept 2015).

As a result of the cases decided while the instant motion was *sub judice*, the First Department has now made clear that an insurer must affirmatively establish that it complied with the no-fault insurance regulations governing the Claim Procedure which prescribe specific time frames for requesting and scheduling EUOs and IMEs, in order to satisfy its prima facie burden on a motion for summary judgment declaring that no coverage exists based on the failure of a claimant or medical provider to appear for an EUO or IME. See American Transit Insurance Co v. Longevity Medical Supply, Inc, supra; American Transit Insurance Co v. Vance, supra; National Liability & Fire Insurance Co v. Tam Medical Supply Corp, supra. The Claim Procedure regulations mandate the following time frames: 1) within 10 business days of receipt of an application for no-fault benefits, the insurer shall forward the prescribed verification forms

to the parties required to complete them; 2) after the insurer's receipt of the completed verification forms, any additional verification, i.e. an IME or EUO, required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of one or more of the completed verification forms; and 3) if the request for additional verification is an IME, the insurer shall schedule the IME to be held within 30 calendar days from the date of receipt of the prescribed verification forms. See 11 NYCRR 65-3.5(a), (b), (d); American Transit Insurance Co v. Longevity Medical Supply, Inc, supra; American Transit Insurance Co v. Vance, supra; National Liability & Fire Insurance Co v. Tam Medical Supply Corp, supra.

Significantly, one of the First Department decisions issued on September 15, 2015, National Liability & Fire Insurance Co v. Tam Medical Supply Corp, supra, is directly on point with the instant action. Holding that plaintiff's summary judgment motion was properly denied, the First Department determined that "[a]lthough the failure of a person eligible for 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 §65-3.5[b])," and plaintiff's reply "failed to supply evidence bearing on whether the EUO had been requested within the appropriate time frame."

Here, defendants' original opposition and cross-motion papers cited the 15-day time frame for requesting additional verification in insurance regulation 11 NYCRR § 65-3.5(b) and asserted that plaintiff had failed to request the EUOs within 15 days of receipt of the claim forms or the NF-2 forms. Defendants also cross-moved to compel discovery of plaintiff's Special

Investigations Unit file and claim file, arguing, *inter alia*, that the date of plaintiff's receipt of the claimants' NF-2 forms and defendants' own claims are "necessary" to their defense of this action so to ascertain whether plaintiff complied with no-fault regulation 11 NYCRR § 65-3.5. Although the court's prior decision determined that plaintiff had established prima facie entitlement to summary judgment, the court did not specifically address the issue raised by defendants as to whether plaintiff complied with the regulation imposing a 15-day time limit for requesting the EUOs.

Since it is now clear, based on recent and binding authority, that as part of its prima facie case, plaintiff is required to make an affirmative showing that it complied with the time frame requirements in 11 NYCRR § 65-3.5, including 15-day time frame for requesting an EUO or IME, the court, under its inherent power to vacate its prior judgment and in the interests of substantial justice, will reconsider plaintiff's prior motion and defendants' prior cross-motion to determine whether plaintiff satisfied its burden to make out a prima facie case, and whether defendants are entitled to discovery.

While defendants SK and Longevity contend that plaintiff failed to demonstrate that it requested their EUOs within the time frame mandated by 11 NYCRR § 65-3.5(b), a review of the record on the underlying motion shows otherwise. As noted above, 11 NYCRR § 65-3.5(b) required plaintiff to request defendants' EUOs within 15 business days of its receipt of "one or more of the completed verification forms." Defendants assert that plaintiff did not establish the date it received the final verification forms, so it is not possible to determine whether their EUOs were timely requested. Plaintiff's original motion papers, however, included its Denial of Claim

Forms, NF-10, which specifically indicate the "date final verification received" from defendants SK and Longevity."[1] Plaintiff also submitted its letters requesting EUOs of defendants SK and Longevity, and affidavits as to the mailings the letters to those defendants on May 11, 2011, which demonstrate that the EUO requests were timely made within 15 business days of the date final verification was received, as indicated on the denial of claim forms. Notably, plaintiff's original affirmation in reply and in opposition to defendants' cross-motion, specifically objected to defendants' argument that the EUOs requests and denials were untimely, and pointed to the NF-10 denial forms annexed as Exhibit K to the motion, which "state with specificity" the dates of "final verification received" and the dates of denials. Thus, since plaintiff's original motion papers established that it timely requested defendants' EUOs in accordance with the no-fault regulations, plaintiff satisfied its prima facie burden for entitlement to summary judgment. See American Transit Insurance Co v. Longevity Medical Supply, Inc, supra; American Transit Insurance Co v. Vance, supra; National Liability & Fire Insurance Co v. Tam Medical Supply Corp, supra.

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[1]Plaintiff submitted a denial claim form for a claim in the amount of $629.65 that was submitted by defendant SK Prime as assignee of claimant Jimenez, indicating that final verification was received on April 26, 2011. Since the affidavit as to the mailing of the EUO letter to SK Prime stated that the EUO request was mailed on April 11, 2011, the request for SK Prime's EUO was timely made within 15 business days of the April 26, 2011 date when final verification was received.

With respect to defendant Longevity, plaintiff submitted a letter to Longevity dated April 11, 2011 acknowledging plaintiff's receipt of Longevity's bill in the amount of $1,186.74 and requesting verification. When Longevity did not respond, plaintiff wrote again on May 11, 2011 and June 10, 2011, requesting documentation for the same bill. In the meanwhile, the affidavit of mailing, shows that plaintiff mailed the letter requesting Longevity's EUO on May 11, 2011. Under these circumstances, where Longevity was unresponsive to plaintiff's repeated requests for final verification, the court finds that plaintiff's May 11, 2011 request for Longevity's EUO was timely made.

Notwithstanding the foregoing conclusions, the court notes that plaintiff's arguments in opposition to instant motion are without merit. As determined above, the untimeliness of reargument and renewal does not bar the court's inherent discretionary power to vacate its own judgment in the interests of substantial justice. See Woodson v. Mendon Leasing Corp, supra; Goldman v. Cotter, supra. Further, even though the failure to appear for an EUO is a breach of a condition precedent to coverage, a request for an EUO is still a request for "additional verification" within the meaning of the no-fault regulations. See National Liability & Fire Insurance Co v. Tam Medical Supply Corp, supra. Moreover, plaintiff's assertion that an EUO "does not need to be requested within a specific number of days," flies in the face of no-fault regulation 11 NYCRR § 65-3.5(b), which explicitly requires an insurer to *request* an EUO and IME within a 15-day time frame. Plaintiff relies on a separate regulation, 11 NYCRR 65-3.5(d), which is applicable only when an IME is requested and mandates a 30-day time frame for *scheduling* an IME.

Finally, as to defendants' prior cross-motion to compel discovery, the court likewise adheres to its original determination denying the cross-motion. Defendants rely on the recent decision of the Appellate Division First Department in American Transit Insurance Co v. Jaga Medical Service, PC, supra, which holds that insurer's motion for summary judgment should be denied as premature if defendant seeks discovery as to the reason for the EUO request or the "handling of the claim so as to determine whether, inter alia, the EUOs were timely and properly requested." Given the court's determination herein that plaintiff's original motion papers were sufficient to establish the dates when plaintiff received the verification forms, any issue as to timeliness of the EUO requests has been eliminated and discovery on that issue is unwarranted.

Discovery as to plaintiff's reason for requesting the EUO is likewise unwarranted. The original affidavit from plaintiff's no-fault claim representative who personally handled the claims and reviewed the claim file, as well as the transcript of the EUO of claimant Mercedes Beato were sufficient to establish that plaintiff had a reasonable basis for requesting the EUOs. Plaintiff's claim representative relied on the volume of the claims totaling more than $30,000, and other facts including the claimants' refusal of medical treatment at the time of the collision, claimant Beato's testimony that she did not seek medical treatment until about 28 days after the collision, and the "heavy," "elaborate and nearly identical" treatment administered to both claimants by many of the same medical provider defendants. Although defendant medical providers and claimants were in a position to refute those facts, they failed to submit an affidavit or documentary proof that might have raised an issue of material fact to defeat plaintiff's motion. As the court previously concluded, defendants have failed to show that facts essential to oppose plaintiff's motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc, 61 AD3d 418 (1st Dept 2009).

Thus, upon the exercise of the court's discretion, in the interests of substantial justice, to reconsider its prior decision, order and judgment dated January 22, 2015, the court adheres to its prior determination granting plaintiff's motion for summary judgment and denying defendants' cross-motion to compel discovery.

Accordingly, it is

ORDERED that defendants' motion is granted only to the extent the court, in the interests

of substantial justice, has reconsidered its prior decision, order and judgment dated January 22, 2015 and entered February 23, 2015, and upon reconsideration, the court adheres to its original determination granting plaintiff's motion for summary judgment and denying defendants' cross-motion to compel discovery; and it is further

ORDERED that the decision, order and judgment of this court dated January 22, 2015 and entered February 23, 2015, shall stand.

DATED: May 4, 2016

ENTER:

HON. JOAN A. MADDEN
J.S.C.