

American Tr. Ins. Co. v Furcal
2016 NY Slip Op 30951(U)
May 23, 2016
Supreme Court, New York County
Docket Number: 650870/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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American Transit Insurance Company,

Plaintiff,

- v -

Index No.
650870/2015

DECISION
and ORDER

Mot. Seq. 001

Victor Furcal, Advanced Orthopaedics, P.L.L.C.,
Cardiovascular Consultants of Long Island, P.C. dba
Cardiovascular Consultants of L.I., P.C., Franklin
Hospital Medical Center, Internal Medicine of
Throggs Neck, LLP, Multi-Specialty Pain
Management P.C., New York Spine Specialists, LLP,
North Shore-LIJ Medical, P.C., Precision Imaging
of New York, P.C. dba Precision Imaging of New York,
Scarantino Chiropractic, P.C., St. Barnabas Hospital,
TC Ambulance Corporation, Tremont Chemist,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This case arises from an automobile accident on February 18, 2014 where defendant Victor Furcal (“Furcal”) was a passenger involved in a motor vehicle accident involving a vehicle insured by plaintiff, American Transit Insurance Company (“American Transit” or “Plaintiff”). Furcal made a claim to the American Transit as a purported injured person under an insurance policy numbered provided to Jem Leasing LLC (“the Subject Policy”).

American Transit commenced an action on March 19, 2015, by a Summons and Complaint seeking a declaratory judgment against defendant Furcal, and

Furcal's medical healthcare providers, Advanced Orthopaedics, P.L.L.C., Cardiovascular Consultants of Long Island, P.C. dba Cardiovascular Consultants of L.I., P.C., Franklin Hospital Medical Center, Internal Medicine of Throggs Neck, LLP, Multi-Specialty Pain Management P.C., New York Spine Specialists, LLP, North Shore-LIJ Medical, P.C., Precision Imaging of New York, P.C. dba Precision Imaging of New York, Scarantino Chiropractic, P.C., St. Barnabas Hospital, TC Ambulance Corporation, Tremont Chemist (collectively, the "Providers") due to the alleged breach of contract by Furcal in failing to appear for a properly requested and scheduled independent medical examination on November 5, 2014 and November 18, 2014. In its Complaint, American Transit seeks a declaration that Furcal is not an eligible injured person entitled to no-fault benefits under the Policy, and that American Transit is not obligated to reimburse the Providers for alleged medical treatment, therapy and/or medical supplies rendered to Furcal.

Plaintiff moves for a default judgment pursuant to CPLR § 3215 against defendants Furcal, Advanced Orthopaedics, P.L.L.C., Cardiovascular Consultants of Long Island, P.C. dba Cardiovascular Consultants of L.I., P.C., Franklin Hospital Medical Center, Internal Medicine of Throggs Neck, LLP, Multi-Specialty Pain Management P.C., New York Spine Specialists, LLP, North Shore-LIJ Medical, P.C., Precision Imaging of New York, P.C. dba Precision Imaging of New York, Scarantino Chiropractic, P.C., TC Ambulance Corporation, and Tremont Chemist (collectively, "Defaulting Defendants"). Defaulting Defendants do not oppose.

Plaintiff also moves for an Order, pursuant to CPLR 3212, for summary judgment against defendant St. Barnabas Hospital. St. Barnabas Hospital opposes the motion for summary judgment and submits the attorney affirmation of Barry Rothman.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d

249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*). CPLR §3212(f) provides that, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1 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. Specifically, 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 mandates at 11 NYCRR 65-1.1 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.

The failure to appear for a scheduled independent medical examination 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 defendant 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, defendant 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 request for an examination 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.

“[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 Dep’t 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 Dep’t 2001]).

Plaintiff submits the Affidavit of Merit of Rohan Ragbir, a claim representative employed by Plaintiff. Ragbir attests to Furcal’s failure to appear for a properly requested and scheduled independent medical examination (“IME”) on November 4, 2014 and November 18, 2014. Plaintiff also provides the affidavits of Tracy Simpson, Mike Ficalora, Robert Snitkoff, and Luis Campbell, which aver to the scheduling of the IME’s and Ragbir’s failure to appear at them. Plaintiff also submits affidavits of service attesting to service upon Defaulting Defendants. Plaintiff has demonstrated entitlement to default judgment against Defaulting Defendants.

Additionally, through the provided affidavits and exhibits thereto, Plaintiff has demonstrated *prima facie* entitlement to summary judgment against defendant St. Barnabas Hospital. As appearances for IME’s were a condition precedent to payment under the subject policy and Furcal breached the requirement by failing to appear, there is no basis for coverage to defendant St. Barnabas Hospital, as his assignee.

In opposition, defendant St. Barnabas Hospital fails to raise a triable issue of fact. Defendant’s counsel’s affirmation raises no issues of fact concerning the mailing of the IME notices to Furcal or Furcal’s failure to attend the IMEs. Furthermore, to the extent that Defendant contends that American Transit’s motion is premature in light of Defendant outstanding discovery demands, Defendant has failed to make a showing that “facts essential to justify opposition may exist,” as required under CPLR 3212(f). The “mere hope” that a party “might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment.” (*Pow v. Black*, 182 A.D.2d 484, 485 [1st Dep’t 1992][citations omitted]).

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for default judgment against defendants Victor Furcal, Advanced Orthopaedics, P.L.L.C., Cardiovascular Consultants of Long Island, P.C. dba Cardiovascular Consultants of L.I., P.C., Franklin Hospital Medical Center, Internal Medicine of Throggs Neck, LLP, Multi-Specialty Pain Management P.C., New York Spine Specialists, LLP, North Shore-LIJ Medical, P.C., Precision Imaging of New York, P.C. dba Precision Imaging of New York, Scarantino Chiropractic, P.C., St. Barnabas Hospital, TC Ambulance Corporation, Tremont Chemist is granted without opposition; and it is further


ORDERED that Plaintiff's motion for summary judgment against defendant St. Barnabas Hospital is granted; and it is further

ORDERED and ADJUDGED that Plaintiff owes no duty to defendants Victor Furcal, Advanced Orthopaedics, P.L.L.C., Cardiovascular Consultants of Long Island, P.C. dba Cardiovascular Consultants of L.I., P.C., Franklin Hospital Medical Center, Internal Medicine of Throggs Neck, LLP, Multi-Specialty Pain Management P.C., New York Spine Specialists, LLP, North Shore-LIJ Medical, P.C., Precision Imaging of New York, P.C. dba Precision Imaging of New York, Scarantino Chiropractic, P.C., St. Barnabas Hospital, TC Ambulance Corporation, Tremont Chemist, and St. Barnabas Hospital to pay No-Fault claims submitted in relation to the February 18, 2014 collision referenced in the complaint involving defendant Victor Furcal.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MAY 23, 2016

MAY 23 2016



Eileen A. Rakower, J.S.C.