

Hertz Vehs. LLC v Mollo
2016 NY Slip Op 31165(U)
June 17, 2016
Supreme Court, New York County
Docket Number: 155094/14
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

HERTZ VEHICLES, LLC,

Plaintiff,

-against-

Index No: 155094/14
DECISION/ORDER
Motion sequence 6

DARREN T. MOLLO, D.C.,
CHARLES DENG ACUPUNCTURE, P.C.,
ISLAND LIFE CHIROPRACTIC PAIN CARE, PLLC,
KINGSBROOK JEWISH MEDICAL CENTER,
JULES FRANCOIS PARISIEN, M.D.,
MAIGA PRODUCTS CORPORATION,
QUALITY CUSTOM MEDICAL SUPPLY, INC.,
KSENIA PAVLOVA, D.O.,
AVALON RADIOLOGY, P.C.,
NKOSI ALEXANDER,
DAVON RODNEY,
RASHID DERISSANT,
ALEX CRANDON,
DANA WOOLFSON, LMT
ILYCE MARANGA, D.C., and
ANGELICA SARENAS,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's CPLR 3212 motion for summary judgment and to dismiss defendant Quality Custom Medical Supply, Inc.'s counterclaim:

Papers	Numbered
Plaintiff's Notice of Motion.....	1
Plaintiff's Memorandum of Law in Support.....	2
Defendant Quality Custom Medical Supply, Inc's Affirmation in Opposition.....	3
Defendants' Alex Crandon and Alexander Nkosi Affirmation in Opposition, dated October 9, 2014.....	4
Defendants' Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Maiga Products Corporation, Ksenia Pavlova, D.O. Affirmation dated June 12, 2015	5
Plaintiff's Affirmation in Support of Motion and in Reply to Opposition, dated July 2, 2015	6
Plaintiff's Affirmation in Support of Motion and in Reply to Opposition, dated July 6, 2015	7
Plaintiff's Affirmation in Further Support, dated November 23, 2015	8
Defendant Quality Custom Medical Supply, Inc's Supplemental Affirmation in Opposition, dated January 22, 2016	9
Plaintiff's Affirmation in Further Support and in Reply, dated March 7, 2016	10

Plaintiff's Letter dated July 20, 2015..... 11

Rubin, Fiorella & Friedman, LLP, New York (Harlan R. Schreiber of counsel), for plaintiff.

The Rybak Firm, PLLC, Brooklyn (Oleg Rybak of counsel), for defendants Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Maiga Products Corporation, Ksenia Pavlova, D.O.

Gary Tsirelman P.C., Brooklyn (Daniel Grace of counsel), for defendant Quality Custom Medical Supply, Inc.

Robert J. Renna, P.C., Brooklyn (Robert J. Renna of counsel), for defendants Alex Crandon and Nkosi Alexander.

Gerald Lebovits, J.

In this declaratory-judgment action, plaintiff moves for summary judgment under CPLR 3212 on the supposed ground that no coverage exists for the no-fault benefits claims for defendants Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Maiga Products Corporation, Ksenia Pavlova, D.O., and Quality Custom Medical Supply, Inc., with respect to a September 12, 2013, collision. The basis for plaintiff's motion is that defendants¹ failed to appear for scheduled examinations under oath (EUOs); thus, according to plaintiff, defendants breached a condition precedent to coverage under the No-Fault Regulations. Plaintiff also moves to dismiss defendant Quality Custom Medical Supply, Inc.'s counterclaim for attorney fees and for a judgment in the amount of its bills. The basis for defendant Quality Custom Medical Supply, Inc.'s counterclaim is that defendant hired an attorney to defend it in this declaratory-judgment action.

Although defendants Crandon and Nkosi's counsel submits an affirmation in opposition to plaintiff's motion, plaintiff is not moving for summary judgment against defendant Crandon and Nikosi.²

Plaintiff establishes its prima facie entitlement to summary judgment. A party's failure to appear for two scheduled EUOs constitutes a material breach of the insurance policy; therefore, the insurer may deny coverage. (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] ["A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage."], *lv denied* 17 NY3d 705 [2011];

¹ Defendant Davon Rodney, Rashid Derissant, Alex Crandon, Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Maiga Products Corporation, Ksenia Pavlova, D.O., and Quality Custom Medical Supply, Inc.

² In a letter dated July 20, 2015, plaintiff explained that it is not moving for summary judgment against defendants Crandon and Nkosi. In a stipulation dated November 4, 2015, plaintiff clarified that it is not moving against defendants Nkosi and Davon Rodney.

Inwood Hill Med., P.C. v Gen. Assur. Co., 10 Misc 3d 18, 20 [App Term 1st Dept 2005] [“If the party fails to appear at the rescheduled EUO, an insurer may issue a denial of pending claims based upon the failure to meet the condition for coverage in not submitting to the requested EUO as required under the prescribed endorsement.”]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2d Dept 2006] [holding that an insurer may retroactively deny claims on the basis of assignor’s failure to appear for additional verification requested by insurer].)

On a summary-judgment motion, the moving party must establish that it timely and properly mailed the notices for EUOs to defendants and that the defendants failed to appear. (*Bath Ortho Supply, Inc. v New York Central Mut. Fire Ins. Co.*, 2012 NY Slip Op 50271[U], *1 [App Term 1st Dept 2002], citing *Unitrin*, 82 AD3d at 560; *Fogel*, 35 AD3d at 721; see *Repwest Ins Co. v Advantage Radiology, P.C.*, 42 Misc 3d 1210 [A], **2-4, 2014 NY Slip Op 50016 [U], **2-4, 2014 WL 127915, at **2-4 [Sup Ct NY County 2014] [“In support of its motion, plaintiff . . . proffers . . . the [EUO] letters . . . the affidavits of service for all such letters, and an affidavit from Joseph R. Federici, Esq. stating that on each scheduled EUO date, he waited for the Defendants . . . [who] failed to attend the scheduled EUOs.”].)

Plaintiff proved that it timely and properly sent the EUO letters to the following defendants: Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Maiga Products Corporation, Quality Custom Medical Supply, Inc., and Ksenia Pavlova, D.O. David Boucher, an attorney from Rubin, Fiorella, Friedman LLP, explains that he was assigned to conduct defendants’ EUOs. He explains that his office generated and mailed EUO letters under his supervision. (Plaintiff’s Notice of Motion, Affirmation of David Boucher, Feb. 17, 2015.) Plaintiff provides as exhibits to its summary-judgment motion the EUOs letters. (Plaintiff’s Notice of Motion, Exhibit G.) Plaintiff also provides the affidavits of service from Robert Colon, who mailed the EUO letters to defendants. (Plaintiff’s Notice of Motion, Exhibit G.)

Plaintiff also proved that the following defendants failed to appear for two EUOs: (1) defendants Darren T. Mollo, D.C., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Maiga Products Corporation, and Quality Custom Medical Supply, Inc. failed to appear for EUOs on December 5, 2013, and December 30, 2013; and (2) defendant Ksenia Pavlova, D.O. failed to appear for EUOs on January 3, 2014, and January 27, 2014. Boucher explains that he was present to conduct defendants’ EUO. (Plaintiff’s Notice of Motion, Affirmation of David Boucher, Feb. 17, 2015, at ¶¶ 3-28.) He explains that he waited for the above-named defendants on the respective EUO dates. (*Id.*) Boucher explains that defendants failed to appear. (*Id.*) Defendants’ failure to appear for two duly scheduled EUOs constitutes a breach of a condition precedent to coverage.

Also, plaintiff proved that it timely and properly denied defendants’ claims. Plaintiff proved that it timely and properly generated and mailed the denials, NF-10s, to defendants. (Plaintiff’s Notice of Motion, Exhibits G, H & P; Plaintiff’s Affirmation in Further Support, Affidavit of Jeremy Rothenberg, Nov. 20, 2015, at ¶¶ 18-23.) Thus, plaintiff’s summary-judgment motion is granted. Plaintiff has no duty to pay no-fault claims with respect to the September 12, 2013, collision for the above-named defendants.

That aspect of plaintiff's motion to dismiss defendant Quality Custom Medical Supply, Inc.'s counterclaim for attorney fees is granted and defendant's counterclaim is dismissed.

Defendants' counsel's affirmations, coming from individuals without personal knowledge, have no probative value. In any event, counsels' affirmations create no material issue of fact for trial. (See *GTF Marketing Inc. v Colonial Aluminium Sales, Inc.*, 66 NY2d 965, 968 [1985] ["As we have previously noted, an affidavit or affirmation of an attorney without personal knowledge of the facts cannot 'supply the evidentiary showing necessary to successfully resist the motion.'"] [citations omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] ["[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing."]; *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 [1st Dept 1981] ["The affirmation of counsel without requisite knowledge of the facts is without probative value. Moreover, the attorney's affirmation sets forth conclusory allegations rather than evidentiary facts and, even if it could be considered, is insufficient."] [citations omitted], *affd* 54 NY2d 715 [1981].)

Defendants' counsel argue, among other things, about the reasonableness of plaintiff's request for EUOs. But Robert Kelly, plaintiff's Director of Special Investigation Unit, thoroughly explains plaintiff's reasons for requesting the EUOs. (Plaintiff's Notice of Motion, Affidavit of Robert Kelly, May 15, 2015.) Defendants' remaining arguments are irrelevant, unpersuasive or both.

In an order dated November 4, 2015, Hon. Paul Wooten directed the parties to amend their papers in light of a change in controlling law under *National Liab. & Fire Ins. Co. v Tam Med. Supply Corp.* (131 AD3d 851, 851 [1st Dept 2015].) The First Department determined the following:

"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 § 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." (*Id.* [citations omitted].)

Plaintiff has demonstrated that it complied with *National Liab. & Fire Ins. Co.*, namely, the no-fault regulations for scheduling defendants' EUOs. Under the no-fault regulations, the insurer may seek additional verification requests, EUOs, within 15 business days of the insurer's receipt of the prescribed verification forms. (*Id.* § 65-3.5 [b].)

Only plaintiff and defendant Quality Custom Medical Supply, Inc., submitted additional papers on the issue whether plaintiff complied with *National Liab. & Fire Ins. Co. v Tam Med.*

Supply Corp. Thus, this court will consider arguments pertaining only to defendant Quality Custom Medical Supply, Inc., on this issue.

Jeremy Rothenberg, plaintiff's no-fault examiner assigned to this claim, explains that plaintiff complied with the no-fault regulations for scheduling EUOs. (Plaintiff's Affirmation in Further Support dated Nov. 23, 2015, Exhibit B, Affidavit of Jeremy Rothenberg, Nov. 20, 2015.) Plaintiff received defendant Quality Custom Medical Supply, Inc.'s bill on November 4, 2013; on November 21, 2013 — within 15 business days — it sent defendant a letter requesting an EUO. (Plaintiff's Affirmation in Further Support dated Nov. 23, 2015, Exhibit B, Affidavit of Jeremy Rothenberg, Nov. 20, 2015, at ¶¶14-15; Exhibit C.; Plaintiff's Notice of Motion, Affirmation of David Boucher, Feb. 17, 2015, at ¶ H.)

ORDERED that plaintiff's summary-judgment motion is granted and a declaratory judgment is granted and plaintiff shall settle order; and it is further

ORDERED that defendant Quality Custom Medical Supply, Inc.'s counterclaim for attorney fees against plaintiff Hertz Vehicles LLC is dismissed; and it is further

ORDERED that plaintiff's counsel must serve a copy of this decision and order with notice of entry on defendants and upon the County Clerk's office, which is directed to enter judgment accordingly.

This opinion is the court's decision and order.

Dated: June 17, 2016



J.S.C.

HON. GERALD LEBOVITS
J.S.C.