Allstate Ins. Co. v American Comprehensive Healthcare Med. Group, P.C.
2016 NY Slip Op 31175(U)
May 20, 2016
Supreme Court, New York County
Docket Number: 151752/2013
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon *Justice* **PART** 42

ALLSTATE INSURANCE COMPANY

- v -

AMERICAN COMPREHENSIVE HEALTHCARE MEDICAL GROUP, P.C., et al.

INDEX NO. 151752/2013

MOTION DATE 11/13/2015

MOTION SEQ. NO. 003

The following papers were read on this motion for summary judgment:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 3

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this declaratory judgment action, the plaintiff moves, inter alia, for summary judgment against the defendants Charles Deng, L.AC., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, Jaime Gutierrez, P.C., Maria S. Masigla, P.T., Masigla Physical Therapy, P.C., and Pierre Jean Jacques Renelique (the answering defendants), as assignees of Shana Carty and Jean Brudny Pierre (the individual defendants), declaring that it is not obligated pay no-fault benefits to the answering defendants to reimburse them for treatment they rendered to the individual defendants for injuries sustained in a motor vehicle accident. The motion is denied.

The individual defendants allege that they were injured in a motor vehicle accident on August 17, 2012, and that they thereafter obtained medical treatment or medical supplies from all of the other defendants. Those other defendants sought payment, as assignees of the individual defendants, for no-fault benefits under insurance policy number 0952601066 issued by the plaintiff, under claim number 0256679861. See Insurance Law 5106(a); 11 NYCRR 65-1.1. In a prior order dated June 2, 2014, this court granted the plaintiff's motion for leave to enter a default judgment against several of the defendants, upon its submission of proof of the facts underlying its cause of action, which showed that it timely mailed two scheduling notices for an examination under oath (EUO) to the individual defendants, and that individual defendants failed to appear for the EUOs, thereby breaching a condition precedent to

coverage. On this motion, the plaintiff, based on the same submissions, seeks summary judgment against the answering defendants declaring that it is not obligated to reimburse them for the cost of treatment and equipment they provided to the individual defendants. The answering defendants oppose the motion, contending that there is a triable issue of fact as to whether the EUO notices were in fact timely mailed to the individual defendants within 15 days of the plaintiff's receipt of the individual defendants' claim or NF-2 form, as required by 11 NYCRR 65-3.5(b). In reply, the plaintiff argues that 11 NYCRR 65-3.5(b) only obligated it to mail a request for "additional verification" within 15 days of its receipt of the claim or NF-2 form, and that an EUO notice is not such a request. It further contends that the applicable regulations set forth no deadline for the mailing of an EUO notice. The court rejects the plaintiff's contention. The demand for an EUO constitutes a request for an additional verification and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of a claim for no-fault benefits or NF-2 form. See National Liability & Fire Ins. Co. v Tam Med. Supply Corp., 131 AD3d 851, 851 (1st Dept 2015); American Tr. Ins. Co. v Jaga Med. Servs., P.C., 128 AD3d 441, 441 (1st Dept 2015).

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. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers. See id. Summary judgment must also be denied if the opposing party presents admissible evidence establishing that there is a triable issue of fact. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 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 AD2d 579, 580 (1st Dept 1992). The court is cognizant that the standards of proof on a motion for leave to enter a default judgment are less stringent than those on a motion for summary judgment. See Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987). Nonetheless, even if the showing made by the plaintiff in connection with its motion for leave to enter a default judgment is sufficient to make a prima facie showing in connection with the instant motion for summary judgment, the answering defendants have raised a triable issue of fact as to whether the EUO notices were timely mailed. Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied.

This constitutes the Decision and Order of the court.

Dated: 5/20/16

, JSC

HON. NANCY M. BANNON

1. Check one: ..... ☐ **CASE DISPOSED** ■ **NON-FINAL DISPOSITION**

2. Check as appropriate: MOTION IS: ☐ **GRANTED** ■ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**