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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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AMERICAN TRANSIT INSURANCE COMPANY,

INDEX NO. 154964/13

Plaintiff,

-against-

JOSEPH MAISONNEUVE, ACTION POTENTIAL CHIROPRACTIC, PLLC, APOLLO MEDICAL DIAGNOSTIC IMAGING SERVICE, PLLC, CHARLES DENG ACUPUNCTURE, P.C., GENTLECARE AMBULATORY ANESTHESIA SERVICES, JGG MEDICAL CARE, P.C., LYONEL F. PAUL, M.D., MAIGA PRODUCTS CORPORATION, MARIA S. MASIGLA, P.T., MARIA SHEILA MASIGLA, P.T., PIERRE J. RENELIQUE, M.D., QUALITY CUSTOM MEDICAL SUPPLY, INC. and TAM MEDICAL SUPPLY, CORP.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for declaratory relief as to no-fault coverage, plaintiff American Transit Insurance Company ("American Transit") moves for summary judgment against the appearing defendants, Action Potential Chiropractic, PLLC, Charles Deng Acupuncture, P.C., Gentlecare Ambulatory Anesthesia Services, JGG Medical Care, P.C., Lyonel F. Paul, M.D., Maiga Products Corporation, Maria S. Masigla, P.T., Maria Sheila Masigla, P.T., Pierre J. Renelique, M.D. and TAM Medical Supply Corp.[1] Defendant JGG Medical Care, P.C. ("JGG Medical") is represented by The Law Offices of Gary Tsirelman P.C., and the balance of the appearing

[1]On July 11, 2014, this court issued an order granting plaintiff's prior motion for a default judgment against the non-appearing defendants Joseph Maisonneuve, Apollo Medical Diagnostic Imagining Services PLLC and Quality Custom Medical Supply, Inc.

defendants are represented by The Rybak Firm, PLLC. Defendants submit separate opposition.

On August 7, 2012, a vehicle owned by Elad Taxi Corp. and insured by plaintiff, was involved in an accident. Defendant Joseph Maisonneuve was the driver of the vehicle. Maisonneuve submitted an application for no-fault benefits dated October 2, 2012 and included authorizations dated September 10, 2012. On November 6, 2012, plaintiff issued a denial of claim form denying the "entire claim" due to untimely notice of the accident.

Plaintiff contends it is entitled to judgment as a matter of law declaring that it has no obligation to provide no-fault benefits to Maisonneuve and his assignees. Plaintiff asserts Maisonneuve breached a condition precedent to coverage by failing to provide timely notice of the accident, which voided the contract ab initio and entitled plaintiff to deny payment to both Maisonneuve and his assignees. In support the motion, plaintiff submits an attorney's affirmation; an affidavit from its claim representative Alisha Sukhoo; an affidavit from its mail room supervisor Luis Campbell; the insurance policy; defendant Maisonneuve's application for no-fault benefits dated October 2, 2012; Maisonneuve's authorizations signed and dated September 10, 2012; an assignment of benefits form dated January 1, 2013, in which Masionneuve assigned his no-fault benefits to defendant Lyonel F. Paul, M.D.; plaintiff's denial of claim form dated November 6, 2012; the pleadings; the Notice of Motion submitted in connection with plaintiff's prior motion for a default judgment against the defaulting defendants; and the court's July 11, 2014 order granting that motion.

In opposition, defendant JGG Medical submits only an attorney's affirmation. JGG Medical argues that plaintiff has failed to establish its defense of untimely notice of the accident,

as it has failed to show that it provided Masionneuve with notice of his rights under the non-fault regulations to submit a reasonable excuse explaining the delay. Specifically, JGG Medical objects that affidavit of plaintiff's mail room supervisor does not state to whom the denial of claim form was mailed, so it is does not establish that the denial was mailed to Maisonneuve or his attorney. JGG Medical also objects that plaintiff's untimely denial precludes it from denying the claims based on untimely notice of the accident; plaintiff received notice from assignor Maisonneuve dated October 2, 2012 and issued the denial more than 30 days later on November 12, 2012. JGG Medical further objects that plaintiff has failed to show that it timely denied JGG's specific bills or claims within 30 days of receipt, as the specific denials as to JGG are not submitted, and that plaintiff relies on inadmissible and insufficient evidence.

Defendants represented by the Rybak firm likewise submit only an attorney's affirmation in opposition. They argue that plaintiff has failed to establish a prima facie case, discovery is outstanding, and triable issues of fact exist. Specifically, defendants assert that plaintiff has failed to show that it timely and properly denied defendants' claims within the time frames set forth in the non-fault insurance regulations, since plaintiff has not identified the date it received defendants' claims so as to determine whether the denials was timely; and in the absence of timely denials, plaintiff is precluded from relying on a defense of untimely notice. Defendants also assert that issues of fact exist as to plaintiff's receipt of their claims, since the regulations provide for oral notice of claims. With respect to plaintiff's denial of claim form, defendants object that it fails to explicitly advise that the denial was not necessarily final and could be excused; plaintiff did not lay a foundation for the admissibility of the denial of claim form; and

the denial of claim form is a "blanket denial" and is "missing necessary information. Defendants further assert that plaintiff has failed to show that it complied with the regulation requiring it to establish "standards" for determining whether an applicant has provide late notice of claim or late proof of claim, and that plaintiff has failed to submit proof that it conducted a "meaningful review" of the assignor's request for reconsideration.

Plaintiff's affidavits and supporting documents show that it denied coverage on the ground that it failed to receive timely notice of the accident in accordance with New York State Insurance Department Regulation 11 NYCRR §65-1.1(d) and the terms of the policy, which require "an 'eligible insured person' to give written notice to the insurer, 'in no event more than 30 days after the date of the accident.'" New York & Presbyterian Hospital v. Country-Wide Insurance Co, 17 NY3d 586, 588 (2011) (quoting 11 NYCRR §65-1.1[d]).[2] The Court of

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[2]Insurance Department Regulation 11 NYCRR §65-1.1(d) governs the language of the Mandatory Personal Injury Protection Endorsement. The section entitled "Conditions" states that "[n]o action shall lie against the Company, unless as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." In addition to notice of the accident (also referred to as a "notice of claim") which is the condition at issue in the instant action, other mandated conditions include "Proof of Claim," which the eligible injured person or assignee must submit within 45 days after the services are rendered; an examination under oath (EUO) of the eligible injured person or that person's assignee; and an independent medical examination (IME) of the eligible injured.

With respect to notice of the accident, the regulation states as follows:

> Notice. In the event of an accident, written notice setting forth details sufficient to identify the eligible injured person, along with reasonably obtainable information regarding the time, place and circumstances of the accident, shall be given by, or on behalf of, each eligible injured person, to the Company, or any of the Company's authorized agents, as soon as reasonably practicable, but in no event more than 30 days afer the date of the accident, unless the eligible injured person submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.

Appeals holds that where as here, "no written notice of accident was given, there was a failure to fully comply with the terms of the no-fault policy, which is a condition precedent to insurer liability." Id at 592-593.

The underlying motor vehicle accident occurred on August 7, 2012. The affidavit of plaintiff's claim representative, Alisha Sukhoo, establishes that plaintiff was not notified of the accident until on or after October 2, 2012, which was more than 30 days after the accident, and for that reason plaintiff issued a denial of claim form on November 6, 2012. Sukhoo states that plaintiff "received a letter of representative from the claimant's attorney dated October 2, 2012 with a police report attached from and on behalf of defendant Joseph Maisonneuve, claiming no-fault benefits under the policy." Plaintiff also submits Maisonneuve's application for no-fault benefits likewise dated October 2, 2012. Sukhoo states that "[d]espite due notice by American Transit Insurance Company, Joseph Maisonneuve failed to provide a reasonable explanation as to why the claim was submitted after the 30-day time period," and "on November 6, 2012, I issued a general denial to the providers, in duplicate." Plaintiff submits a copy of the denial of claim form, which is dated November 6, 2012 and lists Alisha Sukhoo as the "Representative of Insurer." The denial of claim form indicates two reasons for the denial: "injured person excluded under policy conditions or exclusion" and "policy conditions violated." The denial of claim form also specifies the "reason for denial, fully and explicitly," as follows:

> Entire claim is being denied on the basis that proper notice of claim in writing was not received by this carrier, within 30 days from the date of the accident. Late notice will be excused where the applicant can provide reasonable justification of the failure to give timely notice. Forward all documentation that maybe helpful in reevaluation of your claim.

Based on the foregoing, plaintiff has made a prima showing that it did not receive written notice within 30 days of the accident, as required by Insurance Department Regulation 11 NYCRR §65-1.1(d). Plaintiff, however, is not entitled to summary judgment, as it has failed to submit sufficient evidentiary proof that it complied with the regulation requiring it to advise the injured party, Robert Maisonneuve, that late notice will be excused if reasonable justification for the lateness is provided. 11 NYCRR §§65-1.1(d), 65-2.4(b), 65-3.3(e); see Unitrin Auto & Home Insurance Co v. UB Neurosurgery, Inc, 2016 WL 280253 (Sup Ct, NY Co 2016); Medical Care Works, PC v. American Transit Insurance Co, 36 Misc3d 130(A) (App Term 2nd Dept 2012). Where as here, plaintiff insurer has denied the claim based on the failure to give timely notice of the accident/claim, such late notice would be excused if "the eligible injured person submits written proof providing clear and reasonable justification for the failure to comply with such time limitation." 11 NYCRR §65-1.1(d). The regulations explicitly mandate that when a insurer denies a claim based on untimely notice, the "denial must advise the applicant that late notice will be excused where the applicant can provide reasonable justification of the failure to give timely notice." 11 NYCRR §65-3.3 (e).

Contrary to defendants' argument, the language as quoted above in plaintiff's denial of claim form provided the necessary late notice advisory in compliance with 11 NYCRR §65-3.3 (e). See Hempstead Pain & Medical Services, PC v. General Assurance Co, 13 Misc3d 980, 982 (District Ct, Suffolk Co 2006) (regulation section 65-3.3.(e) "does not mandate express language" and "is more reasonably interpreted to require only that the claimant be appraised that a late claim denial is not necessarily final and is subject to being given an opportunity to

demonstrate a reasonable justification for delay"). Notably, plaintiff's denial of claim form included an additional statement advising Maisonneuve to "[f]orward all documentation that maybe helpful in reevaluations of your claim," which is similar to the statement in Hempstead Pain & Medical Services, PC v. General Assurance Co, that "if there is any additional information you wish to submit, we may reconsider our position." Id.

However, even though the denial of claim form included the necessary late notice advisory, plaintiff has failed to make a sufficient evidentiary showing that the denial of claim form was in fact mailed to the injured party, Joseph Maisonneuve. Plaintiff does not submit an affidavit of mailing, but relies on the affidavit of its claim representative Alisha Sukhoo, who merely states that "[d]espite due notice by American Transit Insurance Company, Joseph Maisonneuve failed to provide a reasonable explanation as to why the claim was submitted after the 30-day time period." The phrase "due notice" is vague, conclusory and lacking in detail as to manner and timing of such notice. Sukhoo's additionally statement that "on November 6, 2012, I issued a general denial to the Providers, in duplicate, and delivered it directly to Luis Campbell" is likewise vague, as she neither states that she addressed the envelopes containing the denial, nor identifies the specific persons or entities to whom the denials were addressed. Moreover, Campbell, the mail room supervisor, explains that the mail, including the denials, is already addressed before it is delivered to his office, so, at best, his affidavit is competent proof of a standard office practice and procedure designed to ensure that items are properly mailed.

Thus, absent competent proof that the denial of claim form was properly addressed and mailed to Maisonneuve, plaintiff has failed to show that it complied with the requirement in the

regulations to advise Maisonneuve that untimely notice could be excused. Plaintiff's motion for summary judgment, therefore, must be denied, but such denial is without prejudice and with leave to renew on papers that include sufficient evidentiary proof as to the mailing of the denial of the claim forms to Maisonneuve.

Notwithstanding the foregoing conclusions, the court will address the balance of the issues raised, so to avoid duplication of effort in the event plaintiff renews its motion.

In opposing the motion, defendant JGG Medical and the defendants argue that plaintiff's denial was untimely and that plaintiff has failed to show that it timely and properly denied the specific claims submitted by defendant providers. Defendants' arguments are not persuasive, as under the circumstances presented, a timely denial was not required.

The Appellate Division First Department holds that the failure to appear for an IME or an EUO requested by the insurer pursuant to regulation 11 NYCRR §65.1.1 "is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine set forth in *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, (90 NY2d 195 [1997])." Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 (1st Dept), lv app den 17 NY3d 705 (2011); accord Hertz Corp v. Active Care Medical Supply Corp, 124 AD3d 411 (1st Dept 2015); American Transit Insurance Co v. Lucas , 111 AD3d 423, 424-425 (1st Dept 2013). Recognizing that 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," the First Department holds that the "failure to attend the EUOs [or IMEs] is a violation of a condition

precedent to coverage that vitiates the policy." Hertz Corp v. Active Care Medical Supply Corp, supra at 411 (citing American Transit Insurance Co v. Marte-Rosario, 111 AD3d 442 [1st Dept 2013]; Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra).

Accordingly, upon a claimant's failure to appear for a requested IME or EUO, the no-fault insurer has the "right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued . . . 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." Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra at 560; accord Hertz Corp v. Active Care Medical Supply Corp, supra at 411. In other words, "[t]here is no requirement to demonstrate that the claims were timely disclaimed since the failure to attend medical exams [or examinations under oath] was an absolute coverage defense." American Transit Insurance Co v. Lucas , supra at 424-425 (citing New York & Presbyterian Hospital v. Country-Wide Insurance Co, supra at 593; Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra at 82). .

Here, plaintiff denied coverage based on untimely notice of the accident. As noted above, the Court of Appeals holds the requirement in regulation 11 NYCRR §65-1.1 for written notice of the accident within 30 days of the accident is a "condition precedent to a no-fault insurer's liability." New York & Presbyterian Hospital v. Country-Wide Insurance Co, supra at 590. Applying the above-cited principles to the case at bar, the court concludes that just as the failure to attend an IME or EUO is a breach of a condition precedent to coverage that results in vitiating or voiding the policy, the failure to provide timely notice of the accident is also a breach of

condition precedent to coverage must have the identical effect of vitiating or voiding the policy ab initio, and as such, "fits squarely within the exception to the preclusion doctrine under *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, (90 NY2d 195 [1997])." Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra at 560; accord Hertz Corp v. Active Care Medical Supply Corp, supra at 411. Accordingly, since plaintiff was not notified within 30 days of the accident, it "had the right to deny all claims retroactively to the date of the loss, regardless of whether the denials were timely issued." Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra at 560; accord Hertz Corp v. Active Care Medical Supply Corp, supra at 411; American Transit Insurance Co v. Lucas , supra at 424-425.

Turning to defendants' remaining arguments in opposition, the court finds that defendants fail to off any evidentiary proof and fail to demonstrate the existence of a triable issue of material fact. Defendants merely speculate that plaintiff could have received oral notice of the claim. While they assert plaintiff must demonstrate that it conducted a "meaningful review" of the "assignor's request for reconsideration" and that it has establish "standards" for review of its determinations as to late notice, the record neither shows nor suggests that Maisonneuve in fact responded to the denial of claim form and requested reconsideration so as to excuse his late notice. Contrary to defendants' objections, the denial of claim form is not a "blanket denial" and any information purportedly "missing" from the denial is neither necessary nor material. Moreover, the denial of claim form is properly considered, as plaintiff's claim representative, Alisha Sukhoo, states in her affidavit that "I have been assigned the file in this matter," "I am fully familiar with both the automobile insurance policy and the claims discussed herein," and she personally "issued" a general denial on November 6, 2012. In addition, Alisha Sukhoo is

specifically identified as the "Representative of Insurer" on both the first and fourth pages of the denial of claim form dated November 6, 2012. Finally, defendants have failed to show that summary judgment is premature due to outstanding discovery. See Allstate Insurance Co v. Pierre, 123 AD2d 618 (1st Dept 2014).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied without prejudice and with leave to renew on papers that include evidentiary proof as to the mailing of the denial of the claim form to Joseph Maisonneuve; and it is further

ORDERED that the parties are directed to appear for a status conference on July 21, 2016 at 9:30 a.m, in Part 11, Room 351, 60 Centre Street.

DATED: July 5, 2016

ENTER:

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