

**Ameriprise Ins. Co. v Pugsley Med. Care, P.C.**

2016 NY Slip Op 33225(U)

July 14, 2016

Supreme Court, New York County

Docket Number: Index No. 653864/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

-----X  
AMERIPRISE INSURANCE COMPANY,

Plaintiff,

**DECISION/ORDER**  
**Index No. 653864/2014**

-against-

PUGSLEY MEDICAL CARE, P.C.  
a/a/o SUZANNE JENKINS,

Defendant.

-----X  
HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action against defendant seeking a *de novo* review of a dispute previously arbitrated and a declaratory judgment that plaintiff is not obligated to provide no-fault coverage to defendant. Plaintiff now moves pursuant to CPLR § 3212 for an Order granting it summary judgment against defendant. Defendant cross-moves pursuant to CPLR § 3212 for an Order granting it summary judgment dismissing plaintiff's complaint. For the reasons set forth below, plaintiff's motion is granted and defendant's cross-motion is denied.

The relevant facts are as follows. Suzanne Jenkins, whose vehicle was insured by plaintiff, was allegedly involved in a motor vehicle accident on or about July 30, 2011 (the "Accident"). Thereafter, Jenkins sought treatment for injuries she allegedly sustained during the Accident. Jenkins received treatment from defendant from August 9, 2011 through September 19, 2011 and assigned her right to collect no-fault benefits to defendant. Throughout September and October 2011, plaintiff received multiple bills from defendant for Jenkins' treatment.

On or about October 10, 2011, Jenkins appeared for an Examination Under Oath ("EUO") and provided testimony regarding the Accident and her treatment. By letter dated October 27, 2011, plaintiff, pursuant to its right under the no-fault regulations, requested that a representative of defendant attend an EUO on November 10, 2011 to verify its claims. According to the affidavit testimony of Michael A. Callinan, Esq. ("Callinan"), who was scheduled to conduct the EUO, no representative of defendant appeared at the EUO. By letter dated November 15, 2011, defendant, through its attorney, objected to the EUO request on the grounds that the request was improper, overbroad, vague, unduly burdensome and unsupported by any good reason. Thereafter, by letter dated November 18, 2011, plaintiff notified defendant of another EUO scheduled to be held on December 5, 2011. According to Callinan's affidavit testimony, no representative of defendant appeared on said date. By letter dated December 20, 2011, plaintiff responded to defendant's November 15, 2011 letter by arguing that the no-fault regulations place an "unconditional obligation" on an assignee of benefits to appear for an EUO when one is requested. Further, plaintiff requested that a representative of defendant attend a final EUO on January 5, 2012. Plaintiff's December 20, 2011 letter did not include a statement that plaintiff would reimburse defendant for the reasonable cost of transportation and lost earnings, as required by the no-fault regulations. According to Callinan's affidavit testimony, no representative of defendant appeared on January 5, 2012. Based on these non-appearances, on January 13, 2012 plaintiff issued denials of defendants' claims.

Before this action was commenced, defendant instituted compulsory arbitration against plaintiff. On July 2, 2014, following a hearing held on June 5, 2014, Arbitrator Sandra Adelson, Esq. ("Arbitrator Adelson") issued an award in favor of defendant and against plaintiff for \$5,226.31 and costs and attorneys' fees on the ground that plaintiff's December 20, 2011 letter was defective and, therefore, that plaintiff untimely denied defendants' claims on January 13, 2012, more than 30 days after the last validly-scheduled EUO no-show on December 5, 2011. Master Arbitrator Robyn D. Weisman ("Master Arbitrator Weisman")

affirmed the award on September 10, 2014. Plaintiff commenced the instant action seeking a *de novo* review of this dispute pursuant to 11 NYCRR § 65-4.10(h)(1)(ii), which provides that, if the award of a master arbitrator is \$5,000.00 or greater, exclusive of interest and attorneys' fees, either party may "institute a court action to adjudicate the dispute *de novo*."

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Pursuant to 11 NYCRR § 65-1.1, the mandatory personal injury protection endorsement, an injured person or his assignee or representative shall submit to EUOs upon request by an insurer "as may reasonably be required." The failure to appear for a duly-scheduled EUO is a breach of a condition precedent to coverage under the no-fault policy. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 (1<sup>st</sup> Dept 2011); *see also Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*, 27 Misc.3d 141 (App. Term 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Jud. Dists. 2010) ("the appearance of plaintiff's assignor at an EUO [is] a condition precedent to coverage"). Thus, the failure to appear at an EUO "voids the policy *ab initio*" and gives the insurer "the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued." *See Unitrin Advantage Ins. Co.*, 82 A.D.3d at 560; *see also Allstate Ins. Co. v. Pierre*, 123 A.D.3d 618, 618 (1<sup>st</sup> Dept 2014) (holding that the failure to appear at EUOs "voids coverage regardless of the timeliness of the denial of coverage"). An insurer makes a *prima facie* showing of its entitlement to a declaratory judgment that

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there is no coverage on the basis of EUO no-shows by establishing that it properly mailed EUO notices to the claimant and that the claimant failed to appear at two EUOs. See *Easy Care Acupuncture P.C. v. Praetorian Ins. Co.*, 49 Misc.3d 137(A), at \*1 (1<sup>st</sup> Dept 2015).

In the present case, plaintiff has established its *prima facie* right to judgment as a matter of law as it has shown that it requested that defendant appear at EUOs in accordance with the no-fault regulations and that defendant failed to appear at two EUOs. Plaintiff has submitted the affidavit of Callinan, who was scheduled to conduct the EUOs, which states that defendant failed to appear at EUOs scheduled for November 10, 2011 and December 5, 2011. Further, Callinan testified that the letters scheduling EUOs were mailed to the address listed by defendant on its NF-3 Verification of Treatment Form through the ordinary mailing procedure of his office. As plaintiff has established that it scheduled two EUOs which defendant failed to attend, plaintiff has established its right to deny all claims retroactively to the date of loss, regardless of whether it issued timely denials.

In opposition, defendant has failed to raise a triable issue of fact. Defendant's argument that plaintiff untimely mailed the EUO scheduling letters pursuant to 11 NYCRR § 65-3.5 as the first EUO letter was not mailed within fifteen business days of the EUO of Jenkins, the injured person, is without merit. Pursuant to 11 NYCRR § 65-3.5(a), "[w]ithin 10 business days after receipt of the completed application for motor vehicle no-fault benefits (NYS form NF-2) or other substantially equivalent written notice, the insurer shall forward, to the parties required to complete them, those prescribed verification forms it will require prior to payment of the initial claim." "Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms." 11 NYCRR § 65-3.5(b).

In the present case, plaintiff was not required to mail its first EUO scheduling letter within fifteen business days of Jenkins' EUO as the time-frame established by 11 NYCRR § 65-3.5(b) is set into motion

by the receipt of a completed verification form, not by a separate EUO. However, even if 11 NYCRR § 65-3.5(b) did require plaintiff to mail its first EUO scheduling letter within fifteen business days of Jenkins' EUO, plaintiff has established that it mailed its first EUO scheduling letter within fifteen business days of Jenkins' EUO. The EUO of Jenkins was held on October 10, 2011, merely thirteen days before the first EUO scheduling letter was mailed on October 27, 2011.

Defendant's argument that it did not fail to appear at EUOs twice as it objected to the second EUO request by letter and the third EUO scheduling letter, mailed on December 20, 2011, did not comply with the regulatory notice requirements is also without merit. Defendant has failed to cite any case law holding that the mailing of a letter objecting to an EUO request excuses a failure to appear at an EUO. Rather, the case law cited by defendant only holds that the mailing of a letter objecting to an EUO request preserves a claimant's objection to the reasonableness of the request. *See Rutland Med., P.C. v. State Farm Ins. Co.*, 45 Misc.3d 1033, 1034-35 (Civ. Ct., Kings County 2014). Although the court finds that plaintiff's third EUO scheduling letter, mailed on December 20, 2011, did not comply with the regulatory notice requirements as it did not include that the "insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request" as required by 11 NYCRR § 65-3.5(e), this deficiency is irrelevant as plaintiff has established that defendant failed to appear at two EUOs scheduled for November 10, 2011 and December 5, 2011.

Defendant's argument that the denials issued on January 13, 2012 were untimely as they were issued more than thirty calendar days after defendant failed to appear at the EUO on December 5, 2011 is also without merit. Although an insurer generally must pay or deny a claim for no-fault benefits within thirty calendar days of receipt of proof of claim pursuant to 11 NYCRR § 65-3.8(a)(1), an insurer need not issue timely denials where the failure to appear at EUOs "voids the policy ab initio," thus giving the insurer "the

right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued." See *Unitrin Advantage Ins. Co.*, 82 A.D.3d at 560.

Defendant's argument that plaintiff has failed to establish that it had good cause for its EUO requests pursuant to 11 NYCRR § 65-3.2(c) is also without merit as the burden of persuasion for reasonableness falls to the medical provider, not the insurer, in instances when no-fault coverage was denied based on failure to attend EUOs. See *Bath Ortho Supply Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc.3d 150(A) (N.Y. App. Term 1<sup>st</sup> Dept 2012); *Dowd v. Praetorian Ins. Co.*, 36 Misc.3d 126(A) (N.Y. App. Term 1<sup>st</sup> Dept 2012); *Seacoast Medical, P.C. v. Praetorian Ins. Co.*, 38 Misc.3d 127(A) (N.Y. App. Term 1<sup>st</sup> Dept 2012). Moreover, notwithstanding the fact that it is not plaintiff's burden to demonstrate reasonableness, plaintiff has provided the affidavit of James Glampe, a Senior Special Investigator in the Special Investigative Unit of defendant, who testifies that Jenkins' testimony at her EUO contradicted multiple details of defendants' bills, including the amount of time Jenkins spent meeting with the physician for an evaluation, the identity of the physician who performed the examination and the treatments provided by defendant. Plaintiff has also provided Jenkins' EUO transcript. As such, contrary to defendant's contention, plaintiff has established good cause for the EUO requests.

Accordingly, plaintiff's motion is granted. Upon *de novo* review of the dispute previously submitted to arbitration, resulting in an award by Arbitrator Adelson issued on July 2, 2014 in favor of defendant and against plaintiff and affirmed by Master Arbitrator Weisman on September 10, 2014, it is hereby

ADJUDGED and DECLARED that plaintiff is not obligated to honor or pay claims for reimbursement submitted by defendant nor is plaintiff required to provide, pay, honor or reimburse any claims set forth by defendant in any current or future proceedings, including but not limited to arbitrations and/or lawsuits seeking to recover no-fault benefits arising out of the alleged motor vehicle accident involving Suzanne Jenkins on July 30, 2011; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to provide, pay or honor any current or future claim for no-fault benefits under the Mandatory Personal Injury Protection endorsement in plaintiff's insurance policy nor is plaintiff required to provide, pay, honor or reimburse any claims set forth by defendant in any current or future proceedings, including but not limited to arbitrations and/or lawsuits seeking to recover no-fault benefits arising out of the alleged motor vehicle accident involving Suzanne Jenkins on July 30, 2011; and it is further

ADJUDGED and DECLARED that defendant is not entitled to no-fault coverage for the motor vehicle accident involving Suzanne Jenkins on July 30, 2011; and it is further

ORDERED and ADJUDGED that all pending and future no-fault lawsuits and arbitration proceedings brought by defendant with respect to the motor vehicle accident involving Suzanne Jenkins on July 30, 2011, are permanently stayed.

This constitutes the decision and order of the court.

DATE :

7/14/16

CK  
KERN, CYNTHIA S., JSC  
HON. CYNTHIA S. KERN  
J.S.C.

Wilton A. Kingling  
Clerk

**FILED**  
AUG 15 2016  
COUNTY CLERK'S OFFICE  
NEW YORK