Nationwide Mut. Ins. Co. v HMP Orthopedics, P.C.
2017 NY Slip Op 30059(U)
January 10, 2017
Supreme Court, New York County
Docket Number: 152622/16
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

HMP ORTHOPEDICS, P.C., A/A/O CHRISTOPHER JACKSON,

Defendants.

-- X

Index No. 152622/16
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

Plaintiff seeks three claims for relief in the instant action: 1) de novo review of an arbitrator's award in favor of defendant HMP and against plaintiff, 2) judgment for plaintiff that it is under no obligation to provide any coverage for treatment rendered by defendant HMP to defendant Jackson and 3) a declaratory judgment that no coverage exists because defendant Jackson failed to appear for an EUO. For the reasons discussed below, plaintiff's motion for summary judgment is granted.

Background

Plaintiff claims that there was a motor vehicle accident on August 7, 2014 in which defendant Jackson was a passenger in a car driven by David Rambaran. Plaintiff insists that the insurance policy for the subject vehicle was issued in favor of Mr. Rameshwar Singh. Plaintiff claims that it sought to conduct an EUO to investigate the circumstances surrounding the accident. Plaintiff asserts that it received a bill from a pharmacy for a compound cream for defendant Jackson in excess of $31,000. Plaintiff claims this bill prompted its request for an

EUO of defendant Jackson.

Plaintiff claims it received a no-fault application for defendant Jackson with a letter of representation from Dalton & Associates, which identified Jackson's address as 11-58 Lefferts Blvd., South Ozone Park, NY 11248. Plaintiff maintains that it sent two notices of an EUO to Jackson and his counsel, but Jackson did not appear for the EUO scheduled for March 26, 2015. Plaintiff contends that Jackson's failure to appear for his EUO renders defendant HMP ineligible to recover no-fault reimbursements.

Plaintiff observes that at the arbitration hearing arbitrator Grief concluded that the sole debatable issue was whether the EUO scheduling letters were properly mailed. Arbitrator Grief concluded that plaintiff was under a duty to make further inquiry of Jackson's address after the second EUO notice was returned and, therefore, he ruled in favor of defendant HMP. A Master Arbitrator then reviewed arbitrator Grief's award and affirmed the arbitration ruling.

In opposition, defendant HMP claims that plaintiff failed to demonstrate that its EUO notices were properly mailed. HMP asserts that the bills for services and assignment of benefits list defendant Jackson's address as 111-58 Lefferts Blvd, but plaintiff sent the EUO notices to 11-58 Lefferts Blvd. HMP argues that arbitrator Grief found that the second EUO notice was presumably returned to plaintiff's counsel as undeliverable because there was no such address. HMP claims that the return of the second EUO notice put a burden on plaintiff to conduct further inquiry regarding the correct address.

In reply, plaintiff claims that the Court should conduct a de novo review and disregard the arbitrator's ruling. Plaintiff claims that defendant HMP's failure to offer an individual with personal knowledge of the facts renders its opposition meritless. Plaintiff claims that the

attorney's affirmation in opposition does not allege that he has personal knowledge of the facts. Plaintiff claims there is no caselaw to support defendant HMP's argument that plaintiff had a duty to conduct further inquiry regarding the correct address. Plaintiff maintains that the letters were sent to defendant Jackson's counsel as well as to Mr. Jackson.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

11 NYCRR 65-4.10(h)(1)(ii) permits an appeal from a master arbitrators award "if the

award of the master arbitrator is $5,000 or greater, exclusive of interest and attorney's fees, either party may, in lieu of an article 75 proceeding, institute a court action to adjudicate the dispute de novo." "A de novo review, by its very nature, is not a review of the arbitration proceeding itself or the arbitration award but a review of the underlying dispute, as if an arbitration proceeding never occurred, thus contemplating a full adjudication on the merits of the parties claims" (*Sachs v Zito*, 28 Misc3d 567, 571, 901 NYS2d 818 [Sup Ct, Orange County 2010]).

A presumption of mailing "may be created by either proof of actual mailing or proof of a standard office practice or procedure to ensure that items are properly address and mailed" (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]).

The key issue for this Court is the significance of the incorrect address on plaintiff's EUO notices. Plaintiff acknowledges that it sent the EUO scheduling letters to the wrong address (11-58 Lefferts Blvd). Plaintiff claims that it has no duty to conduct an inquiry and that defendant Jackson's attorney also received these notices, thereby fulfilling plaintiff's obligation.

Despite plaintiff's apparent refusal to conduct any inquiry after the second EUO letter addressed to defendant Jackson was purportedly returned to plaintiff's counsel, the Court grants summary judgment in favor of plaintiff because plaintiff also sent the EUO letters to defendant Jackson's counsel (*see St. Vincent's Hosp. of Richmond v American Tr. Ins. Co.*, 299 Ad2d 338, 339-40, 750 NYS2d 98 [2d Dept 2002]). It is undisputed that Dalton & Associates sent a letter on August 29, 2014 to plaintiff stating that they represented defendant Jackson in connection with the accident on August 7, 2014 (affirmation of plaintiff's counsel, exh E). This letter specifically stated that "[i]f you require further information or documentation, please contact

me"(*id.*). Plaintiff's EUO letters are addressed to Dalton & Associates (*see id.* exhs F, H). Contacting defendant's counsel is sufficient to satisfy plaintiff's prima facie burden.

In opposition, defendant failed to raise an issue of fact precluding summary judgment. Specifically, defendant did not submit any evidence that Dalton & Associates did not receive the EUO notices. If defendant's counsel was unable to contact defendant Jackson or wanted to reschedule the EUO, they should have contacted plaintiff's counsel.

"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" (*Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 470, 33 NYS3d 54 [1st Dept 2016]). Because defendant Jackson did not satisfy a condition precedent, plaintiff is entitled to deny all claims *(see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560, 918 NYS2d 473 [1st Dept 2011]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted.

This is the Decision and Order of the Court.

Dated: January 10, 2017
New York, New York

ARLENE P. BLUTH, JSC