

Country-Wide Ins. Co. v Blenman
2017 NY Slip Op 30306(U)
February 16, 2017
Supreme Court, New York County
Docket Number: 161529/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

- v -

IGENIE F. HARRIS BLENMAN,
("Eligible Injured Party Defendant"),

AND

KINGS COUNTY HOSPITAL CENTER, DOSHI
DIAGNOSTIC IMAGING SERVICES PC C/O
TANGENT SYSTEMS CORP, STAND-UP MRI
OF BROOKLYN PC, MIDDLE VILLAGE
DIAGNOSTIC IMAGING PC, MAXIM
TYORKIN MD, HILLSIDE SURGICARE, NEW
BEGINNING CHIROPRACTIC PC
C/O LAW OFFICES OF GILL S SCHAPIRA PC,
M & M MEDICAL PC C/O ISRAEL, ISRAEL &
PURDY LLP, INTEGRAL ASSIST MEDICAL PC,
ARCADIA MEDICAL BILLING INC,
VISION REHAB PT PC, XVV INC, JYOTI SHAH MD,
MEDCO TECH INC C/O ISRAEL,
ISRAEL & PRUDY LLP, YEVGENTY
MARGULIS PHD CSW, TONG LI
MD PC C/O ISLAND BILLING AND
PROCESSING LLC, PROMPT MEDICAL
SUPPLY INC, GRAIG GRANOVSKY DC,
NATASHA KELLY, DUNAMIS REHAB PT PC,
JOA CHIROPRACTIC PC C/O
GARY TSIRELMAN PC, AOM MEDICAL
SUPPLY INC, STATE CHIROPRACTIC PC,
PROFESSIONAL CHIROPRACTIC CARE, PC

("Medical Provider Defendants").

Defendants.

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Index No.
161529/2014
**DECISION
and ORDER**
MOT. SEQ 3

HON. EILEEN A. RAKOWER, J.S.C.

This is a declaratory judgment action in which plaintiff Country-Wide Insurance Company ("Country-Wide" or "Plaintiff") seeks a judgment declaring that Plaintiff has no obligation to pay defendant medical providers' claims for no-fault benefits because of defendant Igenie F. Harris Blenman ("Blenman"), the eligible injured party defendant, breach of a condition precedent to coverage to submit to independent medical examinations.

By Notice of Motion dated June 21, 2016 and filed on July 8, 2016, Plaintiff moves for summary judgment, pursuant to CPLR 3212, granting Plaintiff summary judgment against defendants Blenman, MIDDLE VILLAGE DIAGNOSTIC IMAGING PC ("Middle Village"), M & M MEDICAL PC C/O ISRAEL, ISRAEL & PURDY LLP ("M&M"), JYOTI SHAH MD, MEDCO TECH INC C/O ISRAEL, ISRAEL & PRUDY LLP ("Medco"), and AOM MEDICAL SUPPLY INC ("AOM") ("Defendants"). AOM opposes, and submits the attorney affirmation of David Landfair. Middle Village opposes, and submits the attorney affirmation of Victor Bota. No other opposition is submitted.

Plaintiff submits the attorney affirmation of R. Diego Velazquez; the affidavit of Sandra W. Garcia, employed as IME Clerk for Plaintiff; Fatima Zuhra, employed as an Administrative Assistant in Plaintiff's Medical Evaluations Unit; and the affidavit of Jessica Mena-Sibrian, who is employed as a No-Fault Litigation/Arbitration Supervisor. The affiants attest that Blenman failed to appear for duly scheduled orthopedic, neurological and chiropractic IMES on July 24, 2014 and August 14, 2014.

Turning to AOM's opposition, AOM submits the attorney affirmation of David Lanfair in opposition to Plaintiff's motion for summary judgment. AOM claims that the motion is not proper because Plaintiff rejected the answer that AOM served on May 29, 2015 as untimely. As such, AOM contends that since Plaintiff rejected AOM's answer, issue is not joined, and summary judgment may not be granted against AOM, a defaulting defendant. AOM also argues that Plaintiff's IME scheduling letters were untimely and Plaintiff has failed to show sufficient proof of the mailing of the IME notices to Blenman and Blenman's non-appearance.

On June 1, 2015, Plaintiff sent AOM a Notice of Rejection of Pleading notifying AOM that AOM's Answer, verified on May 29, 2015, and postmarked May 29, 2015 was "rejected as untimely." Accordingly, since Plaintiff rejected

AOM's answer, issue is not joined and Plaintiff's motion for summary judgment against AOM is denied.

Turning to Middle Village's opposition, Middle Village submits the attorney affirmation of Victor Bota in opposition to Plaintiff's motion for summary judgment. Middle Village argues that Plaintiff failed to meet its prima facie burden to establish that it timely and properly mailed IME scheduling letters to Blenman, that Blenman failed to appear for duly scheduled IMEs, and Plaintiff has failed to establish that the IMEs were timely scheduled.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

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. Specifically, 11 NYCRR 65-1.1 states, "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." 11 NYCRR 65-1.1 further states, "Upon request by the Company, the eligible injured person or that person's assignee or representative shall: ... (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same."

"[T]he First Department has now made clear that an insurer must affirmatively establish that it complied with the no-fault insurance regulations governing the Claim Procedure which prescribe specific time frames for requesting and scheduling EUOs and IMEs, in order to satisfy its prima facie burden on a motion for summary judgment declaring that no coverage exists based on the failure of a claimant or medical provider to appear for an EUO or IME." (*Unitrin Advantage Ins. Co. v. Better Health Care Chiropractic, P.C.*, 2016 WL 2606744 [N.Y.Sup. May 4, 2016], *2, citing *Am. Transit Ins. Co. v. Longevity Med. Supply, Inc.*, 131 A.D.3d 841, 849 [1st Dept 2015]).

11 NYCRR 65-3.5 sets forth the claim procedure that applies to insurers who seek to verify claims. “The Claim Procedure regulations mandate the following time frames: 1) within 10 business days of receipt of an application for no-fault benefits, the insurer shall forward the prescribed verification forms to the parties required to complete them; 2) after the insurer's receipt of the completed verification forms, any additional verification, i.e. an IME or EUO, required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of one or more of the completed verification forms; and 3) *if the request for additional verification is an IME, the insurer shall schedule the IME to be held within 30 calendar days from the date of receipt of the prescribed verification forms.*” (*Unitrin*, 2016 WL 2606744, at *2) (emphasis added).

“The phrase ‘prescribed verification forms’ apparently refers to certain of the forms enumerated in the preceding section, 11 NYCRR 65-3.4,¹ and set forth in

¹ 11 NYCRR 65-3.4 provides:

(b) Unless the insurer will pay the claim as submitted within 30 calendar days, then, within five business days after notice is received by the insurer at the address of its proper claim processing office, either orally pursuant to subdivision (a) of this section or in any other manner, the insurer shall forward to the applicant the prescribed application for motor vehicle no-fault benefits (NYS form N-F 2) accompanied by the prescribed cover letter (NYS form N-F 1). If notice is initially received by the insurer at an address other than the proper claims processing office, the five -day period for forwarding of the prescribed forms shall commence on the day such notice is received at the proper claims processing office, but in no event shall the prescribed forms be forwarded later than 10 business days after receipt of the original notice.

(c) Attached is an appendix (Appendix 13, *infra*), which includes the following prescribed claim forms that must be used by all insurers, and shall not be altered unless approved by the superintendent:

- (1) Cover letter (NYS form NF-1A)-to be used with policies effective on or after September 1, 2001.
- (2) Cover letter (NYS form NF-1B)-to be used with policies effective prior to September 1, 2001.
- (3) Application for motor vehicle no-fault benefits (NYS form NF-2).
- (4) Verification of treatment by attending physician or other provider of health service (NYS form NF-3).
- (5) Verification of hospital treatment (NYS form NF-4).
- (6) Hospital facility form (NYS form NF-5).
- (7) Employer's wage verification report (NYS form NF-6).
- (8) Verification of self-employment income (NYS form NF-7).
- (9) Agreement to pursue social security disability benefits (NYS form NF-8).

Appendix 13 to the Insurance Department regulations.” (*Am. Transit Ins. Co. v. Longevity Med. Supply, Inc.*, 131 A.D.3d 841, 849 [1st Dept 2015]).

In *National Liability & Fire Insurance Co. v. Tam Medical Supply Corp.*, 131 A.D. 3d 851 [1st Dept. 2015], the First Department held:

Plaintiff no-fault insurer moved for summary judgment declaring that its policy does not provide coverage to the individual defendant for the subject accident based on her failure to appear for scheduled examinations under oath (EUO). 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 (*see Hertz Corp. v. Active Care Med. Supply Corp.*, 124 A.D.3d 411, 1 N.Y.S.3d 43 [1st Dept.2015]; *Allstate Ins. Co. v. Pierre*, 123 A.D.3d 618, 999 N.Y.S.2d 402 [1st Dept. 2014]), 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. Accordingly, plaintiff's motion for summary judgment was properly denied.

Nat'l Liab., 131 A.D.3d at 851. *See also Am. Transit*, 131 A.D.3d at 849 (affirming the trial court's denial of plaintiff's summary judgment motion and holding that plaintiff failed to establish prima facie that it was entitled to deny defendant's claim based on claimant's failure to appear for an IME because plaintiff failed to show that the scheduling of the IMEs complied with Insurance Department Regulations, which prescribes a 30-calendar-day time frame for the holding of IMEs).

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- (10) Agreement to pursue workers' compensation or New York State disability benefits (NYS form NF-9).
 - (11) Denial of claim form (NYS form N-F-10).
 - (12) Subrogation agreement (NYS form NF-11).
 - (13) Lump-sum settlement agreement (NYS form NF-12).
 - (14) Election-optional basic economic loss (NYS form NF-13).

N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.4

Here, although Plaintiff submitted evidence that notices of the scheduled IMEs were properly mailed and that Blenman did not appear, Plaintiff failed to submit proof that the scheduling of the IMEs complied with Insurance Department Regulations (11 NYCRR) § 65-3.5 (d), which prescribes a 30-calendar-day time frame for the holding of IMEs. (*Am. Transit*, 131 A.D.3d at 841).

Here, according to Ms. Mena-Sibrian's affidavit and the record before the Court, Plaintiff received bills from Middle Village on June 6, 2014. Plaintiff requested that Blenman appear for IMEs on July 24, 2014 and August 14, 2014. Both dates are beyond the 30-calendar-day time frame from the date Plaintiff purportedly received bills from Middle Village. Plaintiff makes no mention of any request for verification forms or receipt of them which may have delayed the commencement of the 30 day period within which to schedule the IME or EUO. Plaintiff submits no reply, and does not submit any additional information to demonstrate that it complied with the timeframe set forth in 11 NYCRR § 65-3.5 (d) in scheduling Blenman's IME. Plaintiff has therefore failed to satisfy its prima facie burden on a motion for summary judgment declaring that no coverage exists based on the failure of a claimant or medical provider to appear for an IME or EUO.

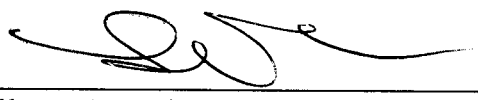
Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

2/16/17
Dated: ~~JANUARY 10, 2017~~

FEB 16 2017


Eileen A. Rakower, J.S.C.

HON. EILEEN A. RAKOWER