

Repwest Ins. Co. v Active Care Med. Supply Corp.
2017 NY Slip Op 30710(U)
April 10, 2017
Supreme Court, New York County
Docket Number: 152550/13
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

REPWEST INSURANCE COMPANY,

Plaintiff,

-against-

Index No: 152550/13
DECISION/ORDER
Motion sequence 2

ACTIVE CARE MEDICAL SUPPLY CORP.,
AEE MEDICAL DIAGNOSTIC, P.C.,
ALLEVATION MEDICAL SERVICES, P.C.,
CITY CHIROPRACTIC CARE, P.C.,
FYZ ACUPUNCTURE, P.C.,
MODERN CHIROPRACTIC, P.C.,
PAIN FREE PHYSICAL THERAPY, P.C.,
PRIME DIAGNOSTIC MEDICAL, P.C.,
PSYCHOLOGY YME, P.C.,
QUALIFIED MEDICAL DIAGNOSTIC, P.C.,
SASAN FAMILY CHIROPRACTIC, P.C.,
SHARP VIEW DIAGNOSTIC IMAGING, P.C.,
DR. STUART I. SPRINGER,
TOP MEDICAL, P.C.,
TRADITION ACUPUNCTURE HEALTH CARE, P.C.,
UNIQUE CHIROPRACTIC CARE, P.C.,
UPSCALE MEDICAL DIAGNOSTICS, P.C.,
VIAD MEDICAL CARE, P.C.,
VELOCITY CHIROPRACTIC, P.C.,
TAVISE BOYD, ALEESIA DAVIS AND
OMAR HOLLEY,
Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's CPLR 3212 motion for summary judgment.

Papers	Numbered
Plaintiff's Notice of Motion.....	1
Plaintiff's Memorandum of Law in Support.....	2
Defendant AEE Medical Diagnostic, P.C.'s Affirmation in Opposition.....	3
Plaintiff's Reply Affirmation.....	4

Bryan Cave LLP, New York (Laury Belony of counsel), for plaintiff.
Gary Tsirelman P.C., Brooklyn (Douglas Mace of counsel), for defendant AEE Medical Diagnostic, P.C.

Gerald Lebovits, J.

In this declaratory-judgment action, plaintiff asserts four causes of action: (1) against defendants Tavise Boyd and Aleesia Davis and the defendant medical providers (named in the above caption), declaring that plaintiff owes no duty to pay no-fault claims with respect to the July 28, 2011, collision (the collision); (2) against defendant Omar Holley and defendant medical providers, declaring that plaintiff owes no duty to pay no-fault claims with respect to the collision; (3) against all defendants, declaring that plaintiff owes no duty to pay no-fault claims with respect to the collision; and (4) against all defendants, permanently staying all no-fault lawsuits and arbitrations relating to the collision.

Plaintiff now moves for summary judgment under CPLR 3212 against defendants AEE Medical Diagnostic, P.C. (AEE Medical) and Sharpview Diagnostic Imaging, P.C. (Sharpview). The basis for plaintiff's motion is that defendants Davis and Boyd breached a condition precedent to coverage under the No-Fault Regulations when Davis failed to appear for two scheduled independent medical examinations (IME) and when Boyd failed to appear for two scheduled examinations under oath (EUO).

Sharpview has not opposed plaintiff's motion. That aspect of plaintiff's summary-judgment motion relating to Sharpview is granted without opposition.¹ Plaintiff shall settle order.

Plaintiff's motion against defendant AEE Medical is also granted.

Plaintiff established its prima facie entitlement to summary judgment. A party's failure to appear for two scheduled EUOs or two scheduled IMEs constitute a material breach of the insurance policy; therefore, the insurer may deny coverage. (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] ["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."], *lv denied* 17 NY3d 705 [2011]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2d Dept 2006] [holding that an insurer may retroactively deny claims on the basis of assignor's failure to appear for two scheduled IMEs].)

On a summary-judgment motion, the moving party must establish that it timely and properly mailed the notices for EUOs to defendants and that the defendants failed to appear. (*Bath Ortho Supply, Inc. v New York Central Mut. Fire Ins. Co.*, 2012 NY Slip Op 50271 [U], *1 [App Term 1st Dept 2002], citing *Unitrin Advantage Ins. Co.*, 82 AD3d at 560; *Fogel*, 35 AD3d at 721; *accord Repwest Ins Co. v Advantage Radiology, P.C.*, 42 Misc 3d 1210 [A], **2-4, 2014 NY Slip Op 50016 [U], **2-4, 2014 WL 127915, at **2-4 [Sup Ct NY County 2014] ["In

¹ Plaintiff received six bills from Sharpview: (1) \$879.73 for date of service 8/25/11, defendant David; (2) \$912.00 for date of service 9/1/11, defendant Davis; (3) \$878.67 for date of service 9/29/11, defendant Davis; (4) \$878.67 for date of service 8/18/11, defendant Boyd; (5) \$879.73 for date of service 8/25/11, defendant Davis; and (6) \$912.00 for date of service 9/1/11, defendant Boyd.

support of its motion, plaintiff . . . proffers . . . the [EUO] letters . . . the affidavits of service for all such letters, and an affidavit from Joseph R. Federici, Esq. stating that on each scheduled EUO date, he waited for the Defendants . . . [who] failed to attend the scheduled EUOs.”.)

To establish that a defendant failed to appear for IMEs, plaintiff must prove that it requested IMEs — by mailing notices — according to the procedures and time frames set forth in the No-Fault Regulations and that the defendant failed to appear. (*Am. Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 [1st Dept 2015], citing *Unitrin Advantage Ins. Co.*, 82 AD3d at 559; *Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]; *accord Am. Transit Ins. Co. v Leon*, 112 AD3d 441, 442 [1st Dept 2013].)

Plaintiff’s Director of Claims Support, David Benyi, states that plaintiff received four bills from defendant AEE Medical: (1) \$604.24, for date of service 8/17/11 for assignor defendant Davis; (2) \$566.92 for date of service 9/20/11 for assignor defendant Davis; (3) \$604.24 for date of service 8/17/11 for assignor defendant Boyd; and (4) \$944.12 for date of service 9/20/11 for assignor defendant Boyd. (Plaintiff’s Notice of Motion, Affidavit of David Benyi, Nov. 8, 2016.)

Plaintiff proved that it timely and properly sent the EUO letters to defendant Boyd to attend EUOs on October 18, 2011, and November 15, 2011. Joseph Federici, an attorney from Rubin, Fiorella, Friedman LLP, explains that he was assigned to conduct defendant Boyd’s EUOs. He explains that his office generated and mailed the EUO letters under his supervision. (Plaintiff’s Notice of Motion, Affirmation of Joseph Federici, Dec. 20, 2012, at ¶¶ 4, 6.) Plaintiff provides as exhibits to its summary-judgment motion the EUOs letters. (Plaintiff’s Notice of Motion, Affirmation of Joseph Federici, Exhibit 1.) Plaintiff also provides the affidavits of service from Neca Rivera and Robert Colon, who mailed the respective EUO letters to defendant Boyd. (Plaintiff’s Notice of Motion, Affirmation of Joseph Federici, Exhibit 1.) Plaintiff also proved that defendant Boyd failed to appear for two EUOs. Federici explains that he was present to conduct defendant Boyd’s EUOs. (Plaintiff’s Notice of Motion, Affirmation of Joseph Federici, Dec. 20, 2012, at ¶¶ 5-7.) He explains that he waited for defendant Boyd on the respective EUO dates. (*Id.*) Boucher explains that defendant Boyd failed to appear. (*Id.*) Defendant Boyd’s failure to appear for two duly scheduled EUOs constitutes a breach of a condition precedent to coverage.

Plaintiff proved that it timely and properly sent letters to defendant Davis scheduling IMEs for October 17, 2011, and November 7, 2011. Plaintiff, through Transcion Medical P.C., a third-party service provider, notified Davis that she was required to attend IMEs with Antoinette Perrie, a chiropractor and acupuncturist. (Plaintiff’s Notice of Motion, Affidavit of Shane Perry, Nov. 13, 2013.) Plaintiff provides the IME letters and log that the letters were sent by certified mail to defendant Davis. (Plaintiff’s Notice of Motion, Affidavit of Shane Perry, Nov. 13, 2013, Exhibit 1.) Plaintiff also proved that defendant Davis failed to appear for two IMEs. Antoinette Perrie states that she was present on October 17, 2011, and November 7, 2011, to conduct Davis’ IME. (Plaintiff’s Notice of Motion, Affidavit of Shane Perry, Nov. 13, 2013, at ¶¶ 6, 9.) She states that defendant Davis failed to appear on October 17, 2011, and November 7, 2011. (Plaintiff’s Notice of Motion, Affidavit of Shane Perry, Nov. 13, 2013, at ¶¶ 6, 9.)

Also, plaintiff proved that it timely and properly denied defendants' claims. Plaintiff proved that it timely and properly generated and mailed the denials, NF-10s, to defendants. (Plaintiff's Notice of Motion, Affidavit of Arlene Daddazio, Nov. 11, 2016; Exhibit 8.) Daddazio, plaintiff's Claims Manager, explains plaintiff's procedures for receiving claims, generating letters, and mailing letters and denial forms.

Defendant AEE Medical's counsel's affirmation, coming from an individual without personal knowledge, has no probative value. In any event, counsel's affirmations create no material issue of fact for trial. (*See GTF Marketing Inc. v Colonial Aluminium Sales, Inc.*, 66 NY2d 965, 968 [1985] ["As we have previously noted, an affidavit or affirmation of an attorney without personal knowledge of the facts cannot 'supply the evidentiary showing necessary to successfully resist the motion.'"] [citations omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] ["[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing."]; *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 [1st Dept 1981] ["The affirmation of counsel without requisite knowledge of the facts is without probative value. Moreover, the attorney's affirmation sets forth conclusory allegations rather than evidentiary facts and, even if it could be considered, is insufficient."] [citations omitted], *aff'd* 54 NY2d 715 [1981].)

Defendant AEE Medical argues that because plaintiff received the NF-2 claim forms on August 22, 2011, and plaintiff scheduled Davis' IME on October 17, 2011 — more than 30 days after receipt of the NF-2 — the IMEs are a nullity. But the August 22, 2011, date that defendant uses in support of its argument pertains to the date when plaintiff received defendant Top Medical P.C.'s claim, not defendant AEE Medical's claim. Plaintiff explained that on September 27, 2011 — before plaintiff received AEE Medical's claim on September 29, 2011, it mailed the IME letter to David scheduling the first IME for October 17, 2011. (Plaintiff's Notice of Motion, Affidavit of Shane Perry, Nov. 13, 2013, ¶ 12; (Plaintiff's Notice of Motion, Affidavit of David Benyi, Nov. 8, 2016, ¶¶ 20-23.)) Plaintiff properly scheduled Davis' IME.

Defendant AEE Medical argues that plaintiff did not prove that it properly scheduled Boyd's EUO. AEE Medical argues that the first EUO was scheduled for October 18, 2011, and that plaintiff waited to mail the second letter on November 1, 2011 — beyond the 10-day period allowed under 11 NYCRR 65-3.6. AEE Medical, thus, argues that the second EUO date is a nullity.

Plaintiff's counsel concedes that plaintiff mailed the second letter scheduling the EUO late, four days beyond the 10-day period. But plaintiff relies on *Triangle R Inc. v Praetorian Co.*, 2010 NY Slip Op 52294 [U], *2, 2010 WL 5479885, at *2 [App Term, 1st Dept 2010] for the proposition that this court should find that plaintiff's follow-up EUO letter was timely.

Plaintiff's late EUO letter reduces plaintiff's 30-day period to pay or deny the claim by four days — the number of days plaintiff's request was untimely. (11 NYCRR 65-3.8 [i]; see *A.C. Med., P.C. v Ameriprise Ins. Co.*, 2016 NY Slip Op 51787 [U], * 1, 2016 WL 7329730, at *1 [App Term, 2d Dept, 11th & 13th Jud Dists 2016] ["Since defendant received the claim in the amount of \$403.58 on August 28, 2012 and mailed an EUO scheduling letter to plaintiff on September 26, 2012, defendant's time to pay or deny that claim was reduced by the number of

days that the EUO request was late (see 11 NYCRR 65-3.8[1]). However, defendant did not timely deny that claim after plaintiff had failed to appear for the second scheduled EUO (see 11 NYCRR 65-3.8[a][1]).") Thus, plaintiff had 26 days in which to deny defendant AEE Medical's claim on the basis that Boyd failed to appear for two EUOs. After Boyd failed to appear for the second EUO on November 15, 2011, plaintiff had 26 days to deny the claim. Plaintiff properly denied the claim November 29, 2011, before the 26-day period. (Plaintiff's Notice of Motion, Exhibit 8.) The *Triangle R Inc.* Court noted that

"[I]t would be incongruous to conclude that the insurance regulation regarding follow-up verification, or any other statute or rule, warrants a result which would, in effect, penalize an insurer who diligently attempts to obtain the information necessary to make a determination of a claim, and concomitantly, rewards a plaintiff who makes no attempt to even comply with the insurer's requests.'" (2010 NY Slip Op 52294 [U], *2, 2010 WL 5479885, at *2 [citations omitted].)

Defendant AEE Medical also argues that plaintiff's denials are not specific to the bills at issue. But plaintiff's NF-10 denial forms are sufficiently detailed. The NF-10s provide that Davis failed to appear for two IMEs, on October 17, 2011, and November 7, 2011, and that Boyd failed to appear for two EUO, on October 18, 2011, and November 15, 2011; Boyd and Davis breached a condition precedent to coverage. (Plaintiff's Notice of Motion, Exhibit 8.)

Plaintiff's summary-judgment motion is granted. Plaintiff has no duty to pay no-fault claims with respect to the July 28, 2011, collision for defendants AEE Medical Diagnostic, P.C. and Sharpview Diagnostic Imaging, P.C. That aspect of plaintiff's motion to dismiss defendant AEE Medical's counterclaim for attorney fees is granted and defendant's counterclaim is dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's summary-judgment motion is granted against defendants AEE Medical Diagnostic, P.C. and Sharpview Diagnostic Imaging, P.C. and a declaratory judgment is granted and plaintiff shall settle order; and it is further

ORDERED that defendant AEE Medical's counterclaim against plaintiff is dismissed; and it is further

ORDERED that all no-fault lawsuits and arbitrations relating to the July 28, 2011, collision for defendants AEE Medical Diagnostic, P.C. and Sharpview Diagnostic Imaging, P.C. are permanently stayed; and it is further

ORDERED that plaintiff's counsel must serve a copy of this decision and order with

NYSCEF DOC. NO. 103

RECEIVED NYSCEF: 04/12/2017

notice of entry on defendants and upon the County Clerk's office, which is directed to enter judgment accordingly.

Dated: April 10, 2017



J.S.C.

HON. GERALD LEBOVITS
J.S.C.