

Unitrin Direct Ins. Co. v Tsatskis
2017 NY Slip Op 31115(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 158414/2016
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

UNITRIN DIRECT INSURANCE COMPANY,

INDEX NO. 158414/2016

Plaintiff,

MOTION DATE 04/11/17

MOTION SEQ. NO. 001

- v -

BORIS TSATSKIS, M.D., GOTTO MEDICAL CARE, P.C.,
VINCENT J. GULFO, M.D., P.C., PRECISION IMAGING
OF NEW YORK, P.C. and MICHELLE GADDY,

Defendants.

The following papers, numbered 12-21 were read on this motion to enter a default judgment.

Notice of Motion—Boucher Affirmation—Schreiber Affirmation—Peretz
Affidavit—Winant Affidavit—Exhibits A-F—Affidavit of Service

No(s). 12-21

Motion by Plaintiff Unitrin Direct Insurance Company for entry of a default judgment against Defendants Boris Tsatskis, M.D., Gotto Medical Care, P.C., Precision Imaging of New York, P.C. and Michelle Gaddy (collectively, “Defaulting Defendants”) is granted in part as follows:

BACKGROUND

This is an action for a declaratory judgment relating to insurance coverage for the treatment of injuries allegedly suffered by Defendant Michelle Gaddy. Defendant Gaddy allegedly was a pedestrian when she was struck by a motor vehicle driven by non-party Susan Peretz on December 20, 2015 at a gas station near the corner of Bedford Avenue and Atlantic Avenue in Brooklyn. (Boucher Affirm. ¶¶ 4-5; Ex. A [Complaint] ¶¶ 7-8; Ex. C [Police Report].) Ms. Peretz was allegedly insured by Plaintiff on that date. (*Id.*) Allegedly, the subject vehicle left the scene and Defendant Gaddy then walked over to a police station and made a police report of the accident. (Boucher Affirm. ¶ 5; Complaint ¶ 7.) The police report states that Defendant Gaddy then went to New York Presbyterian Hospital for treatment. (Police Report.) Plaintiff assigned C000273NY16 as the claim

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

number to all no-fault claims associated with this alleged December 20, 2015 accident. (Boucher Affirm. ¶ 5.)

Plaintiff submits an affidavit from Susan Peretz. Ms. Peretz states that as she was turning slowly into the gas station, Defendant Gaddy walked in front of her while “talking on her phone and not looking around.” (Peretz Aff. ¶¶ 5-6.) Ms. Peretz states that she then “slammed on [her] brakes and stopped a few feet in front of [Defendant Gaddy].” (*Id.* ¶ 7.) Ms. Peretz says that her vehicle did not come into contact with Defendant Gaddy, but that Defendant Gaddy appeared “startled” and demanded Ms. Peretz’s “information.” (*Id.* ¶¶ 7-12.) Ms. Peretz states that she told Defendant Gaddy that “she was not injured and there was absolutely no reason to give [Defendant Gaddy her] personal information.” (*Id.* ¶ 13.) Ms. Peretz states that she then left the gas station because Defendant Gaddy was harassing her. (*Id.* ¶ 14.)

Plaintiff claims that it subsequently received over \$5,700 in no-fault claims from Defendants Boris Tsatskis, M.D., Gotto Medical Care, P.C., Vincent J. Gulfo, M.D.¹ and Precision Imaging of New York, P.C. (collectively, “Provider Defendants”). (Boucher Affirm. ¶ 7; *but see* Complaint ¶ 13 [stating that Plaintiff has received over \$5,500 in no-fault claims from Provider Defendants].) Plaintiff asserts that, given Ms. Peretz’s statement that her vehicle never made contact with Defendant Gaddy and other factors, Plaintiff sought to determine the validity of the claim by requesting examinations under oath (“EUOs”) from Defendant Gaddy and the Provider Defendants. (Boucher Affirm. ¶ 10.)

Plaintiff asserts that Defendant Gaddy’s testimony at her EUO led it to conclude that much of the claimed treatment was medically unnecessary because:

- Defendant Gaddy testified that she never fell after allegedly being hit;
- The “lumbar spine radiograph report,” which was an exhibit at the EUO, indicated that there was no fracture, but rather degeneration from a chronic condition;

¹ This action was settled and discontinued as against Defendant Vincent J. Gulfo, M.D. pursuant to a stipulation filed on NYSCEF on November 8, 2016. (NYSCEF Document No. 5.)

- Defendant Gaddy allegedly told two different versions of the story: one where she was stuck as she was walking and another where she was struck as she was pumping gas; and
- Because Defendant Gaddy walked to the police station after the accident, it seemed unlikely that the alleged accident would have produced injuries requiring three sessions of physical therapy per week.

(*Id.* ¶ 11.)²

Because of the above concerns raised by Defendant Gaddy's EUO, Plaintiff requested that the Provider Defendants appear for EUOs. (*Id.* ¶ 13; Ex. E [EUO Request Letters].)

Plaintiff alleges the following timeline for scheduling EUOs with Defendant Tsatskis:

- On April 6, 2016, Plaintiff's counsel sent a letter to Defendant Tsatskis's listed address at 2121 Kings Highway, Brooklyn, New York 11229, scheduling his EUO for April 21, 2016.
- On April 11, 2016, Plaintiff received the first bill from Defendant Tsatskis.
- On April 19, 2016, Defendant Tsatskis called Plaintiff's counsel and requested that the EUO be adjourned until May 6, 2016.
- On April 22, 2016, Plaintiff's counsel sent a letter to Defendant Tsatskis confirming that his EUO would be held at Plaintiff's counsel's office on May 6, 2016 at 12:00 p.m.
- On April 29, Plaintiff received another Bill from Defendant Tsatskis.

² Plaintiff however does not submit the transcript of Defendant Gaddy's EUO as an exhibit to the instant motion.

- On May 5, 2016, Defendant Tsatskis and Plaintiff's counsel agreed to adjourn the EUO until May 19, 2016 at 1 p.m. and memorialized this agreement in a letter.
- On May 19, 2016, Defendant Tsatskis failed to appear at Plaintiff's counsel's office for his EUO.
- On June 2, 2016, Plaintiff's counsel sent Defendant Tsatskis a letter confirming his EUO for June 17, 2016 at 12 p.m.
- On June 17, 2016 Defendant Tsatskis failed to appear at Plaintiff's counsel's office for his EUO.

(Boucher Affirm. ¶ 15; Schreiber Affirm. ¶¶ 4-14.)

Plaintiff alleges the following timeline for scheduling EUOs with Defendant Gotto Medical Care, P.C. ("Gotto"):

- On April 19, 2016, Plaintiff received a bill from Defendant Gotto.
- On April 22, 2016, Plaintiff's counsel sent a letter to Defendant Gotto's listed address at P.O. Box 300975, Jamaica, New York 11430, scheduling Gotto's EUO for May 10, 2016 at 10 a.m. at Plaintiff's counsel's office.
- On May 10, 2016, Defendant Gotto failed to appear at Plaintiff's counsel's office for his EUO.
- On May 10, 2016, Plaintiff's counsel sent Defendant Gotto a second letter scheduling an EUO at its offices for May 26, 2016 at 12 p.m.
- On May 25, 2016, Plaintiff's counsel and Defendant Gotto agreed to adjourn the EUO until June 7, 2016, and a letter memorializing the agreement to adjourn was sent to Defendant Gotto on that same day.
- On June 7, 2016, Defendant Gotto failed to appear for the EUO.

(Boucher Affirm. ¶ 15; Schreiber Affirm. ¶¶ 15-21.)

On or about October 5, 2016, Plaintiff commenced the instant action seeking a judgment declaring that it “owes no duty to pay No-Fault claims with respect to the December 20, 2015 collision” and permanently staying any No-Fault actions brought by the Defendants. (Complaint ¶ 36.)

Plaintiff provides affidavits of service that appear to show the following:

- That on October 13, 2016 at 12:54 p.m., Plaintiff’s agent personally delivered a copy of the summons and complaint to Defendant Tsatskis.
- That on October 18, 2016 at 11:20 a.m., Plaintiff served Defendants Gotto and Precision Imaging of New York, P.C., organized as business entities, via the Secretary of State of New York.
- That on October 22, 2016 at 10:13 a.m., Plaintiff’s agent personally delivered a copy of the summons and complaint to Defendant Gaddy.

None of the Defaulting Defendants have appeared in the instant action. Plaintiff also provides an affidavit of service that states that follow-up mailings of the Summons and Complaint were made to Defaulting Defendants on March 23, 2017, pursuant to CPLR 3215 (g) (3) and (4). (Boucher Affirm. ¶ 28; Ex. F [Follow-Up Mailing].)

As such, Plaintiff now moves for entry of default judgments against the Defaulting Defendants.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . , the plaintiff may seek a default judgment against him.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, the plaintiff demonstrates its entitlement to a default judgment against the defendant by submitting: (1) proof of service of the summons and complaint, (2) proof of the facts constituting its claim, and (3) proof of the defendant’s default in answering or appearing. (*See* CPLR

3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

I. Plaintiff Has Properly Served Defaulting Defendants.

On the instant motion, it appears that Plaintiff properly served all Defaulting Defendants with copies of the summons and complaint pursuant to CPLR 308 and BCL 306. In addition, it appears that Plaintiff effected the requisite follow-up mailing of copies of the summons and complaint to Defaulting Defendants pursuant to CPLR 3215 (g) (3) and (4). (Boucher Affirm. ¶ 28; Ex. F [Follow-Up Mailing].) Furthermore, it appears that Defaulting Defendants were all served with a copy of the instant motion pursuant to CPLR 2103.

II. Plaintiff Provides Sufficient Proof of the Facts Underlying Its Claim That Defendant Gaddy Did Not Suffer a Legitimate Loss.

In addition to proving service upon Defaulting Defendants, Plaintiff must also “allege enough facts to enable the court to determine that a viable cause of action exists.” (*Jacobsen v S & F Serv. Ctr. Co.*, 131 AD3d 450, 451 [2d Dept 2015].)

“CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.”

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987].)

On the instant motion, Plaintiff has submitted an affidavit from the insured driver stating that there was never any contact between Defendant Gaddy and her vehicle. In addition, Plaintiff alleges that: Defendant Gaddy never fell down after supposedly being hit; that a radiograph report suggests that her spinal injuries resulted from degeneration rather than fractures; that she told differing versions of the alleged accident; and that the amount of physical therapy claimed seemed excessive for someone who allegedly walked over to a police precinct following the accident. As such, Plaintiff alleges sufficient proof for the Court to enter a default judgment as against Defendant Gaddy.

III. Plaintiff Provides Sufficient Proof of the Facts Underlying Its Claim that Defendant Gotto Failed to Attend His EUOs, But Fails to Allege Sufficient Proof as Against Defendant Tsatskis.

Examinations under oath (EUOs) and independent medical examinations (IMEs) are considered to be part of an insurer's "entitlement to 'additional verification'" following receipt of a provider's statutory claim forms. (See 11 NYCRR 65-3.5; *Lender Med. Supply, Inc. v Hartford Ins. Co.*, 35 Misc 3d 1226(A) [Civ Ct, Kings County 2012].) A request for an EUO must be made within fifteen (15) business days of receipt of the prescribed verification forms. (See 11 NYCRR 65-3.5; *O & M Med., P.C. v Travelers Indem. Co.*, 47 Misc 3d 134[A], 17 N.Y.S.3d 384 [App Term, 2d, 11th, & 13th Jud Dists 2015]; *Sure Way NY, Inc. v Travelers Ins. Co.*, 2016 NY Slip Op 26413 [Civ Ct, Kings County 2016].)

The "Mandatory Endorsement" pursuant to 11 NYCRR 65-1.1 states that:

"Upon request by the Company, the eligible injured person or that person's assignee [provider] 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."

(See also *Unitrin Advantage Ins. Co. v. Better Health Care Chiropractic, P.C.*, 2016 N.Y. Slip Op. 30837(U) at *4-5 [Sup Ct, NY County May 4, 2016] [Madden, J]; see also *Country-Wide Ins. Co. v. Blenman*, 2017 N.Y. Slip Op. 30306(U), at *3 [Sup Ct, NY County February 17, 2017] [Rakower, J.] [same].)

Pursuant to 11 NYCRR 65-3.5(a), within 10 business days after receipt of a completed application for no-fault benefits or other substantially equivalent written notice, and before payment of the claim, the insurer must forward prescribed verification forms to the parties required to complete them. Then, pursuant to section 65-3.5(b), after receipt of one or more of the completed verification forms, any additional verification requested by the insurer must be requested within 15 business days of receipt of the completed verification forms. A request for an EUO constitutes an additional request for verification, and is thus subject to the 15-day deadline. (*O & M Med., PC v Travelers Indem. Co.*, 47 Misc 3d 134[A], 17

N.Y.S.3d 384, [App Term, 2d, 11th, & 13th Jud Dists 2015]; *Sure Way NY, Inc. v Travelers Ins. Co.*, 2016 NY Slip Op 26413 [Civ Ct, Kings County 2016].)

If a requested additional verification is not provided to the insurer within 30 days after the original request, the insurer must, at a minimum, within 10 calendar days, follow up with the party from whom the verification was requested. (11 NYCRR 65-3.6[b]). This provision is interpreted as requiring that an insurer reschedule an EUO after a person has failed to appear for the first EUO within 10 days of that failure, meaning that the next scheduling letter must be sent within 10 days of the failure to appear. (*See Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 33 N.Y.S.3d 54 [1st Dept 2016].)

However, the time frames for sending additional verification requests under 11 NYCRR 65-3.5 and 3.6 do not apply to EUOs that are scheduled before an insurance company receives a claim. (*Id.* at 469-470). Thus, only when an insurer receives a claim, must it comply with the follow-up provisions of 11 NYCRR 65-3.6(b). (*Id.*)

In addition, in order to show compliance with the above timing requirements, the insurer must establish “either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed.” (*Progressive Cas. Ins. Co. v Metro Psychological Services, P.C.*, 139 AD3d 693, 694 [2d Dept 2016] [internal quotation marks omitted].) To establish a reliable office procedure, the insurer must show that the procedure is “geared so as to ensure the likelihood that the item is always properly addressed and mailed.” (*Id.*)

If an insurer complies with above timeframe requirements, a provider’s failure to attend an EUO that has been “twice duly demanded” by the insurer constitutes the breach of a condition precedent to coverage, and entitles the insurer to deny coverage as to that provider. (*Parisien v Metlife Auto & Home*, 54 Misc 3d 143(A) [App Term, 2d, 11th & 13th Jud Dists 2017]; *see also American Transit Ins. Co. v. Rodriguez*, 2016 N.Y. Slip Op. 31535(U), at *8 [Sup Ct, NY County August 4, 2016] [Freed, J.]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011].)

On the instant motion, Plaintiff alleges that the initial request for an EUO was sent to Defendant Tsatskis before any bills were received from the latter, and that the initial EUO was scheduled for April 21, 2016. (Boucher Affirm. ¶ 15.)

Plaintiff also alleges that that initial EUO was adjourned per request of Defendant Tsatskis until May 5, 2016. (Schreiber Affirm. ¶¶ 6-7.) Plaintiff further alleges that the May 5, 2016 EUO was adjourned to May 19, 2016 per request of Defendant Tsatskis, but that Defendant Tsatskis failed to appear on May 19, 2016. (Schreiber Affirm. ¶¶ 6-7.) However, Plaintiff did not send a follow-up request for an EUO until June 2, 2016 to Defendant Tsatskis, well after the ten (10) calendar-day deadline—May 29, 2016—for doing so. (Schreiber Affirm. ¶¶ 10-12; *See Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 33 N.Y.S.3d 54 [1st Dept 2016].) As such, Plaintiff failed to comply with the timing requirements of 11 NYCRR 65-3.6, and Plaintiff's motion is denied as to Defendant Tsatskis.

With regard to Defendant Gotto, Plaintiff first received a bill from Defendant Gotto on April 19, 2016, and Plaintiff then sent an EUO letter to Defendant Gotto on April 22, 2016—well within the 15-day timeframe prescribed by 11 NYCRR 65-3.5—scheduling the initial EUO for May 10, 2016. (Boucher Affirm. ¶ 15; Schreiber Affirm. ¶¶ 15-16.) Defendant Gotto did not appear for his first scheduled EUO on May 10, 2016, and on that same day, Plaintiff sent a second EUO letter to Defendant Gotto, scheduling a second attempt at an EUO for May 27, 2016. (Schreiber Affirm. ¶¶ 17-18.) Per request of Defendant Gotto, the May 27, 2016 EUO was adjourned until June 7, 2016. (Schreiber Affirm. ¶¶ 19-20.) Plaintiff alleges that Defendant Gotto failed to attend his second attempt at EUO on June 7, 2016. Plaintiff has also provided evidence—through the Affirmation of Harlan Schreiber, Esq. and the Affidavit of Denise Winant—of “a standard office practice or procedure designed to ensure that items are properly addressed and mailed.” (*Progressive Cas. Ins. Co. v Metro Psychological Services, P.C.*, 139 AD3d 693, 694 [2d Dept 2016].)

As such, Plaintiff has sufficiently alleged that Defendant Gotto breached a condition precedent to coverage by failing twice to attend duly scheduled EUOs. (See *Parisien*, 54 Misc 3d 143[A].) Accordingly, Plaintiff's motion is granted as against Defendant Gotto.

Lastly, Plaintiff does not discuss or cite to any evidence supporting why coverage can properly be denied as against Defendant Precision Imaging of New York, P.C. Accordingly, Plaintiff's motion is denied as against Defendant Precision Imaging.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff Unitrin Direct Insurance Company's motion for entry of a default judgment against Defendants Gotto Medical Care, P.C. and Michelle Gaddy is granted; and it is further

ORDERED that Plaintiff Unitrin Direct Insurance Company's motion for entry of a default judgment against Defendants Boris Tsatskis, M.D. and Precision Imaging of New York, P.C. is denied; and it is further

ADJUDGED that Defendants Gotto Medical Care, P.C. and Michelle Gaddy have no rights under the policy of insurance and that Plaintiff owes no duty to these said Defendants to pay No-Fault claims with respect to the above-referenced December 20, 2015 incident referenced by claim number C000273NY16; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that Plaintiff Unitrin Direct Insurance Company shall serve a copy of the instant Order with notice of entry upon all remaining parties; and it is further

ORDERED that the clerk shall enter judgment accordingly.

The Foregoing constitutes the ORDER, JUDGMENT and Decision of the Court.

Dated: May 19, 2017
New York, New York

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.
J.S.C.

1. Check one:.....

2. Check if appropriate:..... MOTION IS:

3. Check if appropriate:.....

☐ CASE DISPOSED

☒ NON-FINAL DISPOSITION

☐ GRANTED ☐ DENIED

☒ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER

☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE