

Unitrin Advantage Ins. Co. v Jagdeo
2017 NY Slip Op 31908(U)
September 7, 2017
Supreme Court, New York County
Docket Number: 652024/2015
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

- v -

JEREMY JAGDEO, ACTION POTENTIAL
CHIROPRACTIC, PLLC, CHARLES DENG ACUPUNCTURE,
DARREN T. MOLLO, DC, GENTLE CARE AMBULATORY
ANESTHESIA SERVICES, JULES FRANCOIS PARISIEN,
MAIGA PRODUCTS CORP, PEARL MEDICAL, PC,
QUALITY CUSTOM MEDICAL SUPPLY, INC.,
STAR MEDSERVE, PC.,

Defendants.
-----X

HON. MELISSA A. CRANE, J.S.C.

Motions seq. no. 3 and 4 are consolidated for disposition.

This case arises from an automobile accident that occurred on June 17, 2013, involving defendant Jeremy Jagdeo ("assignor"). The assignor alleges that he sustained serious bodily injuries as a result of a collision, and submitted claims to plaintiff for no-fault benefits under the insurance policy that plaintiff issued. The assignor assigned the rights to collect no-fault benefits to co-defendants/medical providers. Plaintiff commenced an action on or about June 9, 2015, by a Summons and Complaint, seeking a declaratory judgment against the assignor, in addition to numerous co-defendants/medical providers.

This action has been discontinued against defendant Quality Custom Medical Supply, Inc (see plaintiff's motion for summary judgment, stipulation of partial discontinuance with prejudiced attached as Exhibit "C").

Index No.
652024/2015
**DECISION
and ORDER**
Mot. Seq. 003
& 004

The court has previously granted default judgment pursuant to CPLR 3215 against the following defendants: Jeremy Jagdeo, Pearl Medical, PC, and Start Medserve, PC (*see* plaintiff's motion for summary judgment, June 1, 2016 Decision and Order granting default judgment attached as Exhibit "D").

Plaintiff now moves for summary judgment against the answering defendants: Action Potential Chiropractic, PLLC., Charles Deng Acupuncture, Darren T Mollo D.C., Gentlecare Ambulatory Anesthesia Services, Jules Francois Parisien, and Maiga Products Corp (*see* plaintiff's motion for summary judgment, defendants' Answer attached as Exhibit "B")

Plaintiff submits the attorney affirmation of Kristina O'Shea; an affidavit of Alternative Consulting and Examinations ("ACE") owner Jim Cannon, attesting to the scheduling of the IMEs and the mailing of the scheduling letters; an affirmation of Ajendra Sohal, MD, the pain management doctor assigned to conduct the assignor's IMEs, who attests to the assignor's non-appearance; and an affidavit of no-fault claims representative Deanna Plants, who handled the no-fault claims.

A summary judgment movant carries the initial burden of tendering sufficient, admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once a movant meets its initial burden, the burden then shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The failure to appear for a scheduled independent medical examination is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio (*See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]). The mandatory personal injury

endorsement provides that the eligible injured person shall submit to an independent medical examination (herein "IME") by physicians when, and as often as, the insurer may reasonably require (*see* 11 NYCRR 65-1.1).

Plaintiff has demonstrated *prima facie* entitlement to summary judgment against the answering defendants. The affidavit of Jim Cannon, owner of a third-party vendor who plaintiff hired to schedule IMEs, establishes timely and properly mailing of the IME notices. The affirmation of Ajendra Sohal, MD, establishes that the assignor failed to appear at the initial and follow-up IMEs (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2nd Dept 2006]). As appearances for IMEs were a condition precedent to payment under the policy, and Jeremy Jagdeo breached the requirement by failing to appear, there is no basis for coverage to the answering defendants, as assignees. By failing to oppose plaintiff's motion for summary judgment, answering defendants have failed to raise an issue of fact for trial.

Wherefore, it is hereby,

ORDERED that the court grants plaintiff, Unitrin Advantage Insurance Company's, motion for summary judgment against defendants Action Potential Chiropractic, PLLC., Charles Deng Acupuncture, Darren T Mollo D.C., Gentlecare Ambulatory Anesthesia Services, Jules Francois Parisien, and Maiga Products Corp., without opposition; and it is further

ADJUDGED AND DECLARED that defendants Action Potential Chiropractic, PLLC., Charles Deng Acupuncture, Darren T Mollo D.C., Gentlecare Ambulatory Anesthesia Services, Jules Francois Parisien, and Maiga Products Corp., are not entitled to no-fault coverage for the motor vehicle accident that occurred on June 17, 2013, involving Jeremy Jagdeo, as referenced in the complaint; and it is further

ORDERED that the court denies defendants' motion to compel and plaintiff's cross-

motion for a protective order as moot. As the court grants summary judgment, there are no issues of fact that necessitate discovery.

This constitutes the decision and order of the court. The court denies all other relief requested.

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DATED: September 8, 2017
New York, New York

ENTER:



MELISSA A. CRANE, J.S.C