

<b>Country-Wide Ins. Co. v Leiva</b>
2018 NY Slip Op 31960(U)
August 1, 2018
Supreme Court, New York County
Docket Number: 151654/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

COUNTRY-WIDE INSURANCE COMPANY,  
Plaintiff,

- against -

Index No.: 151654/2017

JUSTIN LEIVA,

(“Eligible Injured Party Defendant”),

**DECISION & ORDER**

and

SEGRETO, FRANK S. MD, TITAN  
PHARMACY, ABA CHRIOPRACTIC, P.C.,  
ELMONT REHAB PT, PC, FAST CARE  
MEDICAL DIAGNOSTICS, PLLC, INC., UGP  
ACUPUNCTURE P.C. and CORONA  
MEDICAL PLAZA P.C.,

(“Medical Provider Defendants”)

Defendants.

**Anthony Cannataro, J.:**

In this action seeking a declaratory judgment, plaintiff-insurer Country-Wide Insurance Company moves for summary judgment against defendant-provider UGP Acupuncture P.C. (“UGP”) on the grounds that its assignee, the eligible injured party defendant Justin Leiva, breached a condition precedent to his insurance policy.

On May 26, 2016 Leiva was injured when he was hit by a car which was covered under an insurance policy issued by the plaintiff-insurer. Leiva received treatment from several medical providers, including UGP, for his alleged injuries. As required by New York Insurance Law and No-Fault Insurance regulations, Leiva submitted a no-fault claim form (“N-F 2”) to plaintiff. The N-F 2 was stamped “received” by plaintiff on June 20, 2016.

UGP submitted to plaintiff an initial completed verification form (“N-F 3”) dated August 9, 2016, for its treatment of Leiva on August 2nd and 3rd, 2016. The date plaintiff stamped this N-F 3 as “received” was illegible. UGP also submitted a completed N-F 3 dated August 31, 2016 for its treatment of Leiva on August 12, 2016. The date received stamp on this document is also illegible.

On September 6, 2016, plaintiff requested that Leiva appear at an examination under oath (“EUO”) on September 30, 2016 via a notice issued and mailed to Leiva and his attorney. Leiva failed to attend the September 30, 2016, EUO. Plaintiff sent a second notice to Leiva and his attorney on October 4, 2016, for an EUO to be held on October 24, 2016. Leiva again failed to attend. After Leiva’s second non-appearance, plaintiff issued a general denial of all claims associated with Leiva’s claim, retroactive to the initial date of incident May 26, 2016.

Plaintiff contends that it owes no duty to the UGP to pay no-fault claims arising out of the May 26, 2016, accident because Leiva failed to appear for two duly scheduled EUOs, breaching a condition precedent to the insurance policy and voiding the policy *ab initio*. Plaintiff claims that this allows it to retroactively deny all claims associated with the subject incident. UGP counters that plaintiff has not established its entitlement to summary judgment as a matter of law because it failed to submit documentation necessary to prevail on its claim. Specifically, summary judgment is not appropriate because plaintiff failed to demonstrate its full compliance with the timeframes and verification requirements of 11 NYCRR § 65-3.5.

To obtain summary judgment, plaintiff is required to establish a *prima facie* showing of entitlement to summary judgment as a matter of law eliminating all factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). In deciding a summary judgment motion, the court must resolve all reasonable inferences in favor of the non-moving party. (*S.J. Capelin & Assoc. v Globe Mfg. Corp.*, 34 NY2d 388 [1974]).

Under 11 NYCRR § 65-1.1 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 (*Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411, 411 [1st Dept 2015]). Failure to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage under the no-fault policy if timely and properly requested (*Ace Am. Ins. Co. v Dr. Watson Chiropractic, P.C.*, 2018 NY Slip Op 30867[U], \*\*3 [Sup Ct, NY County 2018], quoting *Hertz Corp.* at 411).

11 NYCRR § 65-3.5(a) outlines what constitutes a timely request, stating that within 10 business days after receipt of a completed application for motor vehicle no-fault benefits (NYS Form N-F 2) or other substantially equivalent written notice, an insurer shall forward to parties required to complete them the proscribed verification forms. Additionally, 11 NYCRR § 65-3.5(b) requires that subsequent to the receipt of one or more completed verification forms, the insurer must request any additional verification required to establish proof of the insured's claim, which includes requests for an EUO, within 15 business days of receipt of an initial verification form.

EUOs requested of an eligible injured party after the insurers receipt of the N-F 2 , or of a provider after insurer's receipt of the first prescribed verification form (N-F 3) from that provider, must be made within the required time constraints set forth in 11 NYCRR §§ 65-3.5(b) and 65-3.6(b)(*Ace Am. Ins. Co.*, 2018 NY Slip Op 30867[U], \*\*4, quoting *Allstate Ins. Co. v Health East Ambulatory Surgical Ctr.*, 58 NY3d 873 [Sup Ct, NY County 2017]; see also *Mapfre Ins. Co. of NY v Manoo* , 140 AD3d 468, 469-470 [1st Dept 2016]).

It is uncontroverted in this instance that plaintiff received Leiva's N-F 2 as the "first claim form" on June 20, 2016. Thus, plaintiff was obligated to forward the proscribed initial verification forms to Leiva within 10 business days of June 20, 2016. The plaintiff fails to show any evidence of verification requests made to either Leiva or

UGP. The record contains an N-F 3 from UGP dated August 9, 2016, but the plaintiff's "date received" stamp on this document is illegible.

Regardless, August 9, 2016 is 50 days after the June 20, 2016 receipt of the N-F 2. Plaintiff fails to provide any evidence of verification requests made of Leiva or UGP during this period. Thus, plaintiff failed to demonstrate compliance with 11 NYCRR § 65-3.5(a) by failing to provide evidence that the proscribed initial verification forms were forwarded to Leiva within 10 business days of June 20, 2016.

Plaintiff also failed to meet the requirements set forth in 11 NYCRR 65-3.5(b) with respect to UGP. Plaintiff submitted no evidence demonstrating the date when an initial N-F 3 from UGP was received by the insurer. As such, there is no proof demonstrating that the EUO request dated September 6, 2016, was sent within 15 business days of receipt of the initial N-F 3 from UGP. Therefore, plaintiff has failed to demonstrate compliance with 11 NYCRR § 65-3.5(a) and (b) by failing to establish that it requested Leiva's EUOs in accordance with the procedures and time frames set forth in the regulations. Thus, the plaintiff has not met its burden for summary judgment.

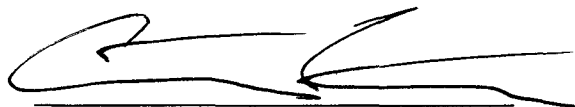
Accordingly, it is

**ORDERED** that the plaintiff's motion for summary judgment is denied; and it is further

**ORDERED** that counsel are directed to appear for a status conference in Room 490, 111 Centre Street on September 12, 2018 at 2:15PM.

Dated: 8/11/18

ENTER:



Anthony Cannataro, JSC