

Country-Wide Ins. Co. v Brissette
2018 NY Slip Op 31995(U)
August 16, 2018
Supreme Court, New York County
Docket Number: 158400/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED**PART****IAS MOTION 2***Justice*

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INDEX NO.158400/2017

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO.002

- V -

SHARENE BRISSETTE, INTERFAITH MEDICAL CENTER,
MITCHELL PHARMACY SOLUTIONS D/B/A AUTO RX, LC, PALM
CHIROPRACTIC P.C., BASEM MANSOUR P.T. P.C., and AMBEL
ACUPUNCTURE P.C.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this breach of contract action, plaintiff Country-Wide Insurance Company ("Country-Wide") moves, pursuant to CPLR 3212, for summary judgment against defendant Interfaith Medical Center ("Interfaith"). After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Sharene Brissette ("Brissette") had an insurance policy (policy # 01 VS 9640954 16, claim # 000316202 001) with Country-Wide that was effective from March to August of 2016. (Docs. 33 at 6, 45 at 2.) On May 15, 2016, Brissette was allegedly injured in a motor vehicle accident while in a vehicle that was insured by Country-Wide. (Docs. 33 at 6, 35 at 7.) Brissette sought medical treatment from several medical providers, including Interfaith, Mitchell

Pharmacy Solutions D/B/A Auto Rx, LC, Palm Chiropractic P.C., Basem Mansour P.T. P.C., and Ambel Acupuncture P.C. (hereinafter “the Medical Provider Defendants”). (Doc. 33 at 5–6.)

On May 19, 2016, she made a claim to Country-Wide via telephone for no-fault insurance benefits. (Doc. 37 at 2.) The Medical Provider Defendants, as assignees of Brissette, have also made claims to Country-Wide seeking reimbursement for medical treatment they rendered to her. (Doc. 33 at 7.) In particular, on July 6, 2016, Country-Wide received written verification that Interfaith had treated Brissette on May 16 and 17, 2016. (Docs. 43 at 5, 46 at 2.)

In order to verify the circumstances surrounding the motor vehicle accident and Brissette’s no-fault claim, Country-Wide wrote to Brissette’s attorney on July 27, 2016, to request that Brissette and her attorney appear at an Examination Under Oath (“EUO”). (Doc. 32 at 6.) The request letter stated that Brissette and her attorney were to confirm their attendance with Country-Wide at least two business days in advance of the EUO. (Doc. 38 at 2.) The first EUO was scheduled for August 16, 2016. (*Id.*) Although Brissette appeared for the EUO on August 16, 2016, she did so without prior confirmation and without her attorney present. (Doc. 32 at 6.)

Thereafter, Country-Wide made several further attempts to schedule an EUO with Brissette and her attorney. On August 22, Country-Wide sent a letter to Brissette’s attorney for a rescheduled EUO date of September 16, 2016. (*Id.* at 6–7.) However, neither Brissette nor her attorney appeared for this EUO. (*Id.* at 7.) On September 20, 2016, Country-Wide sent a notice for a final rescheduled EUO date of October 11, 2016. (Doc. 41 at 2.) The final notice stated that their failure to attend the EUO may be considered a breach of the insurance contract and that it could result in the denial of Brissette’s entire claim. (*Id.*) Again, Brissette and her attorney did not appear for the EUO. (Doc. 42.) Then, on October 27, 2016, Country-Wide issued a general

denial of the claim on the basis that Brissette's failure to appear at the EUOs violated the terms and conditions of her insurance contract. (Doc. 45 at 2-4.)

On September 14, 2017, Country-Wide instituted the instant declaratory judgment action against Brissette and the Medical Provider Defendants by filing a summons and verified complaint. (Doc. 33.) Of the Medical Provider Defendants, only Interfaith answered the complaint. (Doc. 35 at 2-11.) In the papers submitted in support of the instant motion, Country-Wide alleges that, pursuant to 11 NYCRR §§ 65-1.1 and 65-3.5(e), attending the requested EUOs was a condition precedent to coverage with which Brissette did not comply (Doc. 32 at 10-15) and that, because of Brissette's breach of this condition, it is entitled to a declaration that neither Brissette nor any of the Medical Provider Defendants are entitled to recover no-fault benefits under Brissette's policy. (*Id.*) Process was properly served on Interfaith on October 6, 2017, via a filing with the New York Secretary of State. (Doc. 34.)

Country-Wide now moves, pursuant to CPLR 3212, for summary judgment against Interfaith, which has not opposed the motion, on the foregoing grounds.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie demonstration of entitlement to judgment as a matter of law on the undisputed facts. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) In so doing, the movant must tender sufficient evidence to establish the absence of any issue of material fact. (*See Ayotte v Gervasio*, 81 NY2d 1062 [1993].)

Pursuant to 11 NYCRR 65-3.5(b), "any additional verification required by [an] insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed

verification forms.” As noted above, Country-Wide received written verification on July 6, 2016 that Interfaith had treated Brissette on May 16 and 17, 2016. (Docs. 43 at 5, 46 at 2.) Exactly 15 business days later, on July 27, 2016, Country-Wide mailed a notice requesting that Brissette and her attorney appear for an EUO. (Docs. 32 at 6, 38.) Further, pursuant to 11 NYCRR 65-3.6(b), if any requested verification has not been supplied to the insurer 30 calendar days after the original request, then “the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested” Both notices rescheduling the EUOs were mailed to Brissette’s attorney within 10 calendar days of Brissette’s failure to appear. (Docs. 39, 41.) Therefore, Country-Wide complied with the foregoing claim procedure requirements set forth in 11 NYCRR 65-3.5(b) and 3.6(b).

Country-Wide has also established that Brissette breached a condition precedent to coverage in her contract because neither Brissette nor her attorney appeared at any of the three EUOs which Country-Wide scheduled. (*See Unitrin Advantage Ins. Co. v All of NY, Inc.*, 158 AD3d 449, 449 [1st Dept 2018] (“[T]he 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”).) Thus, Country-Wide proved that its EUOs were timely noticed and that Brissette breached the insurance contract by failing to appear for the examinations.

Nevertheless, this Court is constrained to deny summary judgment to Country-Wide because it has not established its compliance with 11 NYCRR 65-3.4(b). That regulation mandates that, when a claim is processed via telephone, the insurer must, within 5 business days after notice is received, “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).” Here, although Country-Wide has submitted proof of the NF-3 forms (Doc. 46), which verify

that the Medical Defendants treated Brissette, as well as the NF-10 form, (Doc. 45), which is the form utilized for denials of claims, Country-Wide has not submitted the NF-1 or NF-2 forms. Although Country-Wide submits the affidavit of one of its employees, who references receipt of the NF-2, the affidavit does not indicate when, if ever, the NF-2 was forwarded to Brissette. (Doc. 43 at 5–6.) Without any record of the NF-2 form, this Court cannot determine whether plaintiff complied with the procedure mandated by 11 NYCRR 65-3.4(b), and summary judgment must be denied.¹

In accordance with the foregoing, it is hereby:

ORDERED that Country-Wide's summary judgment motion, pursuant to CPLR 3212, for a declaratory judgment against defendant Interfaith Medical Center (motion sequence 002) is denied; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment dismissing the counterclaims asserted by defendant Interfaith Medical Center is denied; and it is further

ORDERED that plaintiff Country-Wide is to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

¹ In denying Country-Wide's motion for a default judgment against Brissette and the Medical Provider Defendants (Doc. 51), this Court noted Country-Wide's failure to submit these forms. Nevertheless, Country-Wide has failed to provide these documents in support of the instant motion.

ORDERED that the parties are directed to appear for a preliminary conference on November 20, 2018, at 2:15 PM, at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of this Court.

8/16/2018

DATE

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE

KATHRYN E. FREED, J.S.C.