

Global Liberty Ins. Co. v Ricardo

2018 NY Slip Op 32057(U)

June 22, 2018

Supreme Court, Bronx County

Docket Number: 22575/2017E

Judge: Donald A. Miles

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8**

Index No. 22575/2017
Motion Calendar No.: 6
Motion Date: 01/29/18

GLOBAL LIBERTY INS. CO.,

Plaintiff(s),

-against-

DECISION/ ORDER

Present:

Hon. Donald A. Miles
Justice Supreme Court,

RUPERTO RICARDO
ACTIVE MEDICAL CARE, P.C.
USA CHIROPRACTIC CARE, P.C.
LONGEVITY MEDICAL SUPPLY, INC.
JBS MEDICAL DIAGNOSTIC, P.C.
MINDFUL ACUPUNCTURE, P.C.
AMERICAN CHIROPRACTIC CARE, P.C.
SUCCESS REHAB, P.T., P.C.
WESTCHESTER RADIOLOGY & IMAGING, P.C.
PROMPT MEDICAL SERVICES, P.C.

Defendant(s).

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to amend caption and for default judgment and summary judgment

Papers

Numbered

Notice of Motion, Affidavit of Regina Abbatiello,	
Affirmation in Support, and Exhibits Thereto.....	1
Affirmation in Opposition and Exhibits.....	2
Reply Affirmation.....	3

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

Plaintiff's motion for an order amending the caption to change the name of the first named defendant from "Ruperto Ricardo" to "Ruperto Ricardo a/k/a Ruperto Balbuena," and pursuant to CPLR §3215, for a default judgment in favor of the plaintiff and against the defendants, Active Medical Care,

P.C, USA Chiropractic Care, P.C., JBS Medical Diagnostic, P.C., Mindful Acupuncture, P.C., American Chiropractic Care, P.C., Success Rehab, P.T., P.C., Westchester Radiology & Imaging, P.C., Prompt Medical Services, P.C., is granted.

In support of the motion, plaintiff relies on the affidavit of Regina Abbatiello, its No-Fault Claims adjuster, sworn to September 22, 2017 wherein Plaintiff cites to correspondence it received on September 23, 2014, from Andrew Hirschhorn, 1 Cross Plaza #116, Rosedale, NY 11422, where defendant was initially named as "Ruperto Ricardo." On October 19, 2014, plaintiff states it received further correspondence from personal injury counsel for defendant Ruperto Ricardo a/k/a Ruperto Balbuena, Andrew Hirschhorn, 1 Cross Plaza #116, Rosedale, NY 11422, confirming that said defendant is named "Ruperto Ricardo." Plaintiff further claims that on November 10, 2014 it received correspondence from Andrew Hirschhorn, that counsel was dropping defendant Ruperto Ricardo a/k/a Ruperto Balbuena. Plaintiff has sufficiently demonstrated that the claimant Ruperto Ricardo is also known as Ruperto Balbuena and as such is entitled to leave to amend the caption.

All of the aforementioned defendants, have failed to answer the summons and complaint. As such, Plaintiff is entitled to a declaratory judgment in its favor that it is not obligated to honor or pay claims or future claims for reimbursement submitted by the providers named above, as assignees of Ruperto Ricardo a/k/a Ruperto Balbuena for the motor vehicle accident that occurred on September 12, 2014.

Plaintiff seeks an order granting it summary judgment, pursuant to CPLR § 3212(b), against Longevity Medical Supply, Inc., ordering that the defendant is not entitled to no-fault coverage for the motor vehicle accident that occurred on September 12, 2014, since Ruperto Ricardo a/k/a Ruperto Balbuena failed to attend properly scheduled Examinations Under Oath ("EUO's").

In its complaint, Plaintiff alleges that the incident that gave rise to the claim for payment for medical services that took place on September 12, 2014, is not an insurable event because the claimant, Ruperto Ricardo a/k/a Ruperto Balbuena, allegedly failed to attend EUO'S. Plaintiff contends that on October 14, 2014 it sent Ruperto Ricardo a/k/a Ruperto Balbuena and his attorney, at the address stated on the application for benefits, a letter requesting that he attend an EUO on November 3, 2014, at the location set forth on the EUO scheduling letter. It is undisputed that Ruperto Ricardo a/k/a Ruperto Balbuena failed to attend the duly scheduled EUO.

Plaintiff further contends that on October 31, 2014 it sent Ruperto Ricardo a/k/a Ruperto Balbuena and his attorney, at the address stated on the application for benefits, a letter requesting that he attend an EUO on November 17, 2014, at the location set forth on the EUO scheduling letter. Ruperto

Ricardo a/k/a Ruperto Balbuena failed to attend the duly scheduled EUO once again. Plaintiff contends that on November 21, 2014 it sent Ruperto Ricardo a/k/a Ruperto Balbuena, a letter requesting that he attend an EUO on December 9, 2014, at the location set forth on the EUO scheduling letter. Ruperto Ricardo a/k/a Ruperto Balbuena failed to attend the duly scheduled EUO and the claim was subsequently denied based upon the Claimant's failure to attend the duly scheduled EUO's.

In opposition to the motion for summary judgment counsel for Longevity Medical Supply, Inc., argues, *inter alia*, that the defense in question, being an issue of noncompliance with a policy condition, is not a defense that survives the failure to issue a timely denial of claim form.

A no-fault insurance carrier may request an eligible injured person or that person's assignee to submit to an examination under oath as may reasonably be required. 11 NYCRR 65-1.1. The examination under oath shall be conducted at time and place and time reasonably convenient for the applicant. 11 NYCRR 65-3.5(e). A request for an examination under oath "... must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination." 11 NYCRR 65-3.5(e). Appearance at a properly demanded EUO is a condition precedent to an insurance carrier's liability to pay no-fault benefits. *Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*, 27 Misc.3d 141(A), 2010 WL 2293067 (App. Term 2nd, 11th and 13th Jud. Dists. 2010).

The plaintiff-insurer made a prima facie showing of entitlement to summary judgment dismissing the action for first-party no-fault benefits by establishing that it timely and properly mailed the notices for EUOs to the insured Ruperto Ricardo a/k/a Ruperto Balbuena, and that he failed to appear (see *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [2011]; cf. *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 A.D.3d 720, 721 [2006]). In opposition, plaintiff did not specifically deny the assignor's nonappearance or otherwise raise a triable issue with respect thereto, or as to the mailing or reasonableness of the underlying notices (see *Unitrin* at 560).

In the decision of *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [2011, 918 N.Y.S.2d 473], the First Department explicitly found that "the failure to appear for IMEs requested by an insurer ... is a breach of a condition precedent to coverage under the No-Fault policy, and therefore fits squarely within the exception to the preclusion doctrine (citing *Central General Hosp. v. Chubb*, 90 N.Y.2d 195, 659 N.Y.S.2d 246, 681 N.E.2d 413 (1997))(defense that injured person's condition and hospitalization were unrelated to the accident was non precludable). The First Department justified its finding that an IME no show was a non-precludable defense on the ground that a "breach of a condition precedent to coverage voids the policy *ab initio*." Thus, the failure to appear for an IME

cancels the contract as if there was no coverage in the first instance and the insurer has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely. Id.

In light of the afore-mentioned precedent, it is clear that the claimant's failure to comply with a condition precedent to coverage voids the contract ab initio and plaintiff is not obligated to honor or pay claims or future claims for reimbursement, regardless of whether it issued denials beyond the 30 day period. The Court deems it unnecessary to address the defendant's remaining arguments which are without merit.

Accordingly it is

ORDERED that the motion for leave to amend the caption to change the name of the first named defendant from "Ruperto Ricardo" to "Ruperto Ricardo a/k/a Ruperto Balbuena," is granted and the caption shall now be as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

GLOBAL LIBERTY INS. CO.,
Plaintiff(s),
-against-

Index No.: 22575/2017

RUPERTO RICARDO A/K/A/
RUPERTO BALBUENA,
ACTIVE MEDICAL CARE, P.C.
USA CHIROPRACTIC CARE, P.C.
LONGEVITY MEDICAL SUPPLY, INC.
JBS MEDICAL DIAGNOSTIC, P.C.
MINDFUL ACUPUNCTURE, P.C.
AMERICAN CHIROPRACTIC CARE, P.C.
SUCCESS REHAB, P.T., P.C.
WESTCHESTER RADIOLOGY & IMAGING, P.C.
PROMPT MEDICAL SERVICES, P.C.

Defendant(s).

and it is further

ORDERED that the motion of plaintiff for a default judgment seeking a declaration that the above named defendants are not entitled to no-fault coverage for the motor vehicle accident that occurred on September 12, 2014 for failure of Ruperto Ricardo a/k/a Ruperto Balbuena, to attend duly scheduled

EUOs, is granted; and it is further


ORDERED that motion of plaintiff for summary judgment seeking a declaration that the defendant Longevity Medical Supply, Inc., is not entitled to no-fault coverage for the motor vehicle accident that occurred on September 12, 2014 for failure of Ruperto Ricardo a/k/a Ruperto Balbuena, to attend duly scheduled EUOs, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the defendants within 30 days of entry.

This constitutes the decision and order of this court.

JUN 22 2018
DATE



HON. DONALD A. MILES, J.S.C.