

Nationwide Ins. Co. of Am. v Morillo

2019 NY Slip Op 30209(U)

January 23, 2019

Supreme Court, New York County

Docket Number: 159204/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

INDEX NO. 159204/2016

NATIONWIDE INSURANCE COMPANY OF AMERICA,

MOTION SEQ. NO. 003

Plaintiff,

- v -

CARLOS MORILLO, GREGORIO CASTILLO, AXIAL CHIROPRACTIC, P.C., BARNERT SURGICAL CENTER, L.L.C., BEST TOUCH, PT, P.C., CITY WIDE HEALTH FACILITY, INC., EVERGREEN ACUPUNCTURE, P.C., F-R MOBILE PHYSICIAN, P.C., GARA MEDICAL CARE, P.C., LESTER NADEL, M.D., P.C., LIDA'S MEDICAL SUPPLY, INC., LUBOV KLIMOVA, M.D., MANHATTAN BEACH PHARMACY, INC., MEDICSURG, P.C., QUEENS CHIROPRACTIC, P.C., and STATE CHIROPRACTIC, P.C.,

DECISION, ORDER, AND JUDGMENT

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted.

In this dispute over no-fault insurance benefits, plaintiff Nationwide Insurance Company of America ("Nationwide") moves, pursuant to CPLR 3212, for summary judgment against defendants Axial Chiropractic, P.C. ("Axial"), City Wide Health Facility, Inc. ("City Wide"), and Lida's Medical Supply, Inc. ("Lida's Medical Supply"), based upon the failure of the claimant, Carlos Morillo ("Morillo"), to satisfy a condition precedent to obtaining coverage. City Wide and Lida's Medical Supply oppose the motion. After oral argument and a review of the motion papers, as well as a review of the relevant statutes and caselaw, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

On February 6, 2016, defendant Morillo was allegedly involved in a motor vehicle accident while in a vehicle that was insured by Nationwide. (Doc. 120 at 17–18.) referenced by plaintiff’s claim number 689885-GC. Nationwide subsequently began an investigation into the alleged incident to determine whether the accident was a covered event. (*Id.*) The investigation revealed that, at the time, the policyholder was not driving the vehicle and that all three vehicle occupants, including Morillo, received similar treatments at the same medical facility. (*Id.* at 18.) Morillo’s medical bills amounted to \$50,693.97. (*Id.* at 19.) On March 10, 2016, Nationwide received Morillo’s NF-2 form, otherwise known as an application for motor vehicle no-fault benefits. (Docs. 119 at 7; 129 at 2.)

On March 14, 2016, Nationwide requested that Morillo and his attorney appear for an Examination Under Oath (“EUO”), to be held on April 22, 2016, in order to verify his claim as well as the circumstances surrounding the incident. (Docs. 119 at 7; 130.) Pursuant to Nationwide’s request letter, Morillo and his attorney were to confirm their attendance at the EUO at least two days in advance, and Nationwide was to accommodate any necessary adjournment. (Doc. 130.) Neither Morillo nor his attorney appeared at the April 22 EUO. (Docs. 119 at 8; 131.) Three days later, on April 25, Nationwide rescheduled the EUO for June 3, 2016. (Docs. 119 at 8; 132.) Again, Morillo and his attorney failed to appear. (Docs. 119 at 8; 133.) On June 6, Nationwide mailed a third letter requesting that Morillo and his attorney appear for an EUO on July 6, 2016. (Docs. 119 at 8; 134.)

On July 5, a day before the third scheduled EUO was to proceed, Nationwide received notice from a new law firm that had undertaken representation of Morillo. (Doc. 135.) Morillo did not appear at his EUO the next day. (Docs. 119 at 8; 136.) On July 6, Nationwide informed

Morillo's newly obtained counsel that, despite Morillo's failure to appear for three EUOs, it was nevertheless going to schedule a fourth and final EUO appointment for August 9, 2016. (Doc. 137.) A separate letter confirming the same was sent by Nationwide on July 7, 2016. (Doc. 138.) Although the other two occupants of the vehicle appeared at the EUO on August 9 and completed their examinations, Morillo did not. (Docs. 119 at 9–10; 139.)

Nationwide thereafter commenced this action against Morillo and the captioned medical provider defendants on October 26, 2016 by filing a summons and complaint seeking a declaration that it was not required to provide coverage to Morillo due to the fact that he failed to appear for a duly scheduled EUO on several occasions. (Doc. 120.) A decision issued by the undersigned on May 19, 2017, denied, without prejudice, a motion for a default judgment made by Nationwide due to its failure to submit proof of service of the summons and complaint with respect to Morillo and several of the medical provider defendants. (Docs. 119 at 3; 124 at 6.)

Upon renewal of the default motion, the undersigned, in a decision dated September 20, 2017, granted a default judgment to Nationwide,¹ but not as against Axial, City Wide, and Lida's Medical Supply, which had filed answers to the complaint. (Docs. 121–24.) The order further held that Morillo had breached a condition precedent to coverage by failing to appear for his EUOs. (Doc. 124 at 8.)

Nationwide now moves, pursuant to CPLR 3212, for summary judgment against Axial, City Wide, and Lida's Medical Supply based on Morillo's repeated failure to appear for an EUO. (Docs. 118–19.) City Wide and Lida's Medical Supply oppose the motion. (Docs. 143–44.)

¹ Specifically, the September 20, 2017, decision and order issued a declaration that defendants Best Touch, PT, P.C., Evergreen Acupuncture, P.C., F-R Mobile Physician, P.C., Gara Medical Care, P.C., Lester Nadel, M.D., P.C., Lubov Klimova, M.D., Manhattan Beach Pharmacy, Inc., Queens Chiropractic, P.C., and State Chiropractic, P.C. are not entitled to no-fault benefits. (Docs. 119 at 4; 124 at 8–9.)

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].) If the moving party satisfies this initial showing, then the burden shifts to the opposing party to raise a genuine, triable issue of fact with admissible evidence. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If the opposing party fails to make that showing, then summary judgment must be granted. (*See Oates v Marino*, 106 AD2d 289, 291 [1st Dept 1984].)

In *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498 (2015), the Court of Appeals laid out the framework for the “no-fault regime”:

Upon receipt of one or more of the prescribed verification forms used to establish proof of claim, . . . an insurer has 15 business days within which to request “any additional verification required by the insurer to establish proof of claim” (11 NYCRR 65-3.5[b]). . . . Significantly, an insurance company must pay or deny the claim within 30 calendar days after receipt of the proof of claim (*see* Insurance Law § 5106[a]; 11 NYCRR 65-3.8[c]). If an insurer seeks additional verification, however, the 30-day window is tolled until it receives the relevant information requested.

(*Id.* at 505) (internal citations omitted). The Court further stated that, where an insurer fails to pay or deny a claim within 30 days, the insurer is then precluded “from asserting a defense against payment of the claim.” (*Id.* at 506.) “The only exception to preclusion [is] where an insurer raises lack of coverage as a defense.” (*Id.*)

Summary judgment must be granted in Nationwide’s favor. Morillo’s application for motor vehicle no-fault benefits—otherwise known as the NF-2 form—was stamped as received by

Nationwide on March 10, 2016. (Docs. 119 at 7; 129.) Thereafter, on March 14, 2016, Nationwide requested, for the first time, that Morillo appear for an EUO to be held on April 22, 2016. (Doc. 130.) This request for an additional verification was well within the 15 days that Nationwide had to schedule an independent medical examination (“IME”) or an EUO. (See *Prime Psychological Servs., P.C. v Nationwide Prop. & Cas. Ins. Co.*, 24 Misc3d 230, 2009 NY Slip Op 29100, *233 [Richmond County 2009] (stating that IMEs and EUOs qualify as “additional verification” under the insurance regulations).) Despite advising Morillo of the EUOs, he never appeared, and each time his non-appearance was recorded by a statement on the record. (Docs. 131; 133; 136; 139–40.)

Further, Nationwide timely rescheduled the second, third, and fourth EUOs, since each rescheduling letter was mailed to Morillo at most 3 days after every non-appearance. (Docs. 132; 134; 137–38.) (See *Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 470 [1st Dept 2016] (insurers must adhere to the 10-day follow-up requirements pursuant to 11 NYCRR § 65-3.6).) In *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 (1st Dept 2011), the First Department recognized that a claimant’s non-appearance is a “breach of a condition precedent to coverage” and that it “therefore fits squarely within the exception to the preclusion doctrine” (*Id.* at 560.) The denial of coverage—which is otherwise known as the NF-10—is dated September 1, 2016, and it specifically states that the reason for Nationwide’s denial of coverage is Morillo’s failure to appear for his EUOs. (Doc. 141 at 3.) Therefore, Nationwide has established its prima facie case that Morillo breached a condition precedent to coverage.

Defendants’ arguments to the contrary are unavailing. With respect to defendant City Wide, it argues, first, that Nationwide’s denial was improper because it lacked a “high degree of specificity of the ground or grounds on which the disclaimer is predicated.” (Doc. 143 at 1.) This

argument fails to recognize that the NF-10 listed Morillo's non-appearances at the EUOs as the reason for denying coverage. (Doc. 141 at 3.) City Wide's second argument in opposition is that Nationwide has not established that Morillo was apprised of the location change for the fourth EUO. (Doc. 143 at 2–3.) However, Nationwide has submitted two statements on the record of Morillo's non-appearance on August 9, 2016—a first statement on the record at the location where the EUO was originally requested (Doc. 139), and a second statement on the record at the location where the EUO was next noticed (Doc. 140). Morillo did not appear at either location. Because City Wide has not successfully raised an issue of fact, summary judgment must be granted as against it.

With respect to defendant Lida's Medical Supply, this Court similarly concludes that it has failed to raise a triable issue of fact in response to Nationwide's prima facie case. Lida's Medical Supply asserts that Nationwide did not timely request EUOs and that it did not timely issue a denial of coverage (Doc. 144 at 6), that the EUOs were not properly noticed because Nationwide did not submit competent proof that the request letters were mailed to Morillo (*id.* at 22–25), that the denial was not specific (*id.* at 8), and that summary judgment is premature because discovery has not been conducted at this stage in the proceedings (*id.* at 17–21). Issues as to timeliness and specificity have already been addressed by the foregoing discussion.

With respect to Lida's Medical Supply's claimed need for further discovery, it has been repeatedly held by courts that the fact "that discovery had not been completed was insufficient reason to deny appellants' motion for summary judgment." (*See, e.g., Smith v Andre*, 43 AD3d 770, 771 [1st Dept 2007].) Instead, parties opposing a motion for summary judgment must at least show a "likelihood of discovery leading to such evidence" which would raise issues of fact. (*Frierson v. Concourse Plaza Assocs.*, 189 AD2d 609, 610 [1st Dept 1993].) Lida's Medical

Supply has not met this standard. And, with respect to the claim that Nationwide did not submit proof that the EUO request letters were mailed to Morillo, this Court notes that each scheduling letter shows Morillo's address as well as a certified mail tracking number. (Docs. 130; 132; 134; 138.)

Defendant Axial has not opposed Nationwide's prima facie showing of entitlement to judgment, and therefore summary judgment is granted as against said party.

Finally, the following warrants disposal of this case: As noted by this Court in its decision and order dated May 19, 2017, defendants Morillo, Barnert Surgical Center, L.L.C., and Medicsurg, P.C. were improperly served with the summons and complaint (Doc. 78 at 5-6), and Nationwide did not renew its default judgment motion as against those defendants (Doc. 82 at 3). Further, although the complaint names Gregorio Castillo ("Castillo") as a defendant because he is the holder of the insurance policy at issue (Doc. 2 at 9), Nationwide has admitted that it "did not receive any claims on his behalf, as he was not in his vehicle at the time of the alleged incident" (Doc. 82 at 2.) Moreover, the relief clause in the complaint sought a declaration only as against Morillo and the medical provider defendants, and not as against Castillo. (Doc. 2 at 21.)

In accordance with the foregoing, it is hereby:

ORDERED AND ADJUDGED that plaintiff Nationwide Insurance Company of America's motion for summary judgment is granted; and it is further

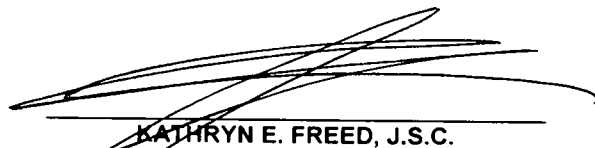
ORDERED AND ADJUDGED that plaintiff has no duty to provide no-fault insurance benefits to defendants Axial Chiropractic, P.C., City Wide Health Facility, Inc., and Lida's Medical Supply, Inc. for claims relating to a motor vehicle on February 6, 2016 referenced by plaintiff's claim number 689885-GC; and it is further

ORDERED that, within 20 days after this order is filed with NYSCEF, plaintiff's counsel is to serve a copy of this order, with notice of entry, on all defendants and on the Clerk of this Court, who is directed to enter judgment accordingly; and it is further

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

1/23/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE