

American Tr. Ins. Co. v Foster
2019 NY Slip Op 30746(U)
March 21, 2019
Supreme Court, New York County
Docket Number: 155900/2017
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 2EFM

Justice

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INDEX NO. 155900/2017

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

TRACY FOSTER, ADVANCED ORTHOPAEDICS, P.L.L.C.,
ADVANCED RECOVERY EQUIPMENT AND SUPPLIES,
LLC,ADVANCED SURGERY CENTER, LLC,ALMATCARE
MEDICAL SUPPLY INC.,BAY CHIROPRACTIC, P.C.,BORIS RIPA
MEDICAL P.C.,COLIN MENTAL HEALTH COUNSELING
P.C.,GALINA GROYSMAN, D.C., ICONIC WELLNESS SURGICAL
SERVICES, LLC,MAIMONIDES MEDICAL CENTER,
MAIMONIDES MEDICAL CENTER, MAIMONIDES MEDICAL
CENTER, NEW YORK MEDICAL & DIAGNOSTIC CARE P.C.,NU
AGE MED SOLUTIONS INC, OMEGA DIAGNOSTIC IMAGING,
P.C.,PROSPER ACUPUNCTURE, P.C.,QUALITY MENTAL
HEALTH COUNSELING, P.C.,RAMAPO VALLEY ANESTHESIA
ASSOC., LLC, and RIPA BORIS, XVV, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 28

were read on this motion to/for DECLARATORY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this declaratory judgment action, plaintiff American Transit Insurance Company (American Transit) moves for a default judgment against defendants Tracy Foster, Advanced Recovery Equipment and Supplies, LLC, Almatcare Medical Supply Inc., Maimonides Medical Center, Maimonides Medical Center d/b/a Maimonides Medical Center Emergency Physician, Maimonides Medical Center d/b/a Maimonides Medical Center Radiology FPP, Prosper Acupuncture, P.C., Ripa Boris d/b/a Boris Ripa Medical P.C. (collectively, the Providers). It seeks summary judgment against Advanced Orthopaedics, P.L.L.C. (Advanced Orthopaedics), which has answered the complaint. Additionally, it seeks a declaratory judgment stating that (1) Tracy

Foster is not an “eligible insured person” and therefore has no right to no-fault benefits under plaintiff’s insurance policy CAP 615223 (the Policy), Claim No.: 789099-05, which pertains to an alleged June 1, 2016 accident (the Incident) involving a vehicle owned by White and Blue Corp. (White and Blue), and (2) accordingly, plaintiff is not obliged to reimburse or pay the claims of the Providers. Because of its contention that Ms. Foster is not an eligible insured person, plaintiff also seeks to be relieved from any responsibility with respect to any current or future arbitrations, lawsuits, and other proceedings which arise either under the above policy and claim or under the policy’s Mandatory Personal Injury Protection endorsement.

Plaintiff does not seek relief against the remaining defendants, Advanced Surgery Center, LLC, Bay Chiropractic, P.C., Boris Ripa Medical P.C., Colin Mental Health Counseling P.C., Galina Groysman, D.C., Iconic Wellness Surgical Services, LLC, New York Medical & Diagnostic Care P.C., Nu Age Med Solutions Inc., Omega Diagnostic Imaging, P.C., Ramapo Valley Anesthesia Assoc., LLC, Quality Mental Health Counseling, and XVV, Inc. Plaintiff has stipulated with these parties to discontinue its claims against them in consideration of their discontinuances of all claims they have submitted in connection with the Incident (*see* NYSCEF Doc. Nos. 3, 5, 6, and 8).

In its affirmation in support, plaintiff alleges that it issued the Policy to White and Blue (NYSCEF Doc. No. 14). The Policy includes a no-fault endorsement which states that plaintiff shall reimburse eligible persons who are injured by an accident which arises out of the use of the insured vehicle (NYSCEF Doc. No. 12, ¶ 6 [citing NYSCEF Doc. No. 14]). Plaintiff stresses that 11 NYCRR 65-1.1 allows plaintiff to request an independent medical examination of an individual who asserts claims under the Policy (NYSCEF Doc. No. 15).

Ms. Foster alleged that she was a passenger in the White and Blue vehicle. Accordingly, in a letter dated June 7, 2016, Ms. Foster's attorney contacted plaintiff, notifying it of the claim, which was assigned claim number 789099-05. The letter stated, in part, that "[a]ll communication regarding this claim should be sent to this office, and we ask you to refrain from contacting our client, except through us" (NYSCEF Doc. No. 15). Ms. Foster then assigned her rights to the parties who are named as defendants in this action, and who, in turn, submitted claims to plaintiff (NYSCEF Doc. No. 12, ¶¶ 10-13). Plaintiff further alleges that "defendants have commenced or have the right to commence actions or arbitrations against the Plaintiff" (*id.*, ¶ 14).

Plaintiff sent a letter to Ms. Foster on October 13, 2016, informing her that it had scheduled an Independent Medical Examination (IME) for November 16, 2016. It further noted that her appearance was mandatory. Plaintiff mailed the letter to Ms. Foster directly, but sent a copy to her attorney as well. On the same day, plaintiff mailed Ms. Foster and her attorney a letter which set forth a different IME date, October 26, 2016. On October 28, 2016, plaintiff sent a third letter to plaintiff, this time with an IME date of November 9, 2016. Ms. Foster did not appear for an IME on these dates (NYSCEF Doc. No. 16). On December 22, 2016, plaintiff mailed a fourth and final letter to Ms. Foster and her lawyer. This letter notified Ms. Foster and her counsel that plaintiff had rescheduled the IME for January 25, 2017 (*id.*). Ms. Foster also did not appear on January 25, 2017. Plaintiff alleges that Ms. Foster's repeated failures to appear for her IME violated 11 NYCRR § 65-3.5, and denied coverage on this basis. Plaintiff then initiated this action against Ms. Foster and the Providers who have submitted claims for services they purportedly rendered to her.

Plaintiff filed the summons and complaint on June 29, 2017 (NYSCEF Doc. No. 1). As is relevant here, plaintiff performed "nail and mail" service on Ms. Foster on October 27 and 31,

2017. NYSCEF Doc. No. 7. Plaintiff's alleged diligent efforts were attempts at service on October 5, 2017 at 4:29 p.m.; on October 17, 2017, at 5:50 p.m.; and on October 27, 2017 at 5:10 p.m. (NYSCEF Doc. No. 7). Plaintiff further annexes an affidavit of military investigation (NYSCEF Doc. No. 24). There is no indication that plaintiff served the attorney who had represented Ms. Foster in her claims application. Plaintiff's alleged service on Ripa Boris d/b/a Boris Ripa Medical P.C. was on someone named "Smith" who refused to provide his or her first name and who is described as an employee and thus "a person of suitable age and discretion." On the issue of non-military service, the process server asked "Smith" whether Boris Ripa was in the military (NYSCEF Doc. No. 2).

Plaintiff served Advanced Recovery Equipment and Supplies LLC via the Secretary of State under Limited Liability Corporation Law § 303, served Almatore Medical Supply Inc. and Prosper Acupuncture P.C. via the Secretary of State pursuant to Business Corporation Law (BCL) § 306, and served the Maimonides Medical Center defendants in conformance with Nonprofit Corporation Law § 306 and BCL § 306.

In addition to the documents this court already has described, plaintiff submits several supporting affirmations and affidavits. NYSCEF Doc. No. 12. They include the statement of Cheryl Glaze, a no-fault claims supervisor for plaintiff, who attests to the procedures for scheduling IMEs. Ms. Glaze explains that the claims examiner in charge of Ms. Foster's claim, Chevan Douglas, "is not currently available now to complete an affidavit." NYSCEF Doc. No. 12, Glaze ¶ 6. The affidavit further states that Mr. Douglas bore the responsibility for generating any no fault request forms and placing them in envelopes which he then was to deliver to the mail room. Jeffrey Rubinton of Medex Analytic Services represents that he mailed the IME notices to Ms. Foster and to her attorney, and Dr. Jeffrey Passick, who was to conduct the November 16,

2016 and January 25, 2017 IMEs, and that Ms. Foster did not appear for an IME on either of these dates. Plaintiff similarly submits an affidavit and affirmation from the individual whose service mailed IME notices for the October 26 and November 9, 2016 IMEs and from the doctor who was to conduct these examinations. Luis Campbell, plaintiff's mail room supervisor, attested to the process for mailing envelopes and states that the general denials for the pertinent claims were mailed on November 17, 2016 and February 7, 2017.

Based on the above, plaintiff argues that a default judgment against the above parties is appropriate. In addition, it contends that summary judgment is proper against Advanced Orthopaedics, P.L.L.C. (Advanced). Plaintiff cites *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC* (82 AD3d 559, 560 [1st Dept], *lv denied*, 17 NY3d 705 [2011]) for the proposition that Ms. Foster's failure to appear for the IMEs requires that summary judgment be granted against Advanced on plaintiff's claim seeking a declaratory judgment. Other than Advanced Orthopaedics, no other party has opposed the motion.

In its opposition, Advanced Orthopaedics argues that plaintiff has failed to establish its entitlement to summary judgment (NYSCEF Doc. No. 25). Advanced relies on 11 NYCRR § 65-3.5 (b), which provides that the insurer must request an IME within 15 days of receipt of the claim, and it must pay or deny the claim within 30 days unless it schedules an IME or other verification within that period (NYSCEF Doc. No. 25, ¶ 13 [citing 11 NYCRR § 65-3.5 (b); *Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 317-18 (2007)]). Advanced notes that, in its denial of claim forms, plaintiff admits it received a bill from Advanced for \$151.23 on August 8, 2016, and plaintiff received a bill for \$10,478.45 on September 7, 2016. It annexes a nearly illegible copy of the first of these claims from which this Court can decipher the August 8, 2016 receipt date, along with a clear copy of the \$10,478.45 bill which confirms the September 7, 2016

date of receipt (NYSCEF Doc. No. 26). Advanced alleges that the October 13, 2016 scheduling letters and the subsequent letters were untimely under 11 NYCRR § 65-3.5 (b), since they were not sent within 15 days of receipt of the claims (NYSCEF Doc. No. 25, ¶ 14). Citing *American Tr. Ins. Co. v Longevity Med. Supply, Inc.* (131 AD3d 841, 841 [1st Dept 2015]), Advanced further alleges that, since the IMEs were scheduled more than 30 days after the receipt of the claims, they, too, were untimely (NYSCEF Doc. No. 25, ¶ 18). For these reasons, Advanced contends, plaintiff has not established a prima facie case regarding the claims it submitted to plaintiff (*id.*, ¶ 21).

In reply, plaintiff states that it has satisfied its prima facie burden. It argues that Advanced did not submit evidence that raises an issue of fact. It quotes 11 NYCRR 65-3.5 (p), which states that “an insurer’s non-substantive technical or immaterial defect or omission, as well as an insurer’s failure to comply with a prescribed time frame, shall not negate an applicant’s obligation to comply with the request or notice” and notes that this rule applies to claims starting from April 1, 2013 (NYSCEF Doc. No. 28, ¶ 7). Plaintiff argues that *Z.M.S. & Y. Acupuncture, P.C. v Geico Gen. Ins. Co.* (56 Misc 3d 926, 930-31 [Civ Ct, Kings County 2017] [ZMS]), in which the Civil Court found that “the insurer’s one-day tardiness in issuing its follow-up request” was “a technical defect excusable under 11 NYCRR 65-3.5 (p)” where every other request had been timely, including the plaintiff’s initial demand, and the delay was extremely short. It states that defendant solely relies on cases involving claims filed before April 1, 2013 and they are therefore inapplicable ((NYSCEF Doc. No. 28, ¶ 13).

After careful consideration of the parties’ arguments, this Court denies plaintiff’s motion. First, as to defendant Ms. Foster, plaintiff has not fulfilled its initial burden of establishing a prima facie case. Specifically, plaintiff served Ms. Foster by “nail and mail” service (CPLR § 308 [4]). However, such service is appropriate only where personal service “cannot be made with due

diligence” (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007] [citations and internal quotation marks omitted]). It is not determinative that a plaintiff has made more than the two requisite attempts at personal service (*see Board of Mgrs. of 50 West 127th St. Condominium v Kidd*, ___ AD3d ___, 2019 NY Slip Op 00973 [1st Dept 2019] [efforts not diligent where plaintiff was aware of defendant’s work and travel schedule]). Instead, courts evaluate the circumstances of each case and, among other things, determine whether a plaintiff “made genuine inquiries about the defendant’s whereabouts and place of employment” (*Faruk v Dawn*, 162 AD3d 744, 745-46 [2nd Dept 2018] [citations and internal quotation marks omitted]). Here, plaintiff’s attempts at service – on October 5, 2017 at 4:29 p.m.; on October 17, 2017, at 5:50 p.m.; and on October 27, 2017 at 5:10 p.m. – were all at times when plaintiff reasonably should have expected that Ms. Foster was at work or heading home from work (*see id.* at 746; *O’Connell v Post*, 27 AD3d 630 [2d Dept 2006]). Since plaintiff did not properly serve Ms. Foster, its motion against her must be denied in all respects.

As for Advanced’s timeliness argument, plaintiff correctly notes that a different analysis regarding its 30-day deadline is appropriate because of the addition of 11 NYCRR § 63-5 (p) to the rules (*see ZMS*, 56 Misc 3d at 928]). Contrary to plaintiff’s suggestion, however, this rule does not vitiate the timeliness requirement (*e.g.*, *Zwanger & Pesiri Radiology Group v Mapfre Ins. Co.*, 56 Misc 3d 1213[a], 2017 NY Slip Op 50981[U] [Sup Ct, Suffolk County 2017]). *ZMS*, upon which plaintiff relies, examines the import of the phrase, in 11 NYCRR § 63-5 (p), that “an insurer’s failure to comply with a prescribed time frame” does not excuse the claimant from complying with the demand. The court reasoned that the provision stems from a policy against denying an insurer’s application for judgment based on the plaintiff’s immaterial, nonsubstantive delays (*ZMS*, 56 Misc 3d at 928-29). Thus, the court determined that in the case before it, where

only one of the plaintiff's demands was untimely, and the delay was only one day, the lateness constituted "a technical defect excusable under 11 NYCRR 65-3.5 (p)" (*ZMS*, 56 Misc 3d at 930).

Here, too, this Court concludes that, under the regulation, it must consider whether the length and circumstances of the delay are such that it is the equivalent of a "nonsubstantive technical or immaterial defect or omission" under 11 NYCRR § 65-3.5 (p). A contrary conclusion would be irrational, as it would excuse an insurer from untimeliness without reservation. Moreover, this Court finds that plaintiff's errors are not immaterial and thus are not excusable under 11 NYCRR § 65-3.5 (p). This is not a situation in which the delay was minimal, and plaintiff otherwise moved forward within the required time frames. Plaintiff did not seek an IME until two months after it received the first bill from Advanced Orthopaedics, and one month after it received the second bill. As Advanced Orthopaedics asserts, both are untimely, and none of these mailings extended the time which plaintiff had to pay the claim or deny approval (NYSCEF Doc. No. 25, at ¶¶ 13-16). Moreover, in violation of 11 NYCRR 65-3.5 (d), plaintiff did not mail its December 22, 2016 rescheduling letter within 10 days after November 16, 2016, and it did not schedule the IME until more than 30 days of the scheduling letter (NYSCEF Doc. No. 25, ¶ 18).¹ Since plaintiff's only response to this argument is that its untimeliness must be excused, and as plaintiff does not provide any justification for its delay, this Court determines that plaintiff has not established its entitlement to judgment against Advanced Orthopaedics.

Even a default declaratory judgment motion must contain "proof of the facts constituting the claim" (*Hertz Vehs., LLC v Best Touch PT, P.C.*, 162 AD3d 617, 617 [1st Dept 2018] [*Hertz*] [quoting CPLR § 3215 (f)]). As part of this showing, plaintiff must establish that it served the

¹ If this were the only delay, this Court might consider it as a technical and nonprejudicial error due to the intervening holiday season. Here, however, there is a pattern of disregard of the applicable rules and this delay is a part of that pattern.

notices of IME in accordance with the time frames in 11 NYCRR 65-3.5 (b) (*see Hertz*, 162 AD3d at 617-18). Since plaintiff does not submit documents which establish the required time frame with respect to the other claimants, it has not set forth a prima facie case concerning their claims (*see Hertz*, 162 AD3d at 618).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the action is severed and dismissed against Advanced Surgery Center, LLC, Bay Chiropractic, P.C., Boris Ripa Medical P.C., Colin Mental Health Counseling P.C., Galina Groysman, D.C., Iconic Wellness Surgical Services, LLC, New York Medical & Diagnostic Care P.C., Nu Age Med Solutions Inc., Omega Diagnostic Imaging, P.C., Ramapo Valley Anesthesia Assoc., LLC, Quality Mental Health Counseling, and XVV, Inc.; and it is further

ORDERED that those branches of plaintiff's motion seeking a default and summary judgment as against defendant Tracy Foster are denied; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment as against defendant Advanced Orthopaedics, P.L.L.C. is denied; and it is further

ORDERED that the motion is denied as against the remaining defendants; and it is further

ORDERED that the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 2

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No.: 155900/2017

- against -

TRACY FOSTER, ADVANCED ORTHOPAEDICS, P.L.L.C.,
ADVANCED RECOVERY EQUIPMENT AND
SUPPLIES, LLC, ALMATCARE MEDICAL
SUPPLY INC., MAIMONIDES MEDICAL
CENTER, MAIMONIDES MEDICAL CENTER
d/b/a MAIMONIDES MEDICAL CENTER
EMERGENCY PHYSICIAN, MAIMONIDES
MEDICAL CENTER d/b/a MAIMONIDES MEDICAL
CENTER RADIOLOGY FPP, PROSPER
ACUPUNCTURE, P.C., and RIPA BORIS
d/b/a BORIS RIPA MEDICAL P.C.,

Defendants.

And it is further

ORDERED that all future papers in this matter shall bear the caption above; and it is
further

ORDERED that within 20 days of entry of this order, plaintiff's counsel shall serve a copy
of the same, with notice of entry, on all parties, as well as on the County Clerk (60 Centre Street,
Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is
further

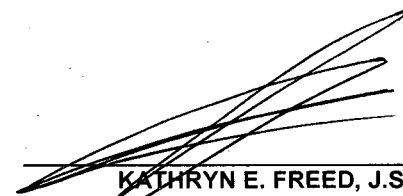
ORDERED that the Clerks are directed to amend the caption accordingly, and to note the severances and dismissals of Advanced Surgery Center, LLC, Bay Chiropractic, P.C., Boris Ripa Medical P.C., Colin Mental Health Counseling P.C., Galina Groysman, D.C., Iconic Wellness Surgical Services, LLC, New York Medical & Diagnostic Care P.C., Nu Age Med Solutions Inc., Omega Diagnostic Imaging, P.C., Ramapo Valley Anesthesia Assoc., LLC, and Quality Mental Health Counseling, XVV, Inc.; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter at 80 Centre Street, New York, New York, Room 280, on April 9, 2019 at 2:15 p.m.; and it is further

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

3/21/2019
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE