

Country-Wide Ins. Co. v St. Michelle

2019 NY Slip Op 31923(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 153773/2017

Judge: Anthony Cannataro

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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. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

INDEX NO. 153773/2017

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

MOTION DATE 03/13/2019

- v -

MOTION SEQ. NO. 003

DANIELLE ST. MICHELLE, NEW AGE ACUPUNCTURE PC, SAN ANTONIO PHYSICAL THERAPY, PC, LONGEVITY MEDICAL SUPPLY INC, EAST FLATBUSH MEDICAL PC, VP CHIROPRACTIC ADJUSTMENT, PC, JOSEPH BATER DC

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY .

In this declaratory judgment action, plaintiff-insurer Country-Wide Insurance Company moves, pursuant to CPLR 3212, for a judgment against defendant Longevity Medical Supply Inc. ("Longevity") on the grounds that Longevity's assignor, the eligible injured party, defendant Danielle St. Michelle, breached a condition precedent to her insurance policy by failing to appear for duly scheduled examinations under oath ("EUO").

Facts

Longevity alleges that Ms. St. Michelle incurred injuries as a result of an accident that took place on May 2, 2016. Ms. St. Michelle then sought treatment from defendant Longevity. Country-wide Insurance, requested an EUO to determine the facts and circumstances surrounding the claim and to determine whether the injuries match those listed on the no-fault claim form ("N-F 2") submitted by Longevity.

Plaintiff first requested Ms. St. Michelle appear for an EUO on August 5, 2016 by mailing a notice of EUO to both Ms. St. Michelle's home address and her attorney's office on July 18, 2016. After Ms. St. Michelle failed to appear at the EUO, another notice of EUO was sent on August 9, 2016 rescheduling the EUO for September 6, 2016. After Ms. St. Michelle again failed to appear, plaintiff sent a third notice on September 20, 2016 rescheduling the EUO to October 12, 2016. Defendant St. Michelle again failed to appear. A final notice was sent on October 18, 2016 rescheduling the EUO for November 3, 2016 and, once again, Ms. St. Michelle failed to appear.

Argument

Plaintiff argues that it owes no duty to defendant to pay no-fault claims arising out of the May 2, 2016 accident because defendant violated the terms of the insurance policy by failing to appear at four properly scheduled EUOs. Defendant argues that plaintiff has failed to establish *prima facie* entitlement to summary judgment as a matter of law because substantial and necessary discovery remains outstanding, and there are material triable issues of fact that are facially apparent in the record. Defendant also argues that the EUO requests and the denial were untimely, and that plaintiff failed to show proof that the letters and notices were actually mailed to the correct address.

Legal Standard

To obtain summary judgment, plaintiff is required to establish *prima facie* 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 Global Mfg. Corp.*, 34 NY2d 388 [1974]). Once the movant meets its initial burden, the burden shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When there is no triable material issue of fact, it is incumbent upon a court, in the interest of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

Decision

Under 11 NYCRR § 65-1.1 there shall be no liability on the part of a 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] [Sup Ct, NY County 2018], quoting *Hertz Corp.*, at 411).

Plaintiff demonstrated its *prima facie* entitlement to a summary judgment by providing scheduling letters for the EUO, and statements on the record of the claimant’s failure to attend, the dates and methods of service of the EUO letters and the disputed bills for the defendant. Plaintiff has also provided a copy of the stated bills and copies of the documents reflecting the dates and timeliness of the requests. Contrary to defendant’s argument, the omission of a suite number from first two EUO scheduling letters is insufficient to raise an issue of improper service, especially where defendant’s attorney also received a copy of the EUO request, satisfying EUO notice requirement as a matter of law (*Am. Transit Ins. Co. v Marte-Rosario*, 111 AD3d 442, 443 [2013]; see also *Darlington Med. Diagnostic, P.C. v Praetorian Ins. Co.*, 36 Misc. 3d 155[A] [App. Term

2012]). The first two EUO requests were properly made and plaintiff could have issued a timely denial after the second EUO no-show.

As to the latter two requests for EUOs, they were sent in "good faith," in an effort to include the suite number as "Apt. 2B" instead of simply "Apt. 2." The additional EUO requests are not contemplated by 11 NYCRR § 65, and so are not subject to the ten-day restriction delineated in that rule. Instead they are subject to the general reasonableness standard in the timing of EUO requests (*see Dillon Medical Supply Corp. v Travelers Insurance Co.*, 7 Misc 3d 927 [Civ. Ct. Kings Co. 2005]).

Under these circumstances, where defendant failed to appear at the first two EUOs, giving defendant an additional opportunity to appear by scheduling a third and fourth EUO, two weeks after defendant's failure to appear at the first two, was not unreasonable. Furthermore, because plaintiff failed to respond to defendant's valid and proper verification requests, the 30-day period within which defendant had to either pay or deny the claim did not begin to run (*see Hospital for Joint Diseases v State Farm Mut. Auto. Ins. Co.*, 8 AD3d 533, 534-535 [2d Dept 2004]; *St. Vincent's Hosp. of Richmond v American Tr. Ins. Co.*, 299 AD2d 338, 340 [2d Dept 2002]). Plaintiff's denial of coverage was within the prescribed 30-day timeframe, counting from the fourth missed EUO.

As such, Ms. St. Michelle's no-fault coverage was vitiated when she violated the terms of the insurance policy by failing to appear at four properly requested EUOs and failed to waive or otherwise object to the EUO in a timely manner. Plaintiff should not be liable for no-fault benefits to the medical provider defendant for medical services and therefore summary judgment is granted.

Accordingly, it is

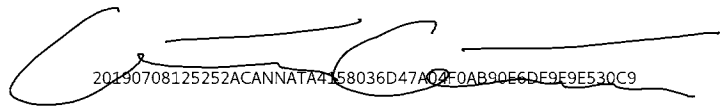
ORDERED that the motion of plaintiff for summary judgment seeking a declaration that it is not obligated to provide No-Fault coverage to defendants with

respect to the May 5, 2016 accident referenced in the complaint, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obligated to provide No-Fault coverage to defendants with respect to the May 5, 2016 accident referenced in the complaint; and it is further

ADJUDGED that plaintiff Countrywide do recover from defendant Longevity, costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and plaintiff have execution therefor.

7/8/2019
DATE



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ANTHONY CANNATARO, 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