

**Unitrin Advantage Ins. Co. v James Acupuncture
Health Care P.C.**

2019 NY Slip Op 32196(U)

July 26, 2019

Supreme Court, New York County

Docket Number: 150465/2017

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

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INDEX NO. 150465/2017

UNITRIN ADVANTAGE INSURANCE COMPANY,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

JAMES ACUPUNCTURE HEALTH CARE P.C., NEIGHBORHOOD MEDICAL HEALTH CARE P.C., REFILL RX PHARMACY INC., RESTORATIVE MASSAGE THERAPY P.C., THERESA HASTAVA, DC, WELL CARE MEDICAL EQUIPMENT LLC, WESTCHESTER RADIOLOGY & IMAGING, P.C., ACTIVE MOTION PHYSICAL THERAPY, P.C., RAI MEDICAL HEALTH P.C., INJURED WORKERS PHARMACY, LLC, ROCKLAND AND BERGEN SURGERY CENTER LLC, TRI-STATE ANESTHESIA, PLLC, RENAISSANCE SURGERY CENTER, LLC, SHAHID MIAN, M.D., P.C., ALLIANCE MEDICAL GOODS SERVICES LLC, HEALTH EAST AMBULATORY SURGICAL CENTER LLC, NORTHEAST ANESTHESIA, P.C., JUSUF ZLATANIC, M.D., P.C., LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C., BARRY HUGHES, DOMINGO AQUINO, TEODORO CARABALLO, XENIA HENRIQUEZ, ARMAC, INC., ENDO SURGICAL CENTER OF EASTBRUNSWICK, L.L.C. A/K/A ENDO SURGICAL CENTER OF NEW JERSEY, HAAR ORTHOPAEDICS & SPORTS MEDICINE, P.C. A/K/A HAAR ORTHOPEDICS & SPORTS MED, P.C., INTERSTATE MULTI-SPECIALTY MEDICAL GROUP, P.C., MEDICAL DEVICE SPECIALTY, MELISSA ROSSI, QUALITY MEDICAL & SURGICAL SUPPLIES, L.L.C. A/K/A QUALITY MEDICAL SURGICAL SUPPLIES, LLC, RIGHT CHOICE SUPPLY, INC., STEVEN STRUHL, WORKERS' COMPENSATION RX SOLUTIONS

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 178, 179, 182

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff's motion for summary judgment on its fourth cause of action against defendants

Refill RX Pharmacy Inc. and Well Care Medical Equipment LLC is denied.

Background

This case arises from an automobile accident on Second Avenue near East 116th St in Manhattan. Plaintiff is an automobile insurer and defendants Domingo Aquino, Teodoro Caraballo, and Xenia Henrique ("claimants") allege injuries during the time the policy was in

effect. Plaintiff insists that claimants suffered no physical injuries, were not visibly injured, and refused medical care at the scene of the accident. Claimants insist they were injured and filed multiple claims with plaintiff for medical expenses incurred from injuries resulting from the accident.

Pursuant to the No-Fault regulations, plaintiff sought Examinations Under Oath (EUOs) of the claimants and each of the claimants appeared and testified. Upon receiving a copy of the EUO transcripts, plaintiff sent them to the claimants via their attorneys to sign. Claimants failed to return a signed copy of the transcripts and plaintiff again sent a letter requesting claimants sign the transcripts. To this date, the transcripts have not been signed.

Plaintiff alleges that the claimants' failure to sign the transcripts violates a condition precedent to coverage under the No-Fault regulations and that summary judgment must be granted and that plaintiff has no obligation to pay the no-fault claims.

In opposition, defendant Refill RX Pharmacy, Inc. and Well Care Medical Equipment LLC assert that plaintiff failed its own obligation to timely request EUOs in the first place and then failed to issue timely denials of the insurance claims. Because plaintiff purportedly breached these requirements, defendants argue that summary judgment should be denied because it has not been conclusively established that plaintiff has no obligation to cover the claims. In reply, plaintiff argues that the timeliness of requesting the EUOs were not objected to during the claim-verification stage and claimants appeared for the EUOs, thereby waiving any timeliness objections. However, plaintiff does not address defendants' argument about untimely denials of the claims in reply.

Discussion

Failure to Sign the Transcripts

Pursuant to the Insurance Law, examinations under oath must be subscribed (11 NYCRR § 65-1.1). Failure “to subscribe and return the transcript of [an] examination under oath violated a condition precedent to coverage and warranted denial of [defendant’s] claims” (*Hertz Vehicles, LLC v Gejo, LLC*, 161 AD3d 549, 77 NYS3d 375 [1st Dept 2018]). “A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage” (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560, 918 NYS2d 473 [1st Dept 2011]). It is undisputed that claimants failed to sign the EUO transcripts, which indicates that a condition precedent to coverage was breached.

Failure to Timely Request EUOs and Deny Claims

Requests for EUOs must be sent within the time frame set by the no-fault regulations (11 NYCRR § 65-3.5 [b]; *Nat’l Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 16 NYS3d 457 [1st Dept. 2015]). “Where an insurer fails to pay or deny a claim within the requisite 30 days under the statute and regulations following its receipt of the proof of claim, the insurer is subject to substantial consequences, namely, preclusion from asserting a defense against payment of the claim” (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 506, 35 NE3d 451 [2015]).

Defendants claim that the motion for summary judgment should be denied because plaintiff failed to show that it timely requested EUOs in the first place and then failed to timely

issue denials of the insurance claims. The issue of timely requests for the EUOs is moot because claimants waived this requirement by showing up for the EUOs and answering the questions. However, defendants are correct in asserting that plaintiff failed to show that it timely denied the insurance claims, which an insurance company must do. Plaintiff does not address the issue of timely denial in its reply papers and does not submit proof that it timely denied the claims. Although plaintiff is correct in asserting that signing the transcripts is a condition precedent to coverage, the Court cannot ignore plaintiff's own obligation to deny the claims on time. Because denial of claims in a timely manner is also a requirement under the Insurance Law, and plaintiff has failed to submit evidence that it complied with this requirement, an issue of fact exists. Because an issue of fact exists, the motion for summary judgment must be denied because it has not been conclusively established that plaintiff is relieved of its responsibility to insure claimants based on a violation of a condition precedent.

Accordingly, it is hereby

ORDERED that the motion for summary judgment as to the fourth cause of action against defendants Refill RX Pharmacy Inc. and Well Care Medical Equipment LLC is denied.

7/26/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINANCIAL DISASTERS

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

HON. ARLENE P. BLUTH