

Country-Wide Ins. Co. v Love
2020 NY Slip Op 30131(U)
January 3, 2020
Supreme Court, New York County
Docket Number: 652365/2018
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14

Acting Justice

COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

INDEX NO. 652365/2018
MOTION DATE 06/11/2019
MOTION SEQ. NO. 002

- v -

SHAMIR LOVE, NEXRAY MEDICAL IMAGING,
P.C., QUALITY CUSTOM MEDICAL SUPPLY, INC., MARIA
SHIELA MASIGLA P.T., JULES FRANCOIS PARSIIEN,
TOTAL CHIROPRACTIC P.C., IMPULSE IMAGING
P.C., HEALTH CHOICE PHARMACY INC, ESSENTIAL
CHIROPRACTIC DIAGNOSTIC P.C., ACH CHIROPRACTIC,
P.C., ALEXIOS APAZIDIS, M.D. P.C., ATLAS RADIOLOGY
P.C., FJL MEDICAL SERVICES P.C., ENERGY
CHIROPRACTIC, P.C., KINGS REHAB ACUPUNCTURE
P.C., AB MEDICAL SUPPLY INC and DIGNITY PT, P.C.

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41-62, 64-70
were read on this motion to/for SUMMARY JUDGMENT

In this action, Plaintiff seeks a declaration that it is under no obligation to pay any no-
fault claims for the medical treatment rendered by appearing Defendant medical providers on the
sole basis that Defendant Shamir Love, the Eligible Injured Person ("EIP"), failed to comply
with a condition precedent to reimbursement, to wit attending Love's failure to attend an
Examination Under Oath ("EUO"). Plaintiff now moves pursuant CPLR §3212 for summary
judgment against answering Defendants Maria Shiela Masigla P.T. ("Masigla"), Jules Francois
Parsien ("Parisien"), Total Chiropractic P.C. ("Total"), Health Choice Pharmacy Inc. ("Health
Choice")¹, ACH Chiropractic, P.C. ("ACH"), FJL Medical Services P.C. ("FJL"), Energy
Chiropractic, P.C. ("Energy"), Kings Rehab Acupuncture P.C. ("Kings"), and AB Medical
Supply Inc. ("AB Medical").

On September 19, 2017, Love was injured in an automobile accident which was covered
under an insurance policy issued by Plaintiff. Love received treatment from the various
Defendant medical providers for injuries he allegedly sustained in the accident. As required by
New York Insurance Law and No-Fault Insurance regulations, Love submitted a no-fault claim
form ("NF-2") to Plaintiff. Plaintiff received the NF-2 form on October 5, 2017 (see Plaintiff's
Exhibit E, NF-2 Form, NYSCEF Document #48).

¹ Although Defendant Health filed an answer, it did not file opposition to this motion.

Thereafter, the appearing medical providers also submitted to Plaintiff verification forms (“NF-3”) seeking reimbursement for medical services provided to Love as assignors of his claims for no-fault benefits (*see* Plaintiff’s Exhibit M, NYSCEF Document #56, pages 1-119). As concerns this motion, Plaintiff received NF-3 claims forms for treatment rendered to Love from the following Defendant on the following dates:

On October 10 and 24, 2017, Plaintiff received NF-3 forms from Jules Francois Parisien (*id.*, pages 31-37).

On October 13 and November 6, 2017, Plaintiff received NF-3 forms from Kings Rehab Acupuncture P.C. (*id.*, pages 73-76).

On October 16 and 27, 2017, Plaintiff received NF-3 forms from AB Medical Supply Inc. (*id.*, pages 80-99).

On October 16, 2017, Plaintiff received a NF-3 form from FJL Medical Services P.C. (*id.*, pages 63-69).

On October 16, 2017, Plaintiff received NF-3 forms from Total Chiropractic P.C., (*id.*, pages 45-53).

On October 23, 2017, Plaintiff received NF-3 forms from Energy Chiropractic, P.C. (*id.*, pages 70-72).

On October 23, 2017, Plaintiff received NF-3 forms from Maria Shiela Masigla P.T. (*id.*, pages 22-30).

On October 27, 2017, Plaintiff received an NF- 3 form from ACH Chiropractic (*id.*, pages 60-62).

On December 27, 2017, Plaintiff received an NF-3 form from Health Choice Pharmacy Inc. (*id.*, pages 117-119).

By notice dated and served by mail on November 8, 2017, Plaintiff requested that Love appear at an EUO on November 28, 2017 (*see* Plaintiff’s Exhibit F, First EUO letter, NYSCEF Document #49). Love failed to attend the November 28, 2017 EUO (*see* Plaintiff’s Exhibit G, EUO statement NYSCEF Document #50). Plaintiff mailed a second notice to Love on December 1, 2017 for an EUO to be held on December 21, 2017 (*see* Plaintiff’s Exhibit H, Final EUO letter, NYSCEF Document # 51). Love again failed to attend (*see* Plaintiff’s Exhibit I, NYSCEF Document, Final EUO Statement, NYSCEF Document #52). Subsequently, it appears Plaintiff issued to Love an NF-10 which purported to deny of all of Love’s no-fault claims retroactive to the initial date of incident September 19, 2017 (*see* Plaintiff’s Exhibit L, Denial of Claim, NYSCEF Document #55).

Now, Plaintiff moves for summary judgment and contends it is not required to pay the appearing Defendant medical providers no-fault claims because Love failed to appear for two

duly scheduled EUO's, breaching a condition precedent to the insurance policy and voiding the policy *ab initio*. Appearing Defendant medical providers contend Plaintiff has not established its *prima facie* entitlement to summary judgment since it failed to submit sufficient documentation to support its claims. Specifically, they claim Plaintiff failed to demonstrate its full compliance with the timeframes and verification requirements of 11 NYCRR § 65-3.5.

To obtain summary judgment, generally, Plaintiff is required to establish a *prima facie* showing of 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 and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*see Castro v Hatim*, 174 AD3d 464, 468 [1st Dept 2019] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As part of its *prima facie* burden on this motion, Plaintiff was required to show that it served EIP Defendant Love and the Defendant medical providers with timely requests for "additional verification" under 11 NYCRR §65-3.5[b] in response to the NF-3 verification forms it received (*see Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 A.D.3d 617 [1st Dept 2018]; *Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Liberty Mut. Ins. Co. v K.O. Med., P.C.*, 142 AD3d 875 [1st Dept 2016]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2d Dept 2006]).

In support of its motion, Plaintiff proffered proof, via documentation and affidavits, it claims supports that notice of an EUO was timely served on Love, the EIP. As to the appearing medical providers, however, while documents were annexed to the moving papers purporting to request "additional verification" from these Defendants, there was no proof of service of these requests on the appearing medical providers. Accordingly, Plaintiff has failed to demonstrate *prima facie* its entitlement to judgment as against Defendants Masigla, Parsien, Total, Health Choice, ACH, FJL, Energy, Kings and AB Medical (*see National Liability & Fire Ins. Co. v Tam Medical Supply Corp.*, 131 AD3d 851 [1st Dept 2015]).

With respect to Health, Plaintiff demonstrated that it received the first NF-3 from this provider on December 27, 2017, nearly two months after it first requested an EUO of Love. As such, the timing provisions of 11 NYCRR §65-3.5[b] were not applicable as to this provider (*see Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 469 [1st Dept 2016]).

Accordingly, it is

ORDERED that the Plaintiff's motion for summary judgment granted as against Defendant Health Choice Pharmacy Inc.; and it is

ORDERED that the Plaintiff's motion for summary judgment denied as to Defendants Masigla, Parsien, Total, Health Choice, ACH, FJL, Energy, Kings and AB Medical, and it is

ORDERED that parties are directed to appear for a preliminary conference on **February 18, 2020 at 9:30 a.m.** in Courtroom 1045, located at 111 Centre Street.

1/3/2020
DATE


FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

HON. FRANCIS A. KAHN III
J.S.C.