

Unitrin Advantage Ins. Co. v ABA Chiropractic, P.C.
2020 NY Slip Op 32236(U)
July 8, 2020
Supreme Court, New York County
Docket Number: 154804/2017
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ

PART

IAS MOTION 47EFM

Justice

UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

- v -

ABA CHIROPRACTIC, P.C., ET AL.,

Defendants.

INDEX NO. 154804/2017

MOTION DATE

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124-136, 139-146
were read on this motion to/for SUMMARY JUDGMENT.

In this action, plaintiff Unitrin Advantage Insurance Company seeks a judgment declaring that it has no obligation to pay no-fault claims arising out of a May 9, 2016 motor vehicle accident involving defendants-claimants Angela Salguado and Dwayne Corwise. Plaintiff now moves pursuant to CPLR 3212 for summary judgment on its first cause of action ("breach" of No-Fault Regulations by Angela Salguado) and third cause of action ("breach" of No-Fault Regulations by Dwayne Corwise) against answering-defendants ABA Chiropractic PC, Apple Acupuncture PC, Corona Medical Plaza, PC, Elmont Rehab PT, PC and UGP Acupuncture, PC.

With respect to plaintiff's motion on the first cause of action, plaintiff argues that defendants' claims for services rendered to defendant-claimant Ms. Salguado must be denied because she breached a condition precedent to coverage by failing to appear at properly scheduled independent medical examinations on two occasions. A no-fault insurer seeking a declaration of no coverage due to asserted violations of the terms of the policy must first demonstrate that it complied with each procedural and timeliness requirement of 11 NYCRR 65-3.5 and 3.6, which governs the handling of no-fault claims. *American Transit Ins. Co. v. Longevity*, 131 A.D.3d 841,

841 (1st Dep’t 2015). Section 65-3.5 provides, in relevant part that, once an insurer receives the verification forms for a pending claim for benefits, the insurer then has 15 days to seek further verification by, for example, requesting an examination under oath or an independent medical examination. *See* 11 NYCRR 65-3.5(b); *Unitrin Insurance Advantage Ins. Co. v. All of N.Y., Inc.*, 158 A.D.3d 449, 449 (1st Dep’t 2018). Further, although the failure of a person eligible for no-fault benefits to appear for a properly noticed EUO or IME constitutes a breach of a condition precedent of the policy, vitiating coverage, the insurer is still required to provide sufficient evidence to show that the notices it served on defendants for additional verification complied with the timeliness requirements of 11 NYCRR 65-3.5(b) and 11 NYCRR 65-3.6(b). *See All of N.Y.*, 158 A.D.3d at 449; *Longevity*, 131 A.D.3d at 842.

Here, although plaintiff submitted evidence that the notices of the scheduled IMEs were properly mailed and that Ms. Salguedo did not appear, plaintiff failed to show evidence that it complied with the timeliness requirements of 11 NYCRR 65-3.5(b). In this regard, the only proof that plaintiff submits is a bill that it received from defendant Auto Rx for treatment provided to defendant-claimant Ms. Salguedo. Affirmation of Thomas Bishop dated June 3, 2019, Exh. G. However, a provider’s bill does not constitute a “prescribed verification form” as defined in section 65-3.5(b). *See Hertz Vehicles LLC v. Best Touch PT, PC*, 162 A.D.3d 617, 618 (1st Dep’t 2018). More importantly, plaintiff fails to submit any evidence to show that this was the first verification form that it received from any of the defendants or, if it was not, when it first received verification forms for Ms. Salguedo’s treatment from each of the answering-defendants. Thus, it is not possible to determine whether the IME notices were timely sent under section 65-3.5(b). *See Kemper Independence Ins. Co. v. Adelaida Physical Therapy*, 147 A.D.3d 437, 438 (1st Dep’t 2017).

Inasmuch as plaintiff argues that it does not need to show when it first received bills or verification forms from the answering-defendants, this argument must be rejected. Where a claimant, such as a medical provider, submits multiple claims for benefits, and the insurer's additional verification request is timely as to some of those claims but untimely as to others, the insurer may only deny coverage as to those claims for which it timely requested verification, not as to all of the claims. *All of N.Y.*, 158 A.D.3d 449-50; *see also Unitrin Advantage Ins. Co. v. Dowd*, 67 Misc.3d 1219(A), at *2 (Sup. Ct. N.Y. Cty. May 21, 2020); *Unitrin Advantage Ins. Co. v. Advanced Orthopedics and Joint Preservation*, 2018 N.Y.Slip Op. 33296(U) (Sup. Ct. N.Y. Cty. 2018). Thus, contrary to plaintiff's contention, the timeliness of an insurer's request for additional verification is measured on a claim by claim basis and an insurer cannot deny coverage for a claim based on an untimely request for additional verification. Since plaintiff failed to submit any evidence to show when it first received a bill or verification form from each of the answering-defendants, it has failed to meet its burden of showing that the IME requests it sent to defendant-claimant Ms. Salgado complied with the timeliness requirements of 11 NYCRR 65-3.5(b) and thus summary judgment on the first cause of action must be denied.

Plaintiff also seeks summary judgment on its third cause of action based on defendant-claimant Mr. Corwise's failure to subscribe and return the transcript for his examination under oath. However, as with Ms. Salgado, plaintiff fails to submit sufficient evidence to show that the notices that it sent for the EUO complied with the timeliness requirements of 11 NYCRR 65-3.5(b). In light of this, there was no showing that Mr. Corwise was required to submit to examinations under oath and subscribe same, pursuant to 11 NYCRR 65-1.1. *See Advanced Orthopedics and Joint Preservation*, 2018 N.Y.Slip Op. 33296(U), at *6. Accordingly, it is

ORDERED that the motion is denied.

7/8/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE