

Nationwide Affinity v Gilmore
2020 NY Slip Op 33516(U)
October 26, 2020
Supreme Court, New York County
Docket Number: 155812/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

NATIONWIDE AFFINITY

Plaintiff,

- v -

GILMORE, VAUGHN M

Defendant.

-----X

INDEX NO. 155812/2019
MOTION DATE 08/17/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 121, 122 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

CRANE, J.:

In motion sequence number 001, this court granted a default judgment in favor of plaintiff, Nationwide Affinity Insurance Company (Nationwide), against defendant Vaughn M. Gilmore (Gilmore) and all but one of the "Healthcare Provider Defendants" based upon the failure of these defendants to appear or serve an answer in this action and the assertion that Gilmore breached a condition precedent to coverage. Unlike the situation with the defaulting defendants, issue was joined when Longevity Medical Supply, Inc. (Longevity) filed an answer and discovery demand on August 23, 2019.

Nationwide now moves, pursuant to CPLR 3212, for summary judgment in its favor against Longevity on the ground that Gilmore (Longevity's assignor) violated the no-fault regulations and applicable policy of insurance by, allegedly, repeatedly failing to submit to Examinations Under Oath (EUOs) (motion sequence number 002).

Background

Nationwide seeks a declaration that it is not obligated to provide any first party coverage, reimbursement, or pay any amounts to Longevity for any no-fault related services for which claims and bills have been, or may in the future be, submitted to Nationwide as the result of an alleged motor vehicle accident occurring on November 26, 2018, for which EUOs were requested and Gilmore did not appear.

In support of its motion, Nationwide alleges the following: On May 2, 2018, Gilmore procured a personal policy of insurance for a 2009 Lexus ES 350 (affirmation of Jennifer Ettinger, dated February 12, 2020, ¶ 15). Longevity, acting as Gilmore's assignee, sought no-fault insurance benefits under the applicable policy of insurance and New York no-fault regulations for services allegedly rendered to Gilmore (*id.* ¶ 18). On December 21, 2018, Nationwide received a letter of representation and a no-fault application for benefits (form NF-2) from counsel for Gilmore (*id.* ¶ 27).

Within 30 days of receiving the NF-2 form, a proscribed verification form, and within 15 days of receiving claims and bills from Longevity by correspondence dated January 14, 2019, Nationwide requested that Gilmore appear for an EUO on February 12, 2019, with respect to claim number 250499-GI (*id.* ¶ 28). Subsequently, Gilmore failed to appear for his EUO on February 12, 2019 (*id.* ¶ 29).

Two days later, on February 14, 2019, Nationwide's counsel sent Gilmore a second EUO scheduling letter, requesting his appearance at an EUO scheduled for March 6, 2019 (*id.* ¶ 30). Gilmore failed to appear for this EUO also (*id.* ¶ 31). Within 30 days of Gilmore's last EUO non-appearance, Nationwide denied all relevant claims (*id.* ¶ 32).

In accordance with the no-fault regulations, on March 22, 2019, less than 30 days after Gilmore's second missed EUO, Nationwide denied the claims submitted on Gilmore's behalf (*id.* ¶ 37). By failing to appear for the EUOs, Nationwide contends that Gilmore breached a material condition precedent to coverage under the applicable insurance policy and no-fault regulations, thereby negating Nationwide's obligations to honor any bills submitted by Longevity for reimbursement (*id.* ¶¶ 43, 55).

Nationwide also contends that it had, and continues to have, a reasonable basis to request Gilmore's EUO to determine whether he is eligible to collect no-fault benefits pursuant to 11 NYCRR § 65-3.16 (a) (12) and Insurance Law § 3102 (a) (1) (*id.* ¶ 21). Nationwide contends further that, due to the suspicious circumstances surrounding the incident, as revealed by Nationwide's preliminary investigation, and the excessive treatment Gilmore received, Nationwide sought to further verify the circumstances of the incident, and obtain information concerning medical treatment that Gilmore allegedly received and the injuries that he allegedly sustained (*id.* ¶ 24). Inexplicably, Gilmore failed or refused to appear for the EUO twice requested by Nationwide (*id.* ¶ 26).

Nationwide argues that it has demonstrated its entitlement to a declaration that Gilmore is not entitled to no-fault benefits by submitting sufficient proof of mailing correspondence to him regarding the scheduling of EUOs on multiple occasions and his failure to appear.

Regarding the mailing of the EUO notices, Nationwide asserts that Allan S. Hollander, Esq.'s affidavit sets forth that the notices were mailed and it describes "the standard practices and procedures" for the mailing of the EUO scheduling letters, thereby creating the presumption of receipt. Mr. Hollander, counsel for Nationwide, represented that he personally verified the mailing process for every EUO letter sent (*id.* ¶ 61). Nationwide alleges further that it mailed the notices

to Gilmore's correct address, and to his attorney by first class mail, given that those addresses were listed on the prescribed NF-2 form and the letters of representation Nationwide received on Gilmore's behalf (*id.* ¶ 62).

Regarding Gilmore's failure to appear for the EUO, Nationwide maintains that it demonstrated Gilmore's non-appearance through the affidavits of Mr. Hollander, who indicated that he was present on the dates of the scheduled EUOs, and he would have conducted the examination had the witness appeared (*id.* ¶ 63).

Nationwide contends that it is entitled to summary judgment because Gilmore failed to meet a material condition precedent to coverage by failing to meet a material condition precedent to the applicable policy of insurance and the no-fault regulations.

In opposition, Longevity argues that Nationwide failed to (1) request a timely and proper verification request in the form of an EUO within 15 days of receipt of the claim forms or the NF-2 form or a follow-up request within 10 days of the alleged EUO no-show; (2) demonstrate by admissible evidence, when, if ever, Nationwide received Longevity's claims so as to demonstrate that Nationwide issued timely denials or timely requests for EUOs as mandated by the no-fault regulations; and (3) demonstrate that it followed the applicable time frames in the no-fault regulations for requesting EUOs, because it did not identify when it received Longevity's claims.

Longevity also argues that (1) the motion is premature, because there has not been adequate discovery and (2) Nationwide did not possess a justification for requesting the EUOs in the first instance, and, therefore, it is attempting to fabricate an after-the-fact justification for the EUO requests.

Discussion

The court grants Nationwide’s motion. Nationwide established that Longevity is not entitled to no-fault benefits because its assignor, Gilmore, failed to appear at the scheduled EUOs (*Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014]). As an assignee of all the rights and remedies to which Gilmore was entitled under the no-fault law, Longevity “stood in the shoes” of Gilmore, and “acquired no greater rights than he had” (*New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 592 [2011]).

“New York’s no-fault automobile insurance system is designed ‘to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists’” (*Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 317 [2007] [internal citation omitted]). “These regulations require an accident victim to submit a notice of claim to the insurer as soon as practicable and no later than 30 days after an accident (*see* 11 NYCRR 65-1.1, 65-2.4 [b])” (*id.*).

Pursuant to the statutory and regulatory framework governing the payment of no-fault benefits, insurance companies “must pay or deny the claim within 30 calendar days after receipt of the proof of claim” (*Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 563 [2008]). However, “[a]n insurer is not obligated to pay or deny a claim until it has received verification of all relevant information requested” (*St. Vincent’s Hosp. of Richmond v American Tr. Ins. Co.*, 299 AD2d 338, 340 [2d Dept 2002]).

“[T]he injured party or the assignee ... must submit proof of claim for medical treatment no later than 45 days after services are rendered (*see* 11 NYCRR 65-1.1, 65-2.4 [c])” (*Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d at 563 [internal quotation marks and citation

omitted)). “Upon receipt of one or more of the prescribed verification forms used to establish proof of claim, ... an insurer has 15 business days within which to request ‘any additional verification required by the insurer to establish proof of claim’ (11 NYCRR 65-3.5 [b])” (*id.* [internal quotation marks and citation omitted]).

The 30-day period in which to pay or deny a claim is extended where the insurer makes a request for additional verification within the requisite 15-day time period. Thus, a timely additional verification request tolls the insurer’s time within which to pay or deny a claim” (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 17-18 [2d Dept 2009] [internal citations omitted]).

Longevity does not controvert Nationwide’s assertions that (1) within 30 days of receiving the NF-2, a proscribed verification form, and within 15 days of receiving claims and bills from Longevity, by correspondence dated January 14, 2019, Nationwide requested that Gilmore appear for an EUO on February 12, 2019, with respect to claims brought under claim number 250499-GI, and (2) the letter was sent to Gilmore, by first-class mail to his address, 249 Thomas S. Boyland Street, Apt. 10N, Brooklyn, New York 11233, and to Gilmore’s counsel, The Law Offices of Barry Richard Feldman, LLC at 1413 Avenue J, 3rd Floor, Brooklyn, New York 11230. The “failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent, vitiating coverage” (*Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]).

Nationwide established, as a matter of law, that it twice duly demanded an EUO from Gilmore, Longevity’s assignor, who had allegedly been injured in a motor vehicle accident, that Gilmore twice failed to appear, and that Nationwide issued a timely denial of the claims arising from Longevity’s treatment of Gilmore. Based upon the foregoing, Nationwide established its

prima facie entitlement to judgment as a matter of law. In opposition, Longevity failed to raise a triable issue of fact as to either the propriety of the demand for the EUO or whether Gilmore actually appeared at the twice scheduled EUO (*Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014]).

Regarding Longevity's argument that Nationwide did not possess a justification for requesting the EUO in the first instance, Nationwide "did not need to set forth the objective reasons for the requested EUOs as part of its prima facie showing of entitlement to judgment as a matter of law" (*Barakat Med. Care, P.C. v Nationwide Ins. Co.*, 49 Misc 3d 147(A), 2015 NY Slip Op 51677(U), *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

Nevertheless, Nationwide provided the following persuasive reasons for requesting Gilmore's EUO: (1) police officers were not called to the scene of the incident and a police accident report was not filed on the date of the motor vehicle loss; (2) Thurman Ramsay, an alleged passenger in Gilmore's vehicle at the time of the alleged incident, purportedly filed a motor vehicle accident report on November 30, 2018, several days after the incident of November 26, 2018; (3) a second vehicle allegedly involved in the November 26, 2018 incident purportedly fled the scene; Mr. Ramsay, however, prepared a motor vehicle accident report dated November 30, 2018 containing information of the second vehicle, including the driver's name and the driver's New York State driver's license number; (4) despite not being taken to a hospital or emergency room immediately following the alleged incident of November 26, 2018, Gilmore received substantial medical treatment from the Healthcare Provider Defendants; (5) Nationwide's preliminary investigation revealed that Gilmore is associated with two different social security numbers; and (6) the passenger in Gilmore's vehicle is not related to Gilmore, thereby prompting Nationwide to

suspect that the insured's vehicle may have been being used as a livery vehicle. None of these assertions are controverted.

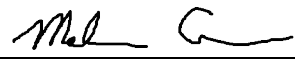
Longevity's contention that the motion should be denied as premature on the ground that discovery was not yet complete lacks merit. "A party who claims ignorance of critical facts to defeat a motion for summary judgment must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue" (*New Way Med. Supply Corp. v State Farm Mut. Auto. Ins. Co.*, 64 Misc 3d 136(A), 2019 NY Slip Op 51158(U), *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019] [internal quotation marks and citations omitted]). Longevity argues that the reason for the EUO request is a necessary fact that is essential to justify opposition to Nationwide's summary judgment motion. However, as discussed above, Nationwide had a reasonable basis to request an EUO.

The same is true for the assertion that additional discovery is warranted, because Nationwide is the entity that possesses all of the information relating to the EUO defense, in that it was Nationwide that scheduled the EUOs. Longevity contends that there have been no examinations before trial of the claim representative that allegedly handled the file or the mail room supervisor who is allegedly familiar with Nationwide's mailing practices and procedures. This assertion is unconvincing in that the record contains ample evidence supporting Nationwide as to this issue (*see e.g.* affidavit of Jessica Rodriguez, "Claims Specialist I," sworn to February 11, 2020; affidavits of Allan S. Hollander, Esq., sworn to February 10, 2020 and February 11, 2020).

Accordingly, it is

ORDERED that the motion by Nationwide Affinity Insurance Company is granted; and it is further

ADJUDGED and DECLARED that defendant Longevity Medical Supply, Inc. is not entitled to no-fault coverage from plaintiff Nationwide Affinity Insurance Company for the motor vehicle accident that occurred on November 26, 2018.

<u>10/26/2020</u> DATE		 MELISSA ANNE CRANE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE