Country-Wide Ins. Co. v Gordon

2020 NY Slip Op 33680(U)

November 4, 2020

Supreme Court, New York County

Docket Number: 655755/2018

Judge: Nancy M. Bannon

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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. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

KANADO GORDON, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION D/B/A LINCOLN HOSPITAL, CITIMEDICAL I, PLLC,WELLMART RX, INC.,SOUTHERN BLVD CHIROPRACTIC P.C.,SMART CHOICE MEDICAL P.C.,PREFERRED MEDICAL, P.C.,MYRTLE DME NYC INC, PYRAMID CARE PT, P.C.,SJ ACUPUNCTURE P.C.,SP ONE SERVICES, INC.,METRO PAIN SPECIALISTS PROFESSIONAL CORPORATION

Defendants.

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INDEX NO. 655755/2018

MOTION DATE 10/27/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

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

In this declaratory judgment action, the plaintiff moves for summary judgment pursuant to CPLR 3212 against answering defendants Citimedical I PLLC and New York City Health and Hospitals Corporation d/b/a Lincoln Hospital. The plaintiff seeks a declaration that that it is not obligated to pay no-fault benefits to it to reimburse the defendants for claims made under insurance policy number PS941399017, claim number 3366418-001, for treatment rendered or medical equipment provided to the individual defendant, Kanado Gordon, for injuries allegedly sustained in an auto accident on May 10, 2018 on the grounds that Gordon failed to appear for duly scheduled Examinations Under Oath (EUOs). Defendant Citimedical I PLLC opposes the motion. The motion is granted.

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see

Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

The court granted a previous motion of the plaintiff pursuant to CPLR 3215 seeking leave to enter a default judgment against the non-answering defendants Kanado Gordon, Wellmart Rx Inc., Southern Blvd Chiropractic PC, Smart Choice Medical PC, Preferred Medical PC, Myrtle Dme NYC Inc., Pyramid Care PT PC, SJ Acupuncture PC, SP One Services Inc., and Metro Pain Specialists Professional Corporation (MOT SEQ 001). In the prior order, the court found that the plaintiff's submissions established, *prima facie*, that it timely mailed the individual defendant a notice for an EUO, and that the individual defendant failed to appear for the duly scheduled EUO or an additional EUO that was timely rescheduled, and therefore the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept 2017); Unitrin Advantage Insurance Company v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept 2011). The plaintiff now moves for summary judgment against Citimedical I PLLC and New York City Health and Hospitals Corporation d/b/a Lincoln Hospital seeking the same relief and provides the same submissions.

Since the plaintiff's submissions are in admissible form, they are also sufficient to establish the plaintiff's entitlement to summary judgment. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra. They establish that the individual defendant failed to appear for duly scheduled EUOs, thereby vitiating his coverage. Specifically, the plaintiff submits, *inter alia*, at least eight NF-3 claims forms from the health care defendants marked received from June 28, 2018 through July 11, 2018 and its first EUO notice dated July 11, 2018, timely scheduling an EUO for August 2, 2018. The plaintiff further submits the affidavit of Jessica Mena-Sibrian, a no-fault litigation supervisor and former claims examiner for the plaintiff, averring that based upon her personal knowledge of the plaintiff's mailing practice and procedure the EUO notices and claims denials were properly mailed the same day that they are generated, the affidavit of Annie Persaud, the administrative assistant for the plaintiff who prepares and mails the plaintiff's EUO notices, further averring that the EUO notices and claims

denials were properly mailed, and the two statements on the record made after Gordon failed to appear for the EUOs.

Having failed to oppose the motion, defendant New York City Health and Hospitals Corporation d/b/a Lincoln Hospital fails to raise a triable issue of fact.

In its opposition, defendant Citimedical I PLLC's argues i) that the plaintiff's submissions are insufficient to demonstrate timely mailing of the EUO notices to Gordon or the denial of claims forms, ii) that the plaintiff's demand for an EUO was unreasonable, and iii) that the plaintiff failed to demonstrate deliberate non-cooperation by Gordon as required under Julius Thrasher v Unites States Liability Insurance Company, 19, NY2d 159 (1967). These arguments are without merit.

The affidavit of Annie Persaud is sufficient to establish a rebuttable presumption of proper mailing. Timely mailing can be established by an affidavit from an employee with knowledge of the party's standard office practices and procedures designed to ensure the items were properly addressed and timely mailed. See Am. Transit Ins. Co. v Lucas, 111 AD3d 423 (1st Dept. 2013). Once a party has submitted proof in admissible, evidentiary form establishing mailing through either of the aforementioned methods, conclusory denial of receipt is insufficient to raise triable issues of fact regarding the mailing. See Darlington Med. Diagnostics, P.C. v Praetorian Ins. Co., 32 Misc. 3d 142(A) (1st Dept. 2011). Rather, to raise a triable issue of fact, a party must sufficiently demonstrate that that the routine office practice was not followed in this instance or that the scheduling letters were never mailed. See Nassau Ins. Co. v Murray, 46 NY2d 828 (1978). Here, Citimedical I PLLC fails to make any such allegations regarding the plaintiff's mailing practices that would raise a triable issue of fact.

Furthermore, the plaintiff's demand for an EUO was reasonable. The affidavit of Jessica Mena-Sibrian avers that the EUO was scheduled in response to a particularly extensive lost earnings claim resulting from a minor-collision with minimal property damage to the vehicles, and that the police report indicated that nobody involved in the accident sustained any injury and that medical treatment at the scene was refused. Citimedical I PLLC's claim that the EUO demands were unreasonable is wholly conclusory and unsupported by any factual allegations.

Moreover, as correctly noted by the plaintiff, under Unitrin Advantage Insurance Company v Bayshore Physical Therapy, PLLC, supra, the Appellate Division, First Department rejected any contention that the doctrine of willfulness, as addressed in Julius Thrasher v Unites States Liability Insurance Company, supra, applied in the context of no-fault insurance claims, instead finding that it only applies in the context of liability policies.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted in its entirety; and it is further,

ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to answering defendants Citimedical I PLLC and New York City Health and Hospitals Corporation d/b/a Lincoln Hospital, to reimburse them for claims made under insurance policy number PS941399017, claim number 3366418-001, for treatment they rendered or medical equipment they provided to the individual defendant for injuries that he allegedly sustained in the motor vehicle accident on May 10, 2018; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of this order; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/4/2020
DATE

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**