

Country-Wide Ins. Co. v Williams

2020 NY Slip Op 34132(U)

December 9, 2020

Supreme Court, New York County

Docket Number: 651788/2018

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**

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|---------------------------------|-----------------------------|------------------------|---------------------|
| PRESENT: | <u>HON. ARLENE P. BLUTH</u> | PART | IAS MOTION14 |
| | <i>Justice</i> | | |
| -----X | | INDEX NO. | <u>651788/2018</u> |
| COUNTRY-WIDE INSURANCE COMPANY, | | MOTION DATE | <u>12/07/2020</u> |
| Plaintiff, | | MOTION SEQ. NO. | <u>003</u> |

- v -

VERNON WILLIAMS, LENOX HILL RADIOLOGY AND
MEDICAL IMAGING ASSOCIATES, P.C.,ALEXANDRU
BURDUCEA, D.O., CITY MEDICAL OF UPPER EAST SIDE
PLLC,ROBERT C. REISS DC PLLC,CARLOS VARGAS,
BROOKLYN SPINE AND JOINT CHIROPRACTIC,
PHYSICAL THERAPY REHAB AND ACUPUNCTURE PLLC
D/B/A BROOKLYN SPINE AND JOINT CHIROPRACTIC,
GOLDSTEP AMBULATORY SURGERY CENTER, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

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

The motion for summary judgment by plaintiff is denied.

Background

Plaintiff moves for summary judgment and an order declaring that defendant Williams is not eligible for no fault benefits arising out of a July 10, 2017 accident because he did not appear for EUOs.

In opposition, defendant Williams claims that he never received the notices about the EUOs. Williams explains that from October 2017 to May 2018, he was not receiving mail as he normally would and he went to a local post office to investigate. Williams claims that he was told that information had been passed to the USPS that he was no longer living in the apartment (an apartment he has lived in with his wife since 2015). Williams also attaches a letter

apparently from the USPS (although the letter is not notarized and there are no dates mentioned) that confirms there was some issue with Williams receiving his mail (NYSCEF Doc. No. 84). He attaches an affidavit from his landlord who affirms that there was an issue with the mail (NYSCEF Doc. No. 83) although the basis for her knowledge is unclear. Williams also complains about service of the summons and complaint but he did not move to dismiss on this ground within 60 days so this point is moot.

In reply, plaintiff claims that Williams failed to rebut the presumption of the EUO mailing and insists that it properly mailed the EUO notices.

Discussion

The Court finds that there is an issue of fact as to whether defendant Williams received the EUO notices and, consequently, whether he ever had an opportunity to honor his obligation and show up for the EUOs. Plaintiff is correct that Williams' affidavit is not perfect. But it clearly states Williams' assertion that he did not receive the EUO notices because of a problem with the USPS during the time in which the EUO notices were sent. This is not a case where an injured defendant offers a conclusory denial of service. Here, Williams raises a legitimate question as to whether he received the EUO notices and, of course, the entire basis for plaintiff's motion is that he is not entitled to any benefits because he failed to show up for the EUOs. A jury could find that Williams did not receive the EUO notices and, therefore, did not violate the policy provisions of plaintiff's policy.

Moreover, as Williams points out, there have not been any depositions in this case. Discovery might reveal more about the exact nature of the mail problem at Williams' apartment and whether he was receiving mail at the time the EUO notices were purportedly sent.

The Court notes that plaintiff's affidavits in support of the motion, particularly NYSCEF Docs.73 and 74, are not perfect, either. And the defects are not addressed in reply. These affidavits go into great detail about plaintiff's mailing procedure. However, each affidavit is too boilerplate and neither is tailored enough to this particular case. This is possibly because they are basically the same affidavits that were used when plaintiff moved for a default judgment, before plaintiff became aware of defendant's claimed trouble with his mail.

For example, the affidavits state that the EUO notices were not returned by the post office. Considering that plaintiff now knows, from prior motion practice, about defendant's claimed mail troubles, plaintiff could have produced their records for the two EUO mailings to show how they know that these were never returned by the post office. Even more troubling is that both affidavits say that a mailing went to the attorney, if the party was represented. Was it really too difficult to look at the records for this file and state affirmatively whether the defendant was represented and give the information of that mailing? Or to say that there was no attorney on file and so no mailing was made to any attorney? Again, this may be a problem associated with reusing affidavits, but considering defendant's claims, plaintiff should have addressed the EUO mailings in detail and with proof. Instead, plaintiff ignored defendant's position – that he never had a chance to attend the EUO because he wasn't getting his mail – and robotically sent boilerplate mailing affidavits.

Summary

The Court recognizes that some of the evidence adduced by Williams in opposition is hearsay. But hearsay evidence can be used in connection with a motion for summary judgment as long as it is not the only evidence submitted in opposition (*Fountain v Ferrara*, 118 AD3d

416, 416, 987 NYS2d 55 [1st Dept 2014]). The fact is that Williams claims he had problems receiving mail during the time period in which the EUO notices were sent, did not receive the EUO notices and details a story about an actual problem with the USPS. He got an affidavit from his landlord and even got a letter from a post office employee. This raises an issue of fact about whether he received the notices and whether he was deprived of the opportunity of attending the EUO. This compels the Court to deny the motion. Williams' opposition did not need to affirmatively establish that he did not receive the EUO notices; rather, he only had to raise an issue of fact about it. And he has done so here. And plaintiff's affidavits did not address Williams' claims at all and relied on boilerplate affidavits.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied.

Remote Preliminary Conference: March 16, 2021.

12/9/2020
DATE


ARLENE P. BLUTH, J.S.C.

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