Country-Wide Ins. Co. v Jules
2021 NY Slip Op 30376(U)
February 8, 2021
Supreme Court, New York County
Docket Number: 656394/2019
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

JULES, LISA E

Defendant.

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INDEX NO. 656394/2019

MOTION DATE 12/12/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

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

Upon the foregoing documents, it is

Plaintiff Country-Wide Insurance Company of America moves, pursuant to CPLR 3215, for a default judgment against defendants Lisa E Jules (Jules), Radwa Physical Therapy P.C., Metropolitan Medical & Surgical P.C., NYS Acupuncture P.C., Sherman Abrams Laboratory Inc, Lida's Medical Supply Inc. (Lida's), Healthwise Medical Associates P.C. (Healthwise), North Flushing Primary Medical Care P.C., Integrated Chiropractic of NY P.C. (Integrated), M & D Elite Pharmacy, LLC, CMA Psychology, P.C., Burke Physical Therapy, P.C. (Burke), Vertebrae Chiropractic Care, P.C., Azcare Inc., and Lyons Medical P.C. for failing to appear and answer the complaint, thus breaching a condition precedent to the relevant policy of insurance.

Defendants Lida's, Healthwise, Integrated, and Burke (collectively, Provider Defendants) cross-move, pursuant to CPLR 5015 (a) (1), vacating their default in this action, and, upon vacatur, for an Order, pursuant to CPLR 3012 (d), granting them an extension of time to appear and plead in this matter, and to compel plaintiff to accept their answer.

The complaint alleges that plaintiff provided a policy of insurance to its "insured" under New York policy of insurance number PS 9408985 17 (Policy). Presumably, the "insured" is Jules, also referred to in the complaint as the "Eligible Injured Party Defendant." The complaint alleges further that the Policy was in effect from May 26, 2017 through May 26, 2018, and that, on April 1, 2018, Jules was involved in a motor vehicle accident. Thereupon, Jules made claims to plaintiff as an "alleged eligible injured party" under the Policy under claim number 000335561-001. Each of the defendants made claims to plaintiff as assignees of Jules under the Policy.

The complaint contains two causes of action. The first seeks a declaration that plaintiff owes no duty to defendants to pay any no-fault claims pertaining to the alleged April 1, 2018 accident referenced in the complaint. The second cause of action seeks an order permanently staying all no-fault lawsuits and arbitrations arising from any no-fault claims submitted to plaintiff in connection with the April 1, 2018 accident.

Plaintiff argues that it has established entitlement to a judgment, declaring that it owes no duty to pay no-fault claims submitted to it by defendants, because Jules failed to appear for the independent medical examination (IME) requested by plaintiff to verify her claims. Specifically, on February 15, 2019, in accordance with New York State Insurance Regulations, and pursuant to the terms of the Policy, plaintiff requested that Jules appear at an IME on February 28, 2019. Jules failed to attend the scheduled IME. The IME was rescheduled for March 21, 2019. Again, Jules failed to appear for the IME. On March 25, 2019, plaintiff issued a general denial.

As a preliminary matter, the cross motion by the Provider Defendants vacating their default, and, upon vacatur, for an Order, pursuant to CPLR 3012 (d), granting them an extension of time to appear and plead in this matter, and compelling plaintiff to accept their answer, is granted. The complaint was filed on October 30, 2019, and the Provider Defendants filed their

answer on December 18, 2019, which plaintiff rejected as untimely. The Provider Defendants contend that the delay in answering was due, in part, to the service upon them through the Secretary of State and law office failure. "Significantly, there was no showing of willfulness, nor did plaintiff demonstrate any prejudice from the delay, and there is a strong public policy in favor of resolving cases on the merits" (*Epstein Becker & Green, P.C. v Samson Mgt. LLC*, 188 AD3d 454 [1st Dept 2020] ["Defendants offered a reasonable excuse for their six-month delay in filing an answer—failure to receive, or misplacement of the papers delivered to the New York State Secretary of State—which was sufficient under the facts of this case"]). "Because no default judgment had yet been entered, defendants were not required to demonstrate a meritorious defense" (*id.*).

As for the merits, "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.*).

"Next, the 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])" (*id.*). "Upon receipt of one or more of the prescribed verification forms used to establish proof of claim, such as the NYS Form NF-5, 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.*).

"Significantly, an insurance company must pay or deny the claim within 30 calendar days after receipt of the proof of claim (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-3.8 [c]). If an

insurer seeks additional verification, however, the 30-day window is tolled until it receives the relevant information requested (*see* 11 NYCRR 65-3.8 [a] [1])" (*id.*).

Here, plaintiff "failed to supply sufficient evidence to enable the court to determine whether the notices it had served on the injury claimants ... were subject to the timeliness requirements of 11 NYCRR 65-3.5 (b) and 11 NYCRR 65-3.6 (b) ... and, if so, whether the notices had been served in conformity with those requirements" (*Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.,* 147 AD3d 437, 438 [1st Dept 2017]). Although the instant matter involves the failure to appear at IMEs, and not Examinations Under Oath (EUOs), the relevant no-fault rules are equally applicable (*see Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014] ["Although the instant case involves the failure to appear at EUOs, and not IMEs, this Court's holding in *Unitrin* applies to EUOs"]).

In *Unitrin Advantage Ins. Co. v All of NY, Inc.*, 158 AD3d 449 [1st Dept 2018]), the Court held that "[a]lthough 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, Unitrin was still required to provide sufficient evidence to enable the court to determine whether the notices it served on Dr. Dowd for the EUOs satisfied the timeliness requirements of 11 NYCRR 65–3.5 (b) and 11 NYCRR 65–3.6 (b)" (*id.* at 449).

Here, plaintiff failed to meet its burden of filing "proof of the facts constituting the claim," i.e., proof establishing that the notices that it served on defendants complied with the timeliness requirements of 11 NYCRR 65–3.5 (b) (*see Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 617 [1st Dept 2018] [the motion papers did not provide the dates of the prescribed verification forms or other proofs of claim submitted by the medical provider defendants]).

As it relates to timeliness, the factual allegations are of a motor vehicle accident occurring on April 1, 2018; Jules' no-fault claim form dated April 20, 2018; and first class letters sent on February 15, 2019 and March 8, 2019, scheduling IMEs for plaintiff on February 28, 2019 and March 21, 2019, respectively (*see* aff of Anita Megnauth, sworn to August 25, 2020, NYSCEF Doc No. 36). Plaintiff states further that it received the following bills: (1) from NYS Acupuncture P.C. on January 24, 2019, February 11, 2019, and February 12, 2019, for dates of service between December 17, 2018 and January 16, 2019; (2) from Radwa Physical Therapy P.C. on January 31, 2019, for dates of service between December 18, 2018 and January 10, 2019; and (3) from Integrated on January 17, 2019 and January 31, 2019, for dates of service from November 14, 2018 to January 4, 2019 (*see* aff of Jessica Mena-Sibrian, sworn to July 14, 2020, NYSCEF Doc No. 34). "Admissible evidence may include affidavits by persons having knowledge of the facts [and] reciting the material facts" (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.,* 25 NY3d 498, 508 [2015]) [internal quotation marks and citation omitted]).

Notwithstanding the foregoing, plaintiff's papers in support of its motion do not permit the court to resolve the timeliness issues as to the scheduled IMEs. In *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC* (82 AD3d 559, 561 [1st Dept 2011], the First Department ruled that "[p]laintiff satisfied its prima facie burden on summary judgment of establishing that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that defendants' assignors did not appear" (*id.* at 560). Such is not the case here. The assertion by plaintiff that the IMEs were scheduled within a reasonable time frame is conclusory. The no-fault regulations provide specific time frames in which an insurer must schedule an IME, and a "reasonable time frame" is not one of them (*see e.g.* 11 NYCRR 65-3.5 & 65-3.6); *see also American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 842

[1st Dept 2015] ["plaintiff was required to submit proof of the timely notice in order to make a prima facie showing of entitlement to judgment as a matter of law"]).

Accordingly, it is

ORDERED that the motion by plaintiff Country-Wide Insurance Company is denied; and it is further

ORDERED that the cross motion by Lida's Medical Supply Inc., Healthwise Medical Associates P.C., Integrated Chiropractic of NY P.C., and Burke Physical Therapy, P.C. is granted, and plaintiff is directed to accept service of the answer of the cross movants; and it is further

ORDERED THAT the parties are to appear for a conference, via Microsoft teams, on March 9, 2021 at 9:30 am.

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2/8/2021
DATE

MELISSA ANNE CRANE, J.S.C.

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