

<b>Country-Wide Ins. Co. v Caesar</b>
2021 NY Slip Op 31049(U)
March 30, 2021
Supreme Court, New York County
Docket Number: 654316/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

RODNEY CAESAR, BETH ISRAEL MEDICAL CENTER, DAMADIAN MRI IN CANARSIE, P.C., LONGEVITY MEDICAL SUPPLY, INC., JULES F. PARISIEN, M.D., HAMZA PHYSICAL THERAPY PLLC, MASTER CHENG ACUPUNCTURE P.C., RALPH INNOVATIVE MEDICAL P.C., SAME DAY PROCEDURES, LLC, BRONX CHIROPRACTIC REHABILITATION P.C., MANHATTAN'S HANDS OF HOPE P.T., P.C., PSYCHOLOGY AFTER ACCIDENT P.C., SOOD MEDICAL PRACTICE, LLC F/K/A INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY, LLC, SPINE CARE OF NJ, P.C., LEOMAX SUPPLIES INC., MMA PHYSICAL THERAPY, P.C., BS KINGS COUNTY MEDICAL P.C., RKD RX CORP. D/B/A RKD PHARMACY, GALMAR DIAGNOSTIC MEDICAL, P.C., MID-STATE ANESTHESIA CONSULTANTS LLC

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment as against medical provider defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. is granted.

Background

Prior to July 22, 2017, plaintiff, Country-Wide Insurance Company issued an insurance policy (number BS 7715175 17) that was in effect from July 22, 2017 to April 27, 2018. On February 5, 2018, the claimant-defendant, Rodney Caesar, was allegedly injured in a motor vehicle accident and submitted a claim (number 000334119-001) to plaintiff as an alleged eligible injured person under the aforementioned insurance policy. The claimant-defendant sought medical treatment and/or supplies for injuries allegedly arising out of the subject alleged accident from the medical provider defendants, namely, Beth Israel Medical Center; Damadian MRI in

Canarsie, P.C.; Master Cheng Acupuncture P.C.; Ralph Innovative Medical P.C.; Same Day Procedures, LLC; Psychology After Accident P.C.; Sood Medical Practice, LLC F/K/A Interventional Pain Consultants of North Jersey, LLC; Spine Care of NJ, P.C.; BS Kings County Medical P.C.; RKD Rx Corp. D/B/A RKD Pharmacy; Galmar Diagnostic Medical, P.C.; Mid-State Anesthesia Consultants LLC; Manhattan Hands of Hope P.T., P.C.; Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. The claimant-defendant assigned his right to collect No-Fault benefits under the subject insurance policy to the medical provider defendants, who then submitted claims for reimbursement to plaintiff. On April 19 and May 3, 2018, the claimant-defendant failed to appear for a scheduled and rescheduled Examination Under Oath (“EUO”), thereby breaching a condition of the subject insurance policy. Thus, plaintiff disclaimed coverage. (NYSCEF Doc. 1.)

On August 29, 2018, plaintiff commenced the instant action, seeking a judgment against defendants (1) declaring that plaintiff owes no duty to defendants to pay No-Fault claims that defendants submitted arising out of the subject alleged accident; (2) permanently staying all No-Fault lawsuits and arbitrations arising from No-Fault claims that defendants submitted arising out of the subject alleged accident; and (3) awarding costs, disbursements, and attorney’s fees to plaintiff (NYSCEF Doc. 1, at 15).

On October 12, 2018, medical provider defendants Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. jointly answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 23).

Pursuant to a stipulation dated April 11, 2019, plaintiff discontinued the instant action as against medical provider defendant Manhattan Hands of Hope P.T., P.C., only (NYSCEF Doc. 24).

By Decision and Order (Seq. No. 001) dated October 22, 2019, this Court granted plaintiff’s motion for a default judgment as against the claimant-defendant and medical provider defendants Beth Israel Medical Center; Damadian MRI in Canarsie, P.C.; Master Cheng Acupuncture P.C.; Ralph Innovative Medical P.C.; Same Day Procedures, LLC; Psychology After Accident P.C.; Sood Medical Practice, LLC F/K/A Interventional Pain Consultants of North Jersey, LLC; Spine Care of NJ, P.C.; BS Kings County Medical P.C.; RKD Rx Corp. D/B/A RKD Pharmacy; Galmar Diagnostic Medical, P.C.; and Mid-State Anesthesia Consultants LLC. That Decision and Order also (1) declared that plaintiff is not obligated to pay No-Fault benefits for any claims that the aforementioned defendants submitted to plaintiff, arising out of the subject alleged accident; and (2) stayed all of defendants’ No-Fault lawsuits and arbitrations arising out of the subject alleged accident. (NYSCEF Doc. 43.)

Plaintiff now moves (Seq. No. 002), pursuant to CPLR 3212, for summary judgment as against medical provider defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. for the relief requested in the subject pleadings on the ground that the claimant-defendant failed to appear on either date for an EUO, thereby breaching plaintiff’s subject insurance policy (NYSCEF Doc. 47).

Medical provider defendants Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. jointly oppose the instant motion (Seq. No. 002). They assert, inter alia, the following: (1) plaintiff has failed to comply with the 11 NYCRR 65-3.8 timeline(s) for paying a claim and/or issuing a denial; (2) the instant motion for summary judgment is premature, as there has not been sufficient time for discovery; and (3) plaintiff has failed to demonstrate the merits of the alleged defense arising from the claimant-defendant's alleged failure to appear at his EUO. (NYSCEF Doc. 64.)

In reply, plaintiff cites to Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1<sup>st</sup> Dept. 2011), and asserts, inter alia, the following: (1) even if proof of the subject EUO notification was insufficient, the Applicant or its counsel had a duty to communicate with the subject insurer about the EUO request; (2) plaintiff had a right to deny claims retroactively when the claimant-defendant failed to appear for the subject EUO, regardless of whether or not plaintiff issued the subject denial(s) timely; and (3) the claimant-defendant waived any objection to the EUO (NYSCEF Doc. 77).

#### Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1<sup>st</sup> Dept. 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

This Court is convinced that plaintiff has made out a prima facie case for summary judgment as against medical provider defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C., including by submitting affidavits of fact by individuals with personal knowledge detailing plaintiff's attempts to notify the claimant-defendant about the scheduled and rescheduled EUO and by submitting proof that the claimant-defendant failed to appear at least twice. Medical provider defendants Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. have submitted boilerplate arguments that plaintiff has failed to provide sufficient detail of these efforts at notifying the claimant-defendant and documenting the claimant-defendant's failure to appear. A common-sense view of plaintiff's statements demonstrates that they are more than sufficient. The judicial system of the State of New York could not survive if it had to conduct trials to determine who worked in plaintiff's mailroom on a given day and what route he or she took through the office to place the appropriate mailings in an outbox to the United States Postal Service. Nor can anyone expect plaintiffs to record the entrance doorway of the doctor's office on the days in question and to use facial recognition software to determine who entered the offices at the appointed times. Medical provider

defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C., for their part, apparently have failed to reach out to their own customer to determine whether or not the customer (the claimant-defendant) received the notices of the scheduled and rescheduled EUO and claims to have appeared for an EUO or has simply thumbed his nose at the notices or claims. Enough is enough.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion (Seq. No. 002), by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment against medical provider defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C., is hereby granted.

Accordingly, the Clerk is hereby directed to enter judgment (1) declaring that plaintiff owes no duty to medical provider defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. to pay No-Fault claim(s) (number 000334119-001), arising out of the alleged February 5, 2018 accident, that said defendants submitted to plaintiff under the subject insurance policy (number BS 7715175 17); (2) permanently staying all No-Fault lawsuits and arbitrations arising from No-Fault claim(s) (number 000334119-001), arising out of the alleged February 5, 2018 accident, that medical provider defendants Hamza Physical Therapy PLLC; Longevity Medical Supply, Inc.; Jules F. Parisien, M.D.; Bronx Chiropractic Rehabilitation P.C.; Leomax Supplies Inc.; and MMA Physical Therapy, P.C. submitted to plaintiff under the subject insurance policy (number BS 7715175 17); and (3) awarding costs and disbursements to plaintiff.

Plaintiff's claim that the events described herein have voided the subject insurance policy is hereby denied without prejudice. See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1<sup>st</sup> Dept. 2011).

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3/30/2021  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: