

American Tr. Ins. Co. v Cueto
2021 NY Slip Op 31050(U)
March 30, 2021
Supreme Court, New York County
Docket Number: 654850/2019
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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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

BRYAN CUETO, CITY WIDE HEALTH FACILITY INC, CP
MEDICAL DIAGNOSTIC SERVICES PC,DV
CHIROPRACTIC CARE PC,EAST 19 MEDICAL SUPPLY
CORP., FIVE PALMS ACUPUNCTURE PC,FRANK
SAUCHELLI, MD, HET MEDICAL PC,JOHN A NASRINPAY
PT, OUTREACH MANUAL PHYSICAL THERAPY, PC,PRO
EDGE CHIROPRACTIC PC,PSYCHOLOGY AFTER
ACCIDENT PC,SUPER SCRIPT PHARMACY

Defendant.

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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

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents and for the reasons set forth hereinbelow, the instant motion by plaintiff, American Transit Insurance Company, pursuant to CPLR 3212, for summary judgment is granted as against medical provider defendant East 19 Medical Supply Corp. and denied, solely as moot, as against medical provider defendant City Wide Health Facility Inc.

Background

On November 16, 2017, the claimant-defendant, Bryan Cueto, was allegedly injured in a motor vehicle accident and notified plaintiff, American Transit Insurance Company. The claimant-defendant sought medical services from the medical provider defendants, namely, City Wide Health Facility Inc; CP Medical Diagnostic Services PC; DV Chiropractic Care PC; East 19 Medical Supply Corp.; Five Palms Acupuncture PC; Frank Sauchelli, MD; HET Medical PC; John A. Nasrinpay PT; Outreach Manual Physical Therapy, PC; Pro Edge Chiropractic PC; Psychology After Accident PC; and Super Script Pharmacy. The claimant-defendant assigned his right to collect No-Fault benefits to the medical provider defendants, who, in their capacities as the claimant-defendant's assignees under plaintiff's subject insurance policy (number BC616822), submitted claims to plaintiff. On February 21 and March 14, 2018, the claimant-defendant failed to appear for a scheduled and rescheduled Independent Medical Examination ("IME") and, thus, violated a condition of the subject insurance policy. Thus, plaintiff disclaimed coverage. (NYSCEF Doc. 1.)

On August 19, 2019, plaintiff commenced the instant action against the claimant-defendant and the medical provider defendants, seeking a judgment (1) declaring that the claimant-defendant and the medical provider defendants are not entitled to No-Fault coverage under the subject insurance policy for claims arising out of the subject alleged accident, and (2) awarding costs and disbursements to plaintiff (NYSCEF Doc. 1, at 9).

On September 26, 2019 (e-filed on September 27, 2019), medical provider defendant City Wide Health Facility Inc. (“the answering defendant”) answered the instant complaint with various denials, twenty Affirmative Defenses, and a counterclaim (NYSCEF Doc. 25). On September 27, 2019, plaintiff replied to that counter-claim (NYSCEF Doc. 27).

On October 16, 2019, plaintiff moved, pursuant to CPLR 3215, for a declaratory judgment on default as against the claimant-defendant and all medical provider defendants except for the answering defendant (NYSCEF Doc. 28).

By stipulation dated November 1, 2019, plaintiff extended the time in which medical provider defendant East 19 Medical Supply Corp. could answer by thirty-days (i.e., to December 1, 2019) (NYSCEF Doc. 37).

By Decision and Order dated November 8, 2019 (and e-filed on November 12, 2019), this Court granted plaintiff’s motion for a declaratory judgment on default as against the claimant-defendant, and medical provider defendants CP Medical Diagnostic Services PC, DV Chiropractic Care PC, Five Palms Acupuncture PC, Frank Sauchelli, MD, HET Medical PC, John A. Nasrinpay PT, Outreach Manual Physical Therapy, PC, Pro Edge Chiropractic PC, Psychology After Accident PC, and Super Script Pharmacy. This Court also directed plaintiff and answering medical provider defendants City Wide Health Facility Inc., and East 19 Medical Supply Corp., “if appropriate,” to appear for a preliminary conference on December 10, 2019. (NYSCEF Doc. 38.)

On November 20, 2019, medical provider defendant East 19 Medical Supply Corp. answered with various admissions, denials, thirty-two Affirmative Defenses, and a counter-claim (NYSCEF Doc. 41).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in favor of plaintiff and against the remaining medical provider defendants, namely, City Wide Health Facility Inc. and East 19 Medical Supply Corp. (NYSCEF Doc. 47).

As here relevant, in opposition, medical provider defendant East 19 Medical Supply Corp. asserts, inter alia, the following: (1) the affidavits by employees of plaintiff’s third-party IME vendor and by physicians (about the subject IME) are inadmissible, as they lack captions and are dated two years prior to the date of the instant motion; (2) plaintiff has failed to establish that the subject IME letters were timely; (3) plaintiff has failed to establish that the claimant-defendant did not appear for the subject IME(s); and (4) plaintiff has failed to establish that it followed the proper mailing procedures for the subject IME correspondence. Medical provider defendant East 19 Medical Supply Corp. also asserts that plaintiff should not be permitted to cure the aforementioned defects in its reply papers. (NYSCEF Doc. 54.)

In reply, plaintiff cites to Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011), and asserts, inter alia, the following: (1) the medical provider defendants “stand in the shoes” of the claimant-defendant whom plaintiff previously determined does not have any rights to assign; (2) the Appellate Division, First Department has held that the insurance carrier may deny claims retroactively to the date of loss, regardless of the timeliness of claim denial(s); and (3) plaintiff submitted proofs in admissible form and from individuals with personal knowledge of the subject matter (NYSCEF Doc. 58).

Pursuant to a stipulation dated March 18, 2021, plaintiff discontinued the instant action, with prejudice, as against medical provider defendant City Wide Health Facility Inc., only (NYSCEF Doc. 60).

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 (1st 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 defendant East 19 Medical Supply Corp., 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 IME and by submitting proof that the claimant-defendant failed to appear at least twice. Medical provider defendant East 19 Medical Supply Corp. has 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 defendant East 19 Medical Supply Corp., for its part, apparently has failed to reach out to its own customer to see whether or not the customer (the claimant-defendant) received the notices of the scheduled and rescheduled IME and has simply thumbed its nose at the notices. Enough is enough.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion by plaintiff, American Transit Insurance Company, pursuant to CPLR 3212, for summary judgment is hereby granted as against

medical provider defendant East 19 Medical Supply Corp. and is hereby denied, solely as moot pursuant to the March 18, 2021 stipulation of discontinuance (NYSCEF Doc. 60), as against medical provider defendant City Wide Health Facility Inc. Accordingly, the Clerk is hereby directed to enter judgment declaring that there is no No-Fault coverage under plaintiff's subject insurance policy (number BC616822) for benefits that the claimant-defendant, Bryan Cueto, and medical provider defendant East 19 Medical Supply Corp claim arising out of the alleged November 16, 2017 motor vehicle accident.

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 (1st Dept. 2011).


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3/30/2021
DATE

ARTHUR F. ENGORON, 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"/>	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	<input type="checkbox"/>	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT
					REFERENCE