

Country-Wide Ins. Co. v St. Pierre
2021 NY Slip Op 31052(U)
April 1, 2021
Supreme Court, New York County
Docket Number: 655056/2018
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 -

PIDIER ST. PIERRE, ENGLINTON MEDICAL, P.C., NEW MILLENNIUM MEDICAL IMAGING, P.C., LENCO DIAGNOSTIC LABORATORIES, INC., ATLAS PHARMACY LLC, ARTHUR AVENUE MEDICAL SERVICES, P.C., MAZ CHIROPRACTIC, P.C., LIDA'S MEDICAL SUPPLY INC., RELIABLE CPM SURGICAL SUPPLIES INC., AMBULATORY SURGICAL CENTER OF ENGLEWOOD, ASCE ANESTHESIA PC, DURAMED LLC, FIRST HAND PHYSICAL THERAPY P.C., CUSTOM RX PHARMACY LLC, SANFORD CHIROPRACTIC, P.C., INTEGRATED CHIROPRACTIC OF NY P.C., TRAPEZIUS DIAGNOSTIC CHIROPRACTIC P.C., EXCELL CLINICAL LAB, ENGLEWOOD ORTHOPEDICS GROUP PC, JOHN NASRINPAY, NATURAL ACUPUNCTURE TOUCH P.C., QUANTUM REHAB, PHYSICAL THERAPY, P.C., BARRY SLOAN D.O.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 79, 80, 81, 82, 83, 84, 87, 87, 88, 90, 91, 92, 93, 94, 95

were read on this motion for

JUDGMENT - SUMMARY

Upon the foregoing documents and for the reasons set forth hereinbelow, (1) the instant cross-motion by certain medical provider defendants to amend their Answer to include medical provider defendant Ambulatory Surgical Center of Englewood as a party defendant is granted; and (2) the instant motion by plaintiff, Country-Wide Insurance Company, pursuant to CPLR 3212, for summary judgment against certain medical provider defendants is also granted.

Background

The Underlying Accident and Ensuing Claims

Plaintiff, Country-Wide Insurance Company, issued an insurance policy (number VS 963696617) that was in effect from July 17, 2017 to July 17, 2018. On October 22, 2017, the claimant-defendant, Pidier St. Pierre, was allegedly injured in a motor vehicle accident and submitted a claim to plaintiff as an alleged eligible injured party under the subject insurance

policy. The claimant-defendant sought medical treatment from the medical provider defendants, namely, Englington Medical PC; New Millennium Medical Imaging, P.C.; Lenco Diagnostic Laboratories, Inc.; Atlas Pharmacy LLC; Arthur Avenue Medical Services, P.C.; Maz Chiropractic, P.C.; Lida's Medical Supply Inc.; Reliable CPM Surgical Supplies Inc.; Ambulatory Surgical Center of Englewood; ASCE Anesthesia PC; Duramed LLC; First Hand Physical Therapy P.C.; Custom Rx Pharmacy LLC; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; Excell Clinical Lab; Englewood Orthopedics Group PC; John A. Nasrinpay; Natural Acupuncture Touch P.C.; Quantum Rehab Physical Therapy, P.C.; and Barry Sloan D.O. 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 the subject insurance policy, submitted claims for reimbursement to plaintiff. On January 18, February 16, and March 13, 2018, the claimant-defendant failed to appear for a scheduled and rescheduled Examination Under Oath ("EUO"), thereby breaching a condition of plaintiff's subject insurance policy. Thus, plaintiff disclaimed coverage. (NYSCEF Doc. 1.)

On October 11, 2018, plaintiff commenced the instant action against defendants, seeking a judgment (1) declaring that plaintiff owes no duty to defendants to pay No-Fault claims arising out of the subject alleged accident; (2) permanently staying all No-Fault lawsuits and arbitrations based on No-Fault claims arising out of the subject alleged accident that defendants submitted to plaintiff; and (3) awarding costs and disbursements to plaintiff (NYSCEF Doc. 1).

On November 29, 2018, medical provider defendants Maz Chiropractic, P.C.; Lida's Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; and John A. Nasrinpay jointly answered the instant complaint with various admissions, denials, and forty Affirmative Defenses (NYSCEF Doc. 24).

On November 30, 2018, medical provider defendants ASCE Anesthesia PC; Reliable CPM Surgical Supplies Inc.; and Englewood Orthopedics Group PC jointly answered the instant complaint with various admissions, denials, forty-three Affirmative Defenses, and a counter-claim (NYSCEF Doc. 25). On December 4, 2018, plaintiff replied to said counter-claim (NYSCEF Doc. 26).

The Prior Motion (Seq. No. 001)

On August 2, 2019, plaintiff moved, pursuant to CPLR 3215, for a default judgment as against the claimant-defendant and medical provider defendants Englington Medical PC; New Millennium Medical Imaging, P.C.; Lenco Diagnostic Laboratories, Inc.; Atlas Pharmacy LLC; Arthur Avenue Medical Services, P.C.; Ambulatory Surgical Center of Englewood; Duramed LLC; First Hand Physical Therapy P.C.; Custom Rx Pharmacy LLC; Excell Clinical Lab; Natural Acupuncture Touch P.C.; Quantum Rehab Physical Therapy, P.C.; and Barry Sloan D.O. (NYSCEF Doc. 30).

On October 28, 2019, this Court granted that motion against the claimant-defendant and medical provider defendants Englington Medical PC; New Millennium Medical Imaging, P.C.; Lenco Diagnostic Laboratories, Inc.; Atlas Pharmacy LLC; Arthur Avenue Medical Services, P.C.; Ambulatory Surgical Center of Englewood; Duramed LLC; First Hand Physical Therapy P.C.;

Custom Rx Pharmacy LLC; Excell Clinical Lab; Natural Acupuncture Touch P.C.; Quantum Rehab, Physical Therapy, P.C.; and Barry Sloan D.O. That Decision and Order also (1) declared that plaintiff owes no duty to pay No-Fault claims that the aforementioned defendants submitted to plaintiff under the subject insurance policy arising out of the subject alleged accident, and (2) permanently stayed all arbitrations, lawsuits, and enforcement of awards or judgments by the aforementioned defendants, arising out of the subject alleged accident. (NYSCEF Doc. 49.)

The Instant Cross-Motion (Seq. No. 002)

Medical provider defendants Reliable CPM Surgical Supplies Inc.; Ambulatory Surgical Center of Englewood; Englewood Orthopedics Group PC; and ASCE Anesthesia PC cross-move, (1), pursuant to CPLR 3025, for permission to amend their answer to add medical provider defendant Ambulatory Surgical Center of Englewood; and (2) to allow medical provider defendant Ambulatory Surgical Center of Englewood to be considered an answering defendant as to which the aforementioned default judgment would not apply (NYSCEF Doc. 87).

According to the October 22, 2020 affirmation of Melissa Bentancourt, Esq., attorney for the immediately aforementioned medical provider defendants, the failure to list medical provider defendant Ambulatory Surgical Center of Englewood on the subject November 30, 2018 Answer arose from a clerical error by counsel's law office, and said addition would not prejudice plaintiff (NYSCEF Doc. 87).

The Instant Motion (Seq. No. 002)

Plaintiff now moves (1), pursuant to CPLR 3212, for summary judgment against medical provider defendants MAZ Chiropractic, P.C.; Lida's Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; John Nasrinpay; ASCE Anesthesia PC; Reliable CPM Surgical Supplies Inc.; and Englewood Orthopedics Group PC P.C. for the relief requested in the instant pleadings on the ground that the claimant-defendant failed to appear for his EUO, thereby breaching the subject insurance policy; and (2) for an order dismissing all counter-claims made against plaintiff (NYSCEF Doc. 52).

Medical provider defendants Maz Chiropractic, P.C.; Lida's Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; and John A. Nasrinpay jointly oppose plaintiff's instant motion for summary judgment against them. Those medical provider defendants assert, inter alia, the following: (1) plaintiff has failed to establish that it complied with 11 NYCRR 65-3.8 by paying a claim or issuing a denial within thirty days of receiving proof of the claim; (2) plaintiff's motion for summary judgment is premature, as there has not been sufficient time for discovery; and (3) plaintiff has not established the merits of its EUO no-show defense. (NYSCEF Doc. 69.)

Medical provider defendants Reliable CPM Surgical Supplies Inc.; Ambulatory Surgical Center of Englewood; and ASCE Anesthesia P.C. also jointly oppose plaintiff's instant motion for summary judgment against them. Those medical provider defendants assert, inter alia, the following: (1) plaintiff has failed to establish that it complied with 11 NYCRR 65-3.8; (2) the affidavit of Ms. Mena-Sibrian does not address the subject bill(s) for the subject three medical provider defendants; (3) plaintiff has not established that it mailed the correspondence

scheduling the subject EUOs; and (4) plaintiff has not established that the claimant-defendant failed to appear for the EUOs. (NYSCEF Doc. 85.)

In reply, plaintiff asserts, inter alia, the following: (1) the subject applicant or the applicant's counsel had a duty to communicate with plaintiff about the EUO request; (2) plaintiff provided notice of the subject EUO appointments timely; and (3) the claimant-defendant waived any objection to the subject EUO (NYSCEF Doc. 93).

Discussion

The Request to Amend the November 30, 2018 Answer

CPLR 3025(b), "Amendments and supplemental pleadings by leave," states as follows:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Medical provider defendants Reliable CPM Surgical Supplies Inc.; Ambulatory Surgical Center of Englewood; Englewood Orthopedics Group PC; and ASCE Anesthesia PC have established that the absence of medical provider defendant Ambulatory Surgical Center of Englewood from their November 30, 2018 Answer arose from clerical error. CPLR 2001. Additionally, said medical provider defendants have complied with CPLR 3025(b) by submitting a proposed amended verified answer (NYSCEF Doc. 90). To date, neither plaintiff nor any of the defendants have opposed or otherwise responded to this request. Therefore, the proposed amended answer that said medical provider defendants e-filed as NYSCEF Doc. 92 will be deemed served on plaintiff, nunc pro tunc.

The Request for Summary Judgment

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 defendants MAZ Chiropractic, P.C.; Lida's Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; John Nasrinpay; ASCE Anesthesia PC; Reliable CPM Surgical Supplies Inc.; Englewood Orthopedics Group PC P.C.; and Ambulatory Surgical Center of Englewood,

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 three times. The aforementioned medical provider defendants 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 plaintiff 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. The aforementioned medical provider defendants, for their part, apparently have failed to reach out to their own customer/patient, the claimant-defendant, to determine whether or not he 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. Enough is enough.

As noted above, on October 28, 2019, this Court granted a default judgment in favor of plaintiff and against the claimant-defendant and various medical provider defendants, among whom was Ambulatory Surgical Center of Englewood. At the time of that Decision and Order, medical provider defendant Ambulatory Surgical Center of Englewood had not appeared in the instant action. Likewise, at the time that plaintiff moved for summary judgment against the remaining medical provider defendants, medical provider defendant Ambulatory Surgical Center of Englewood had still not answered the instant complaint and/or opposed or otherwise responded to the instant matter. Pursuant to this Court's determination, stated above, to grant certain medical providers' request to add medical provider defendant Ambulatory Surgical Center of Englewood to their November 30, 2018 Answer, this Court will also grant summary judgment in favor of plaintiff and against medical provider defendant Ambulatory Surgical Center of Englewood; although this procedure may be unorthodox, this Court is convinced that to do otherwise would needlessly complicate this case, given that the claimant-defendant failed to appear for an EUO, and, therefore, none of the defendants, including Ambulatory Surgical Center of Englewood, can have a defense to this case.

Conclusion

Thus, for the reasons stated hereinabove, it is hereby ordered as follows: (1) the instant cross-motion by medical provider defendants Reliable CPM Surgical Supplies Inc.; Ambulatory Surgical Center of Englewood; Englewood Orthopedics Group PC; and ASCE Anesthesia PC [a] to amend their November 30, 2018 Answer to add medical provider defendant Ambulatory Surgical Center of Englewood as a party defendant and [b] to allow medical provider defendant Ambulatory Surgical Center of Englewood to be considered an answering defendant as to which the aforementioned October 28, 2019 default judgment would not apply, is hereby granted; (2) the proposed amended answer that medical provider defendants Reliable CPM Surgical Supplies Inc.; Ambulatory Surgical Center of Englewood; Englewood Orthopedics Group PC; and ASCE Anesthesia PC e-field as NYSCEF Doc. 92 is hereby deemed served on plaintiff, Country-Wide Insurance Company, nunc pro tunc; (3) the instant motion by plaintiff, pursuant to CPLR 3212, for summary judgment is hereby granted against medical provider defendants MAZ Chiropractic,

P.C.; Lida’s Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; John Nasrinpay; ASCE Anesthesia PC; Reliable CPM Surgical Supplies Inc.; Englewood Orthopedics Group PC P.C.; and Ambulatory Surgical Center of Englewood; and (4) all cross-claims submitted against plaintiff are hereby dismissed.

The Clerk is hereby directed to enter judgment declaring that plaintiff owes no duty to medical provider defendants MAZ Chiropractic, P.C.; Lida’s Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; John Nasrinpay; ASCE Anesthesia PC; Reliable CPM Surgical Supplies Inc.; Englewood Orthopedics Group PC P.C.; and Ambulatory Surgical Center of Englewood to pay No-Fault claims arising out of the alleged October 22, 2017 accident; (2) permanently staying all No-Fault lawsuits and arbitrations based on No-Fault claims arising out of the alleged October 22, 2017 accident that medical provider defendants MAZ Chiropractic, P.C.; Lida’s Medical Supply Inc.; Sanford Chiropractic, P.C.; Integrated Chiropractic of NY P.C.; Trapezius Diagnostic Chiropractic P.C.; John Nasrinpay; ASCE Anesthesia PC; Reliable CPM Surgical Supplies Inc.; Englewood Orthopedics Group PC P.C.; and Ambulatory Surgical Center of Englewood submitted to plaintiff; and (3) awarding costs and disbursements to plaintiff.



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4/1/2021
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: