

Unitrin Advantage Ins. Co. v Advant Orthocare, Inc.
2021 NY Slip Op 31114(U)
March 25, 2021
Supreme Court, New York County
Docket Number: 161561/2018
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. W. FRANC PERRY</u>	PART	IAS MOTION 23EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>161561/2018</u>
UNITRIN ADVANTAGE INSURANCE COMPANY,		MOTION DATE	<u>N/A</u>
Plaintiff,		MOTION SEQ. NO.	<u>004</u>

- v -

ADVANT ORTHOCARE, INC, AVANGARD SUPPLY, INC,
 CITIWIDE MEDICAL TESTING, PC, GRAHAM WELLNESS
 MEDICAL, PC, KOLB RADIOLOGY, PC, LENCO
 DIAGNOSTIC LABORATORIES, INC, LIJ MEDICAL
 CENTER, LONGEVITY MEDICAL SUPPLY, INC, NEW
 MILLENNIUM MEDICAL IMAGING, PC, NORTH AMERICAN
 PARTNERS IN ANESTHESIA, NORTH SHORE LIJ
 MEDICAL, PC, ST. MARY FAMILY PHYSICAL THERAPY,
 PC, THOMPSON MEDICAL, PC, XIAOYAN JIANG, YAN Z
 CHIROPRACTIC, PC, JESUS RODRIGUEZ

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 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 SUMMARY JUDGMENT(AFTER JOINDER

In this action., Plaintiff Unitrin Advantage Insurance Company ("Plaintiff") seeks a declaratory judgment that it has no duty to pay the No-Fault claims of Claimant relating to a June 2, 2018 motor vehicle accident involving one of its insureds, Jesus Rodriguez ("Claimant"). Motion sequence 004 is Plaintiff's motion for summary judgment against remaining¹ Defendant Longevity Medical Supply, Inc. ("Defendant"), for a declaration that Plaintiff has no duty to pay No-Fault claims because Claimant failed to appear for properly scheduled independent medical examinations ("IMEs). The motion has been fully submitted.

¹ By decisions and orders dated December 18, 2019 and May 22, 2020 (NYSCEF Doc Nos. 41 and 57), this court Granted Plaintiff's motions for default judgment against all other named Defendants.

Background

Claimant was driving a 2009 Nissan automobile when he collided with another motor vehicle on June 2, 2018. Claimant was insured by Plaintiff at the time of the accident. Plaintiff alleges that Claimant sought medical treatment thereafter, and that, collectively, the Defendants submitted over \$56,000.00 in medical claims

Plaintiff argues that it properly and timely requested Claimant to appear at two separate IMEs, and that Claimant failed to appear, vitiating coverage. In opposition, Defendant argues that Plaintiff fails to satisfy its burden for summary judgment because it cannot prove compliance with the relevant no-fault regulations.

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Pursuant to the no-fault regulations, an “eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the [insurance] Company, when, and as often as, the Company may reasonably require.” (11 NYCRR 65-1.1.) “The appearance of the

insured for IMEs *at any time* is a condition precedent to the insurer's liability on the policy." (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 722 [2d Dept 2006] [emphasis added].) The failure to appear for an IME constitutes "a breach of a condition precedent to coverage . . . [giving the insurer] the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued." (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [citation omitted].)

As the First Department has explained . . . for a no-fault insurer to establish its prima facie entitlement to judgment as a matter of law in a declaratory judgment action on the ground that a claimant failed to appear for an IME or Examination Under Oath (EUO), it must show that it mailed its initial request for verification to the claimant or his/her health care providers within 10 days of receipt of the NF-2 benefits claim form submitted by the claimant (*see* 11 NYCRR 65-3.5[a]), and mailed an additional request for verification, such as a request for an IME or EUO, within 15 days of receipt of the patient's response to the initial request for verification (*see* 11 NYCRR 65-3.5[b]; *Hertz Vehs. LLC v Significant Care. PT, P.C.*, 157 AD3d 600 [1st Dept 2018]; *see also* 11 NYCRR 65-3.6[b] [requiring insurer to reschedule IME by mailing follow up notice within 10 days of claimant's nonappearance]).

The demand for an IME constitutes a request for an additional verification (*see* 11 NYCRR 65-3.5[d]) and, as such, is subject to the requirement that any such request be mailed by an insurer or its agent within 15 days of receipt of the patient's or provider's initial response to the verification request (*see Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]; *Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 470 [1st Dept 2016]; *National Liability & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851, 851 [1st Dept 2015]; *American Tr. Ins Co. v Jaga Med. Servs. P.C.*, 128 AD3d 441, 441 [1st Dept 2015]).

(*PV Holding Corp.*, 2019 WL 6916073, at *2-3, quoting *PV Holding Corp. v Hank Ross Med. P.C.*, 2019 WL 4600813, *2-3 [Sup Ct, NY County 2019].) And, pursuant to 11 NYCRR 65-3.5 [d], the IME must be scheduled "to be held within 30 calendar days from the date of receipt of the prescribed verification forms."

Here, the chronology is as follows. Plaintiff received Claimant's NF-2 form on June 28, 2018. (NYSCEF Doc No. 65.) On July 9, 2018, Plaintiff received a Health Insurance Claim Form

insured for IMEs *at any time* is a condition precedent to the insurer's liability on the policy." (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 722 [2d Dept 2006] [emphasis added].) The failure to appear for an IME constitutes "a breach of a condition precedent to coverage . . . [giving the insurer] the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued." (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [citation omitted].)

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(*PV Holding Corp.*, 2019 WL 6916073, at *2-3, quoting *PV Holding Corp. v Hank Ross Med. P.C.*, 2019 WL 4600813, *2-3 [Sup Ct, NY County 2019].) And, pursuant to 11 NYCRR 65-3.5 [d], the IME must be scheduled "to be held within 30 calendar days from the date of receipt of the prescribed verification forms."

Here, the chronology is as follows. Plaintiff received Claimant's NF-2 form on June 28, 2018. (NYSCEF Doc No. 65.) On July 9, 2018, Plaintiff received a Health Insurance Claim Form

from medical provider Jiang. (NYSCEF Doc No. 67.) On July 19, 2018, Plaintiff mailed a letter scheduling an IME to Claimant, to be held on August 13, 2018. (NYSCEF Doc No. 66.) After Claimant failed to appear, a second IME letter was mailed on August 15, 2018, rescheduling the IME for August 30, 2018. (*Id.*)

With these facts, Plaintiff fails to meet its burden for summary judgment because it cannot demonstrate compliance with 11 NYCRR 65.3-5[d]. (*Am. Transit Ins. Co. v Longevity Medical Supply, Inc.*, 131 AD3d 841, 842 [1st Dept 2015].) The August 13, 2018 IME was not scheduled to be held within 30 calendar days of the receipt of the claim form on July 9, 2018. Thus, the motion must be denied. Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

03/25/21
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER REFERENCE

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT