

Country-Wide Ins. Co. v Adams
2021 NY Slip Op 31219(U)
April 13, 2021
Supreme Court, New York County
Docket Number: 652363/2018
Judge: Louis L. Nock
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and injunctive relief for present and future claims arising from the incident on the grounds that Adams failed to appear at a duly-scheduled and notified Examination Under Oath (“EUO”), in violation of the Policy. All Defendants were served with process and a default judgment was entered against several defendants pursuant to a prior order of this court (NYSCEF Doc 78). Plaintiff now moves for summary judgment against the remaining defendants. Defendants Stark Medical Supply, Inc., Quantum Rehab, Physical Therapy, P.C., and July PT (the “Defendants”) jointly oppose.

Discussion

On a motion 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12, *rearg denied* 8 NY3d 934 [1960]).

Here, Plaintiff has met its *prima facie* burden by submitting the affidavit of Jessica Mena-Sibrian, No-Fault Litigation/Arbitration Supervisor for Plaintiff, and the affidavit of Annie Persaud f/k/a Fatima Zuhra, the EUO Clerk for Plaintiff. Mena-Sibrian attests to the relevant business practices of Plaintiff and attests that Plaintiff requested an EUO of Adams in accord with these practices following receipt of claim forms and bills from Defendants, as assignees of Adams (Mena-Sibrian aff ¶¶ 1-10). Mena-Sibrian also attests to the dates on which Plaintiff received each bill from Defendants (*id.* ¶ 9). Persaud attests to the mailing of two EUO

scheduling letters sent to Adams, copies of which are submitted in support of the motion, in accord with Plaintiff's regular business practices (Persaud aff ¶¶ 9-10). Both Mena-Sibrian and Persaud attest that Adams failed to appear at both EUOs (Mena-Sibrian aff ¶¶ 13, 16; Persaud aff ¶¶ 9-10). Finally, Mena-Sibrian attests that, on November 24, 2017, Plaintiff denied the claim and mailed denial letters to all Defendants (Mena-Sibrian aff ¶ 17). Copies of Adams' application for no-fault benefits, Defendants claim forms, and the denial of claim forms are submitted, *inter alia*, in support of the motion (NYSCEF Docs 49, 56, 57).

As stated by the Appellate Division, First Department, in *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC* (82 AD3d 559 [1st Dept], *lv denied* 17 NY3d 705 [2011]):

The motion court properly determined that plaintiff insurer may retroactively deny claims on the basis of defendants' assignors' failure to appear for independent medical examinations (IMEs) requested by plaintiff The failure to appear for IMEs requested by the insurer "when, and as often as, [it] may reasonably require" (Insurance Department Regulations [11 NYCRR] § 65-1.1) is a breach of a condition precedent to coverage under the no-fault policy Accordingly, when defendants' assignors failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8 [c]; *Stephen Fogel Psychological*, 35 AD3d at 721-722).

. . . A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage (*see Chubb*, 90 NY2d at 199).

(82 AD3d at 560 [citations omitted].) This principle has also been extended to the failure to appear for a duly-scheduled and notified EUO (*Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437 [1st Dept 2017]). Defendants have not presented any evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact in opposition to the motion.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment against Jules Francois Parisien, MD, Stark Medical Supply Inc, Quantum Rehab, Physical Therapy, P.C., and July PT, P.C. is granted; and it is further

ORDERED and ADJUDGED that on the first cause of action Plaintiff owes no duty to Defendant's Jules Francois Parisien, MD, Stark Medical Supply Inc, Quantum Rehab, Physical Therapy, P.C., and July PT, to pay No-Fault claims submitted in relation to the July 21, 2017, Claim No.: 000328792-001, Policy.: VS 9646824 17, referenced in the complaint involving Gillian Adams; and it is further

ORDERED and ADJUDGED that on the second cause of action that all arbitrations, lawsuits and enforcement of awards or judgments in connection with the July 21, 2017 loss, Claim No.: 000328792-001, Policy.: VS 9646824 17, referenced in the complaint involving Gillian Adams are hereby permanently stayed.

This constitutes the decision and order of the court.

The County Clerk is directed to enter Judgment accordingly.

ENTER:



<u>4/13/2021</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE