

American Tr. Ins. Co. v Michel
2021 NY Slip Op 31419(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 650126/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY

PART IAS MOTION 23EFM

Justice

-----X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

INDEX NO. 650126/2019
MOTION DATE N/A
MOTION SEQ. NO. 002

- v -

GLEND A MICHEL, ARTHROKINEMATICS PT PC, BRONX
MEDICAL DIAGNOSTIC PC, DIGNITY PT PC, JK SPINE
HEALTH CHIROPRACTIC PC, METROPOLITAN
INTEVENTIONAL MEDICAL SERVICES PC, MOONLIGHT
ACUPUNCTURE PC, MYRTLE AVENUE TRADING LLC, PI
PHYSICAL THERAPY PC, SANFORD CHIROPRACTIC
PC, SPINE CARE OF NJ PC, TANDINGAN PT PC, URBAN
MEDICAL PC

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In this action, Plaintiff American Transit Insurance Company ("Plaintiff") seeks a declaratory judgment that it owes no duty to pay no-fault claims arising from a June 13, 2017 motor vehicle accident involving one of its insured, nonparty Patricia Morales ("Morales").¹ In motion sequence 002, Plaintiff moves for summary judgment against sole remaining Defendant, Spine Care of New Jersey, PC ("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"). Defendant cross-moves to dismiss the complaint or for further discovery in the alternative. The motions have been fully submitted.

¹ Pursuant to a stipulation, the action was discontinued against PI Physical Therapy. (NYSCEF Doc No. 20.) In a decision and order dated November 8, 2019, this court granted Plaintiff's motion sequence 001 for a default judgment against all Defendants except for Spine Care of New Jersey PC (collectively the "former Defendants"). (NYSCEF Doc No. 31.)

Background

Morales was driving a motor vehicle on June 13, 2017, when she was allegedly involved in a motor vehicle accident with former Defendant Glenda Lee Michel (“Claimant”). (NYSCEF Doc No. 1, Complaint, at 6-7.) Claimant allegedly sought medical treatment from the rest of the former Defendants and assigned her right to collect no-fault benefits to them.

Plaintiff moves for summary judgment against Defendant, alleging that it properly and timely requested Claimant to appear at two separate IMEs and that Claimant failed to appear, vitiating coverage. (NYSCEF Doc No. 36.)

Defendant cross-moves for dismissal, arguing that Plaintiff failed to timely request Claimant to appear at the IMEs, in violation of 11 NYCRR 65-3.5 [d]. (NYSCEF Doc No. 43.) In support, Defendant submits an American Arbitration Association arbitration award between the two parties wherein an arbitrator ruled that Plaintiff did in fact fail to timely request the IMEs. (NYSCEF Doc No. 44.)

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, as demonstrated by exhibits submitted by Plaintiff, the chronology is as follows. Claimant’s application for no-fault benefits, or NF-2 form, was date stamped received by Plaintiff on July 17, 2017. (*Id.* at 12.) Plaintiff mailed Claimant a letter dated September 26, 2017 scheduling an IME to be conducted on October 19, 2017 at 1:15 pm. (NYSCEF Doc No. 37 at 17.) Plaintiff mailed a second letter October 23, 2017 rescheduling the IME to be conducted on November 28, 2017 at 3:15 pm. (*Id.* at 18.) The denial of claim form was dated December 8, 2017 and mailed to Claimant. (*Id.* at 32.)

Plaintiff has failed to demonstrate that it made its initial request for verification to the Claimant within 10 days of receipt of Claimant’s NF-2 form as provided by 11 NYCRR 65-3.5[a]. Further, Plaintiff fails to demonstrate when it received the Claimant’s initial response to the verification request. Without that date, the court is unable to ascertain whether the letter scheduling the initial IME was timely sent within the 15-day period provided by 11 NYCRR 65-3.5[b]. However, what is clear from the submissions is that Plaintiff failed to comply with 11 NYCRR 65-3.5[d], in that the September 26, 2017 IME scheduling letter was mailed more than 30 days after the receipt of Claimant’s NF-2 form on July 17, 2017.

Plaintiff’s arguments in response are unavailing and the cases relied upon are inapposite. *Hereford Ins. Co. v Lida’s Med. Supply, Inc.*, 111 AD3d 423 [1st Dept 2013] is distinguishable, as the issue in that case was whether the issuance of the denial of the claim was timely pursuant to 11 NYCRR 65-3.8; not whether the IME itself was properly scheduled pursuant to 11 NYCRR 65-3.5. In *Hereford*, the plaintiff had already “submitted competent evidence that the notices scheduling the claimant’s medical examinations were mailed, [and that the claimant] fail[ed] to

appear[.]” (*Id.* at 424.) Plaintiff has failed to do so here. Likewise, *Matter of Global Liberty Ins. Co. v Top Q. Inc.*, 17 AD3d 1131 [1st Dept 2019] and *Global Liberty Ins. Co. v Professional Chiropractic Care, P.C.*, 139 AD3d 645 [1st Dept 2016] are also distinguishable, as those cases both dealt with claimants’ failure to attend “*duly scheduled* independent medical exams.” (*Top Q. Inc.*, at 1131 [emphasis added]; see also *Professional Chiropractic Care, P.C.* at 646.) Lastly, *New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586 [2011] has no bearing on this case, as that case dealt with the “independent conditions precedent” of written notices: of an accident’s occurrence within 30 days, provided by the claimant and pursuant to 11 NYCRR 65-1.1 [d]; and of a no-fault claim within 45 days, provided by an assignee of benefits and pursuant to the same section. (*Id.* at 589-90.) The court has considered Plaintiff’s remaining arguments and finds them unavailing. (NYSCEF Doc No. 45 at 13-16.) As such, Plaintiff has failed to meet its burden for summary judgment.

Defendant’s cross motion to dismiss

Defendant’s cross-motion to dismiss the complaint for failure to state a claim is granted. The issue of whether Plaintiff was liable for no-fault payments to Defendant in light of Claimant’s alleged failure to appear for the IMEs has already been resolved in the May 8, 2020 arbitration before the American Arbitration Association. (NYSCEF Doc No. 44.) In his decision, the arbitrator found that the “scheduling letters for the IME of the [Claimant] for this specific claim for reimbursement [were] untimely and therefore a nullity,” and that “[American Transit Insurance] could not rely on the failure of the [Claimant] to appear for these IMEs as a defense to this claim for reimbursement.” (*Id.* at 3-4.) Plaintiff’s “failure to appeal the award to a master arbitrator precluded judicial review of questions that would have been reviewed by a master

arbitrator had an administrative appeal been taken[.]” (*Carty v Nationwide Ins. Co.*, 149 AD2d 328, 330 [1st Dept 1989].)

Thus, it is hereby

ORDERED that Plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that Defendant Spine Care of New Jersey’s cross-motion to dismiss is granted and the complaint is hereby dismissed.

04/27/21
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED			<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: