

Liberty Mut. Ins. Co. v Bien-Aime
2022 NY Slip Op 31580(U)
May 12, 2022
Supreme Court, New York County
Docket Number: Index No. 654094/2020
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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LIBERTY MUTUAL INSURANCE COMPANY, LM
GENERAL INSURANCE COMPANY,

Plaintiffs,

INDEX NO. 654094/2020

MOTION DATE 05/09/2022

MOTION SEQ. NO. 002

- v -

JHOAN BIEN-AIME, BAYSIDE PHYSICAL THERAPY,
CHIROPRACTIC & ACUPUNCTURE PLLC, CD
ORTHOPEDICS PC, DR. ILAN COHEN & DR. KRISHNA,
DR. SALIBS MEDICAL PRACTICE PC, HEALTHMAKERS
MEDICAL GROUP PC, HP MEDICAL CARE PC, JANG
ACUPUNCTURE PC, KV MEDICAL OF NY PC, MGS
MEDICAL TECHNOLOGY PLLC, NYH MED CENTER OF
QUEENS, OLYMPIC ORTHOPEDICS, ORTHOCARE
SUPPLIES COMPANY, ORTHOCARE SUPPLIES
INC., QUEENS EMERGENCY MEDICAL ASSOCIATES
PLLC, RADIOLOGY ASSOCIATES OF MAIN STREET
PC, S&M PHARMACY INC., SMG MEDIQUIP
LLC, SUNNYVALE PHYSICAL THERAPY PLLC, ZWANGER
AND PERSIRI RADIOOGY GROUP LLP

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiffs for summary judgment is granted.

Background

In this no-fault dispute, plaintiffs previously obtained a default judgment against various defendants including the individual defendant (Ben-Aime) who took out a policy with plaintiffs.

Plaintiffs assert that Ben-Aime procured a policy using an address in Wyandanch, New York.

They maintain that Ben-Aime was in a car accident in Queens for which she later sought medical

treatment and the medical provider defendants in this case sought reimbursement under the subject policy.

Plaintiffs argue that they conducted an investigation to verify Ben-Aime's residency and insist that she lived in Queens. They maintain that they held an Examination under Oath ("EUO") with Ben-Aime and she testified that she had moved back into the Queens address (her parents' house) on the morning of the accident. Prior to the accident, she lived at the Wyandanch, New York address in a house owned by her uncle although plaintiffs observe she did not have a lease, pay bills or even know the first name of her uncle's wife who lived in that house. Plaintiffs point out that Ben-Aime's employer has the Queens address on file.

They argue that they are entitled to summary judgment because Ben-Aime misrepresented her address to procure motor vehicle insurance with plaintiffs in order to get a lower rate. Plaintiffs claim they would not have written the policy for Ben-Aime with the premium they offered had they known the vehicle would be in Queens. Plaintiffs conclude that Ben-Aime breached the insurance policy by submitting false statements.

Only defendant Orthocare Supplies, Inc. ("Orthocare") filed opposition. It claims that plaintiffs did not submit any admissible evidence in support of its motion and so the Court must deny it. Orthocare argues that mismatched statements are not proof that Ben-Aime committed fraud.

In reply, plaintiffs emphasize that Ben-Aime procured the policy in August 2019 with the Wyandanch address and that its investigation showed she actually lived in Queens. They assert that their investigator ran a search which showed that the subject car was at the Queens address going back to 2017 and it was in Queens consistently in 2018.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The instant dispute centers on burdens. Plaintiffs met their burden by submitting the affidavits of their investigator (NYSCEF Doc. No. 50), their underwriter (NYSCEF Doc. No. 56) and the EUO transcripts of Ben-Aime (NYSCEF Doc. No. 54). These all support plaintiffs’ assertion that the car was garaged in Queens. Unfortunately for Orthocare, they did not submit

any evidence to raise a material issue of fact. Ben-Aime defaulted and they did not include an affidavit from anyone with personal knowledge.

The Court recognizes that the EUO of Ben-Aime contains some evidence that she lived in Wyandanch. But there was more than enough testimony for plaintiffs to conclude she lived in Queens when she took out the policy. Ben-Aime admitted that her employer had the Queens address on file and that she received mail at the Queens address (NYSCEF Doc. No. 54 at 10). She also acknowledged that she never paid rent, had a lease or knew the name of her uncle's wife while purportedly living there (*id.* at 11, 14). Apparently, Ben-Aime lived at this address because it was close to her college but she admitted she finished college in 2016 (*id.* at 15-16). The policy at issue was purchased in 2019 and Ben-Aime had been working in Manhattan when the policy was procured (*see id.* at 8 [testifying that she had worked for two separate employers in Manhattan for the last five years]).

Although this constitutes circumstantial evidence, the Court finds that plaintiffs were entitled to conclude that Ben-Aime misrepresented where she lived. It is not this Court's role to make arguments for defendants and, here, the only defendant opposing the motion is Orthocare. This medical provider defendant has no independent knowledge about Ben-Aime's residency and therefore, the Court grants plaintiffs summary judgment.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiffs against the only appearing defendant, Orthocare Supplies, Inc. is granted; and it is further

DECLARED that defendant Ben-Aime is not entitled to no-fault benefits arising out of the November 9, 2019 accident involving her, plaintiffs' insurance policy number AOS22113140770; and it is further

DECLARED that plaintiffs need not honor or pay any claims from the defendants in this action (excluding those with whom plaintiffs reached a resolution) arising out of the November 9, 2019 accident involving Ben-Aime and plaintiffs' policy number AOS22113140770.

5/12/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE