

Country-Wide Ins. Co. v Clarke
2022 NY Slip Op 32384(U)
July 20, 2022
Supreme Court, New York County
Docket Number: Index No. 656058/2018
Judge: Kathy J. King
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY KING

PART 06

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

INDEX NO. 656058/2018

MOTION DATE 07/21/2021

MOTION SEQ. NO. 002

- v -

DIAN CLARKE, COMMUNITY MEDICAL IMAGING
P.C.,HEALTHY LIVING CHIROPRACTIC, P.C.,ALEXIOS
APAZIDIS, M.D. P.C.,NY WELLNESS MEDICAL P.C.,VIP
PHARMACY CORP, EQUILIBRIUM OF LIFE
ACUPUNCTURE P.C.,CENTRAL SUPPLIES OF NY CORP

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 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

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

Upon the foregoing documents, Country-Wide Insurance Company (“Country-Wide”) moves for the following relief:

1) summary judgment, pursuant to CPLR 3212, against Defendants HEALTHY LIVING CHIROPRACTIC, P.C., NY WELLNESS MEDICAL P.C., and CENTRAL SUPPLIES OF NY CORP.; and

2) a declaratory judgment, pursuant to CPLR 3001and 3017(b), that it is not liable to pay no-fault benefits to the Medical Provider defendants for medical services allegedly provided to the eligible injured party under Country-Wide insurance policy PS 9389062 17. Defendants HEALTHY LIVING CHIROPRACTIC, P.C., NY WELLNESS MEDICAL P.C., AND CENTRAL SUPPLIES OF NY CORP (collectively “The Provider Defendants”) oppose the requested relief.

BACKGROUND

This action arises out of claims for No-Fault reimbursement stemming from an alleged motor vehicle accident on June 14, 2018, involving Defendant Dian M. Clarke (“Clarke”). The policy in question was issued to Clarke and effective on the date of the accident under policy number PS 9389062 17. Clarke assigned rights to collect no-fault benefits to various health care providers including the Provider Defendants, who have submitted claims to the plaintiff with an assignment of benefits based on services rendered. Plaintiff denied all bills submitted by Provider Defendants, based on the failure of Clarke to appear for Examinations Under Oath.

On December 06, 2018, Plaintiff filed a Summons and Complaint against Clarke, Non-Answering Defendants, and the Provider Defendants and sought a declaratory judgment pursuant to CPLR §3001 to declare that Clarke breached the insurance policy and that Clarke, the Non-Answering Defendants and the Provider Defendants are not entitled to No-Fault benefit coverage for their respective claims. Plaintiff now moves for summary judgment against the Provider Defendants and for a declaratory judgment that the plaintiff’s denial of claims of the Provider Defendants are deemed valid.

MOTION FOR SUMMARY JUDGMENT

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562; *Graffeo*, 46 AD3d

at 615). “[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim...mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, the Court finds that plaintiff has not established its prima facie entitlement to summary judgment as a matter of law. The affidavit of Kyaw Nyein, plaintiff’s No-Fault Claims Supervisor, attests to plaintiff’s request for Clarke to appear for a scheduled medical examination on September 10, 2018, and October 3, 2018. However, the Court finds that plaintiff failed to provide proof in admissible form that the medical examinations of Clarke were scheduled within 30 days of receipt of the verification forms pursuant to 11 NYCRR §65-3.5(d) which provides, “[i]f the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms.” Additionally, there is no showing that plaintiff was exempt from the regulations pursuant to 11NYCRR 65-3.5(b) (see also *Kemper Indep. Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]). Since the Plaintiff failed to make a prima facie showing, plaintiff’s motion for summary judgment is denied, thus, a declaration of rights pursuant to CPLR 3001 and 3017(b) is unwarranted at this time.

Based upon the foregoing, it is hereby,

ORDERED that the branch of plaintiff’s motion for summary judgment and a declaratory judgment against the Provider Defendants HEALTHY LIVING CHIROPRACTIC, P.C., NY WELLNESS MEDICAL P.C., AND CENTRAL SUPPLIES OF NY CORP is denied without prejudice to renew upon proof of compliance with 11 NYCRR 65-3.5(b) and 11 NYCRR §65-3.5(d); and it further,

ORDERED that the plaintiff and the Provider Defendants, HEALTHY LIVING CHIROPRACTIC, P.C., NY WELLNESS MEDICAL P.C., and CENTRAL SUPPLIES OF NY CORP are directed to appear for a virtual conference on August 31st, 2022, at 2:30pm.

This constitutes the Decision and Order of the Court.

<u>7/20/2022</u>		<i>/s/ Kathy J. King</i>
DATE		KATHY KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<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