

<b>Country-Wide Ins. Co. v Evans</b>
2022 NY Slip Op 33966(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 651064/2022
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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INDEX NO. 651064/2022

COUNTRY-WIDE INSURANCE COMPANY,

MOTION SEQ. NO. 001 002

Plaintiff,

- v -

DECISION + ORDER ON MOTION

ORLYN EVANS et al.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 107

were read on this motion for DEFAULT JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion for SUMMARY JUDGMENT

Jaffe & Velazquez, LLP, New York, NY (Carl J. Gedeon of counsel), for plaintiff.
Friedman Sanchez, LLP, Brooklyn, NY (Emil J. Sanchez of counsel), for defendant Orlyn Evans.
The Rybak Firm, PLLC, Brooklyn, NY (Oleg Rybak of counsel), for defendants Longevity Medical Supply, Inc., Exon Medical Equipment, Inc., BL Pain Management, PLLC, and Bronx County Acupuncture, P.C.

Gerald Lebovits, J.:

This is a no-fault insurance coverage action. On motion sequence 001, plaintiff, Country-Wide Insurance Company, moves without opposition for default judgment under CPLR 3215 against a number of medical providers that have failed to appear in the action, each of which is an assignee of the eligible injured person, Orlyn Evans. On motion sequence 002, Country-Wide moves for summary judgment under CPLR 3212 against the defendants that have appeared in the action, including Evans and her remaining medical-provider assignees. Motion sequences 001 and 002 are consolidated here for disposition. The motion for default judgment is granted. The motion for summary judgment is denied without prejudice.

1. Country-Wide moves for default judgment on the ground that Evans assertedly failed twice without justification to appear for examinations under oath (EUOs) properly requested by Country-Wide, thereby assertedly breaching the conditions of her no-fault policy. Country-Wide has provided an affidavit of its EUO clerk (NYSCEF No. 62), supported by copies of NF-3

billing forms received from Evans's medical-provider assignees (NYSCEF No. 64); two EUO requests (NYSCEF No. 57, 59); and statements on the record at the scheduled EUOs reflecting Evans's nonappearance (NYSCEF Nos. 58, 60). This evidence suffices to establish, prima facie, that Evans failed without justification to appear for two properly scheduled EUOs, each satisfying the timeliness requirements of 11 NYCRR 65-3.5 and 3.6. Country-Wide's default-judgment motion against the nonappearing defendants is granted.

2. Country-Wide moves for summary judgment against Evans and the appearing medical providers on the same EUO-nonappearance ground. Evans and the appearing medical providers, represented by different counsel, separately oppose the motion. The parties' arguments for and against summary judgment entails somewhat more discussion than Country-Wide's unopposed request for default judgment.

Evans argues that plaintiff's EUO-nonappearance claim is barred by issue preclusion due to plaintiff's previously asserting the argument, unsuccessfully, in no-fault arbitrations arising from the same collision (*see* NYSCEF Nos. 113, 114 [arbitration decisions]). This court is not persuaded that issue preclusion applies here. That doctrine bars a party from contesting an issue only if the identical issue were fully litigated in a prior proceeding and necessarily decided against that party. (*See Ross v Med. Liab. Mut. Ins.*, 75 NY2d 825, 826 [1990].) The arbitral decisions on which Evans relies did not necessarily decide that one or both of the EUO requests on which Country-Wide relies was either untimely or improper. Rather, one of the two decisions went against Country-Wide because Country-Wide's claim denial in that proceeding listed an incorrect amount claimed by the provider-assignee. (*See* NYSCEF No. 114 at 3.) The other decision held that Country-Wide failed to establish that Evans failed twice to appear for EUOs, but only because the arbitrator had first precluded Country-Wide's nonappearance evidence for having been untimely submitted in the arbitration. (*See* NYSCEF No. 113 at 3-4.) Neither of these decisions addresses the timeliness of Country-Wide's EUO requests; whether those requests were properly mailed; or whether Country-Wide's nonappearance evidence, if properly put before the adjudicator and fully considered, suffices to demonstrate that Evans failed twice to appear. These arbitral decisions lack issue-preclusive effect in this action.

Evans also contends that the EUO request letters were not properly mailed because they were sent only to Evans, not also to her counsel, despite counsel's having told Country-Wide to include them on all correspondence. But Evans does not dispute that she herself received the EUO letters. Nor does she ever say that upon receiving letters from Country-Wide, she asked it to copy her counsel on future letters. In these circumstances, that plaintiff did not send the letters to Evans's counsel as well is immaterial. (*See Advanced Neurological Care, P.C. v State Farm Mut. Auto. Ins. Co.*, 38 Misc 3d 750, 751 [Nassau Dist Ct 2012] [rejecting provider's argument that insurer's verification requests were rendered defective by their having been sent only to the provider and not also to counsel, absent any indication that the provider objected to its attorney being left off correspondence from the insurer].)

Defendants Longevity Medical Supply, Inc., Exon Medical Equipment, Inc., BL Pain Management, PLLC and Bronx County Acupuncture, P.C. appeared and oppose Country-Wide's summary-judgment motion. These medical-provider defendants assert first that Country-Wide has not shown that it timely sought Evans's EUO. In particular, the medical providers assert that

Country-Wide did not establish when it received NF-3 billing forms. But the NF-3s submitted by Country-Wide are stamped with their dates of receipt. (*See* NYSCEF No. 64 [collecting NF-3 forms].) Given those dates, Country-Wide’s EUO requests were timely.

These medical-providers also argue that Country-Wide has failed to provide a specific objective justification for its EUO requests, as required by 11 NYCRR 65-3.5 (e). This court agrees. Country-Wide’s motion papers do not provide admissible evidence indicating the objective basis for the EUO request—whether in its EUO scheduling letters or in the affidavits and other evidence submitted on this motion. Absent that justification, Country-Wide is not entitled to summary judgment against these defendants. (*See Country-Wide Ins. Co. v Delacruz*, 205 AD3d 473, 473-474 [1st Dept 2022].)

Country-Wide contends, citing a 2006 opinion letter issued by the State Insurance Department (now the State Department of Financial Services), that “a carrier is not required to provide the reasonable and objective standards for its EUO request.” (NYSCEF No. 108 at ¶ 58, citing 2006 Ops Ins Dept No. 06-12-16.) That letter, though, states only that a no-fault insurer need not set forth the objective justification for requesting an EUO *in the request itself* (or in an ensuing claim denial). That principle does not support Country-Wide’s position that it need not provide justification for the EUO process thereafter, whether during the claims-verification process or in later litigation.<sup>1</sup> (*See Delacruz*, 205 AD3d at 473-474 [litigation]; *Kemper Independence Ins. Co. v AB Med. Supply, Inc.*, 187 AD3d 671, 671 [1st Dept 2020] [litigation]; *Kemper Independence Ins. Co. v Accurate Monitoring, LLC*, 73 Misc 3d 585, 588-590 [Sup Ct, NY County 2021] [claims-verification process].)

Further, the record reflects that Country-Wide moved for summary judgment after receiving discovery demands from these medical-provider defendants—but before responding to them. In these circumstances, this court agrees with defendants that Country-Wide’s summary-judgment motion is premature. (*See* CPLR 3212 [f].) Country-Wide contends that defendants have not shown that discovery might lead to the discovery of relevant evidence, as required to warrant denial of the motion as premature. But the appearing defendants’ discovery demands are aimed at the core issues presented by the motion—whether Evans failed twice to appear for EUOs notwithstanding timely and proper EUO requests sent to her by Country-Wide’s agents and employees. In asking this court to grant summary judgment without first having responded to defendants’ discovery demands, Country-Wide moved too quickly. (*See American Transit Ins. Co. v Jaga Med. Servs., P.C.*, 128 AD3d 441, 441 [1st Dept 2015] [holding that “discovery on plaintiff’s handling of the claim so as to determine whether, inter alia, the EUOs were timely and properly requested is also essential to justify opposition” for CPLR 3212 [f] purposes]; *accord Kemper Independence*, 187 AD3d at 671 [noting, in denying summary judgment as premature, that plaintiff insurer had “moved for summary judgment before any depositions had been conducted”].) Country-Wide is not entitled, on this record, to summary judgment against Evans or against the appearing medical-provider assignees.

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<sup>1</sup> Nor does this court agree with Country-Wide that the appearing defendants waived any EUO-justification argument due to Evans’s not having asked Country-Wide to provide a justification during the claims-verification process. (*Delacruz*, 205 AD3d at 474.)

Settle Order.

  
**HON. GERALD LEBOVITZ**  
J.S.C.

11/21/2022  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: