SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

State Farm Fire and Casualty Company

INDEX NO. 158919-2022

MOT. DATE

- v -

MOT. SEQ. NO. 002 & 003

Edmond Exilus, et. al.

The following papers were read on this motion to/for OSC and summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 79-89

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 94-109

Replying Affidavits NYSCEF DOC No(s). 105-114

In this action, plaintiff-insurer seeks a declaration that it does not have an obligation to pay no-fault benefits in connection with a motor vehicle accident. The accident occurred on June 28, 2022 near the intersection of Kings Highway and Schenectady Avenues in Brooklyn, New York. There are two motions pending before this court which are hereby consolidated for the court's consideration and disposition in this single decision/order.

In motion sequence 002, plaintiff State Farm Fire and Casualty Company ("State Farm") moves by Order to Show Cause ("OSC") to stay or restrain defendants Northeast Medical Devices LLC, Nourseen, PT, PC, S and C Chiropractic, PC, ARD RX Inc., Majestic Medical Imaging PC, Walmed Equipment LLC, and Pain Relief RX, Inc. (the "answering defendants") from prosecuting any current or future proceedings pending the court's decision of plaintiff's motion for summary judgment pursuant to CPLR §§ 6301 and 6313. The answering defendants opposed the OSC. In the OSC, the court granted a temporary restraint enjoining the answering defendants from prosecuting pending actions or commencing new actions pending hearing and decision on the motion.

In motion sequence 003, State Farm moves for summary judgment against the answering defendants pursuant to CPLR § 3212 and seeks a declaration that it has no duty to pay the no-fault benefits in connection with the June 28, 2022 motor vehicle accident. It argues that coverage was vitiated because a condition precedent to coverage was breached. The answering defendants also oppose this motion. Issue has been joined as to the answering defendants and note of issue has not yet been filed. Therefore, this motion was timely brought and summary judgment relief is available.

The court will first consider the summary judgment motion, as the outcome of this motion necessarily affects the OSC. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor,

Dated: October 16, 2023

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☑ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The relevant facts are as follows. Prior to the alleged June 28, 2022 collision, State Farm issued an automobile insurance policy to claimant, Edmond Exilus ("Exilus") which insured a 2002 Acura (the "insured vehicle"). The policy covered any occupants of the insured vehicle for any medically necessary and causally related medical expenses arising out of the use or operation of the insured vehicle as a result of an accidental collision without claim of prejudice or surprise. Allegedly, on June 28, 2022, Exilus was operating the insured vehicle which contained passenger Marie Metellus ("Metellus") when, while stopped at a red light at or near the intersection of Kings Highway and Schenectady Ave. in Brooklyn, New York, an adverse vehicle rear-ended him. According to the police report, the adverse vehicle "left the scene without exchanging information." On July 27, 2022 State Farm received bills from One Touch Health Supply Inc. dated July 21, 2022 for services provided to Exilus and Metellus. State Farm has submitted copies of these bills.

Following receipt of the bills, State Farm scheduled Exilus and Metellus for Examinations Under Oath ("EUO"s). In two letters dated July 27, 2022, one addressed to counsel for Metellus and one addressed to counsel for Exilus, State Farm advised the complainants that they were required to submit to EUOs on August 11, 2022. The notices also stated that the EUOs could be conducted virtually or in person. Although these letters were not submitted as part of the motion for summary judgment, they were previously submitted as part of mot. seq. 001 and State Farm references these documents by their NYSCEF document numbers in the affidavits submitted in support of the instant motion. Since the answering defendants do not object to this technical defect, and there is no prejudice otherwise, the court will consider the previously submitted affidavits on this motion.

In support of its motion, plaintiff submits the affidavit of Dominique Wafer, a Claim Specialist at State Farm. Wafer's affidavit is based upon her knowledge of State Farm's standard business practices acquired throughout her employment and training as well as the documents contained in State Farm's file. Based upon this knowledge, Wafer states the following. All documents received by State Farm in regard to PIP benefits follow the same standard business practices, and these practices were in place and utilized "at the time that the documents relating to this matter were received and/or created." When mail comes in, it is picked up from the post office boxes, Monday through Friday, and delivered to an imaging facility. Here, it is tagged with a sheet identifying when the document was received and scanned through a high-speed scanner. The documents are then held in an electronic "queue" for review by a State Farm employee who associates the document with a claim number. When a bill is entered into the system, an employee reviews the bill to determine if it should be paid or denied. If denied, State Farm will generate an accompanying NF-10 and/or EOR. These forms are then printed at a State Farm location and mailed from the local post office.

Wafer also states, based off of her review of the State Farm file, that after State Farm considered the claims filed in connection with the June 28, 2022 accident contemplated in this action, it requested EUOs from Exilus and Metellus (the "claimants"). State Farm requested these EUOs because it had doubts as to whether the claimants were injured as claimed based on the fact that: 1) according to a

report for the subject loss, neither of the claimants reported any injuries or requested any medical attention at the scene of the accident; 2) the loss involved a phantom vehicle that fled the scene; 3) the address that Exilus proffered when he secured the policy is different than the address that was recorded for him in the police report; 4) the loss occurred in Brooklyn, New York, over 250 miles away from the policy address; 5) the bills received in connection with the alleged injuries list a Brooklyn address for Exilus; 6) the police report stated that the insured vehicle was registered to a Brooklyn address; 7) as a result of the loss, Exilus reportedly received medical attention in Brooklyn, NY, even though the policy was secured with an address in Utica, NY; and 8) State Farm sent an investigator to the policy address. The investigator discovered that there were no residences associated with that address and the owner of a residence close to the address states that he did not know Exilus and had never rented to him.

Plaintiff also submits the sworn affirmation of Garrett Rigby, Esq., an associate at Goldberg, Miller & Rubin, PC ("GMR"), the attorneys for State Farm. Rigby's affidavit is based upon his knowledge of GMR's standard procedure in conducting EUOs acquired throughout his employment and training as well as his review of GMR's file for this claim and his own personal knowledge as the attorney assigned to take the EUOs of Exilus and Metellus. Based on this knowledge, Rigby states the following. State Farm noticed Exilus to appear for an EUO by letter dated Jul 27, 2022. Rigby was assigned by GMR to conduct the EUO on August 11, 2022 at 12pm. On August 10, 2022, Exilus' attorney confirmed his appearance and stated that he would appear virtually. On August 11, 2022, at 12pm, Rigby utilized the Zoom link created for the EUO. At no time did Exilus or his attorney appear in the Zoom meeting. The EUO was rescheduled for September 6, 2022 at 12pm to be held virtually upon request of Exilus' attorney. Rigby was assigned by GMR to perform this EUO as well. On that date, Rigby again utilized the Zoom meeting link created for the EUO. At no time did Exilus or his attorney appear for the EUO. State Farm also noticed Metellus to appear for an EUO by letter dated Jul 27, 2022. Rigby was assigned to conduct the EUO of Metellus on August 11, 2022 at 2pm. On August 11, 2022, Metellus' attorney confirmed her appearance and stated that she would appear virtually. On August 11, 2022, at 12pm, Rigby utilized the Zoom link created for the EUO. At no time did Metellus or her attorney appear in the Zoom meeting. The EUO was rescheduled for September 6, 2022 at 2pm to be held virtually upon request of Metellus' attorney. Rigby was assigned to perform this EUO as well. On that date, Rigby again utilized the Zoom meeting link created for the EUO. At no time did Metellus or her attorney appear for the EUO.

Parties' arguments

State Farm claims that the Exilus and Metellus did not attend their EUOs, that the EUOs were rescheduled, and that the claimants failed to appear on the rescheduled EUO dates as well. State Farm argues that the claimants' failure to appear for the EUOs is a breach of a condition precedent to coverage and therefore that coverage is vitiated. It asserts that the court should therefore grant its summary judgment motion and declare that it has no duty to pay any of the no-fault benefits submitted by the answering defendants in connection with the alleged June 28, 2022 motor vehicle accident.

In opposition to the motion, the answering defendants assert that State Farm has failed to demonstrate that the claimants did not appear for their EUOs. The answering defendants further argue that there is a triable issue of fact regarding whether the EUOs were timely scheduled in accordance with 11 NYCRR § 65-3.5(b) and whether the claims were properly and timely denied pursuant to 11 NYCRR § 65-3.8; Otherwise, the answering defendants contend that State Farm failed to provide affidavits from persons with personal knowledge of the facts and failed to provide a reasonable basis for requesting the EUOs of the claimants.

On reply, State Farm argues: 1) the answering defendants' affidavit in opposition to the motion violates the word count permitted by the court in contravention of 11 NYCRR § 202.8-b(a); 2) the answering defendants fail to proffer an affidavit of an individual with personal knowledge of the facts and therefore have failed to raise a triable issue of fact in opposition to the summary judgment motion; 3) the EUOs were properly and timely scheduled; 4) they need not timely deny the claims because a breach

of a condition precedent to coverage voids the policy regardless of whether denials of the claims were timely issued; and 5) State Farm had a reasonable basis for its EUO requests.

Discussion

It is well established that "failure to submit to an EUO and 'subscribe to the same' violates a condition precedent to coverage" (*Hertz Vehicles, LLC v. Best Touch PT, P.C.*, 162 AD3d 617 [1st Dept 2018]; 11 NYCRR § 65-2.4[c][2]). A violation of a condition precedent to coverage vitiates an insurance policy (*PV Holding Corp. v. Hank Ross Med., P.C.*, 188 AD3d 429 [1st Dept 2020]; *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]). Through the affidavit of Dominique Wafer and the affirmation of Garrett Rigby, State Farm has demonstrated that Exilus and Metellus failed to appear for their EUOs. Therefore, the burden shifts to the answering defendants to demonstrate that a triable issue of fact exists.

First, the court will consider the answering defendants' argument that triable issues of fact exist regarding whether the EUOs were timely and properly scheduled pursuant to 11 NYCRR § 65-3.8 and 11 NYCRR § 65-3.5. 11 NYCRR § 65-3.8 states that an insurer must pay a claim or issue a denial within 30 days of receipt of proof of the claim. However, contrary to the assertion of the answering defendants, the timeliness of State Farm's denial of their claims is irrelevant since the violation of a condition precedent to coverage gives plaintiff the right "to deny all claims retroactively to the date of the loss, regardless of whether the denials were timely issued" (*Unitrin Advantage Ins. Co. v. Dowd*, 194 AD3d 507 [1st Dept 2021]; *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]).

11 NYCRR § 65-3.5(b) states that an EUO must be requested within fifteen days of receipt of the claim or verification form. An insurer need only demonstrate that it requested an EUO within 15 business days from receipt of a bill (*State Farm Fire and Cas. Co. v. Blackburn*, 79 Misc3d 1229[A] [Sup Ct NY Co 2023]). An insurer seeking judgment against a given provider need not show that it timely requested an EUO relative to a bill received from *that* provider; rather, as long as the EUO requests were timely relative to *a* bill from *any* provider, the claimant's failures to appear at the EUO will support the insurer's coverage defense (*Id.*). Here, State Farm has submitted the One Touch bills that served as the basis for the EUO request. The bills are dated July 21, 2022. State Farm mailed notices to Exilus and Metellus to appear for EUOs on July 27, 2022, well within the 15-day time frame permitted by the regulation.

The answering defendants rely on *Unitrin Advantage Ins. Co v. All of NY* (158 AD3d 449 [1st Dept 2018]) to assert that the fifteen-day deadline set forth in 11 NYCRR § 65-3.5 applies to every individual claim submitted by every individual defendant. However, *Unitrin* involved multiple claims filed by the same medical provider. In relevant part, the First Department held that the plaintiff-insurer was required to pay no fault benefits for dates of service that were more than fifteen days before plaintiff noticed EUOs. *Unitrin Advantage* can be read in harmony with *State Farm Fire and Ca. Co. v. Blackburn,* which means that 11 NYCRR § 65-3.5 may bar payment for all bills from a single medical provider for dates of service prior to fifteen days before plaintiff noticed an EUO, but payment for all medical bills from multiple providers may be retroactively denied if plaintiff timely noticed an EUO as to one medical provider's bill (see also *PV Holding Corp. v. AB Quality Health Supply Corp.*, 189 AD3d 645 [1st Dept 2020] [stating that coverage vitiated coverage applies to all claims, and is not determined on a bill-by-bill basis]; *Stephen Fogel Psychological, P.C. v. Progressive Casualty Ins. Co.*, 35 AD3d 720 [2d Dept 2006] [stating that "an insurer may deny [no-fault] claims retroactively to the date of loss for a claimant's failure to attend EUOs"]).

Additionally, State Farm has met its burden of demonstrating that its request for EUOs was served within 15 days of receipt of a bill that served as the basis for the request. Therefore, the burden shifts to the answering defendants to demonstrate a triable issue of fact. The answering defendants claim that

State Farm was required to and failed to demonstrate that the EUOs were requested within 15 days of the receipt of each of their claims. Therefore, they must prove that their claims were filed with State Farm more than 15 days before State Farm noticed the subject EUOs. Yet the answering defendants they have not submitted any of their bills as evidence that the EUO requests were untimely. Therefore, the answering defendants have failed to raise an issue of fact on this point.

Next, the answering defendants argue that State Farm did not to submit sufficient affidavits from individuals with personal knowledge to establish its *prima facie* case. It argues that State Farm failed to submit an affidavit from someone who "personally mailed the verification/denial, or who had personal knowledge of the office's mailing practices and procedures" at State Farm and who can state based on personal knowledge that mailing procedures were adhered to in this case. The answering defendants also assert that State Farm failed to submit an affidavit demonstrating that State Farm had a reasonable basis to demand EUOs.

A party's affidavit setting forth its standard business practice concerning receipt of mail and mailing of notices and stating that those business practices were complied with will create a presumption of proper mailing (see *Wells Fargo Bank N.A. v. Ho-Shing*, 168 AD3d 126 [1st Dept 2019]; *Badio v. Liberty Mut. Fire Ins. Co.*, 12 AD3d 229 [1st Dept 2004]). In her affidavit, Wafer states based upon her personal knowledge State Farm's standard business practice concerning the receipt of no-fault claims, how claims are processed, and how notices are mailed. Furthermore, Wafer states that those business practices were complied with regarding the claims at issue in this case. Therefore, a presumption exists that State Farm received the bills at issue from the answering defendants, processed those bills, and mailed any notices of deficiencies in the bills or denial of those bills. The burden then shifts to the answering defendants to demonstrate that they did not receive notice from State Farm. The answering defendants have not filed any affidavits stating that proper notices were not received, nor any other evidence negating the presumption of proper mailing.

Additionally, State Farm has submitted copies of the dated bills that served as the basis for State Farm's demand for EUOs and dated notices demanding that the complainants appear for EUOs. In Rigby's affirmation he states the dates that the EUOs were scheduled and that the attorneys for both Metellus and Exilus confirmed that they would appear for the EUO, thus demonstrating that both claimants received the EUO notice. Rigby then states that neither claimant appeared for their EUO or their rescheduled EUO. Regarding the reasonable basis to demand an EUO, in her affidavit, Wafer expounds on the facts that raised a strong possibility that the collision did not occur as the claimants allege. These facts provide a reasonable basis to request an EUO. Accordingly, the evidence that State Farm has submitted is sufficient to establish a *prima facie* case.

Finally, the answering defendants claim that State Farm did not establish that the claimants failed to appear for EUOs because 1) the affirmation of Rigby is dated 9 months after the date that the EUOs were taken and he does not provide a basis for his recollection; 2) Rigby never states that the Zoom link was sent to the claimants or their counsel; and 3) because there is no evidence that anyone waited at the physical location to take the EUOs.

These arguments fail. The answering defendants attempt to call into question the veracity of Rigby's representations in his affirmation by generally claiming that the event took place too long ago for him to be able to remember the details of the EUOs. The court is satisfied with Rigby's affidavit because: 1) Rigby states that he reviewed GMR's file for this case to refresh his memory; and 2) even assuming *arguendo,* that his memory was not refreshed, a general claim that Rigby could not recall an event that occurred 9 months ago is not a reason to disregard his affirmation. The answering defendants could have introduced evidence to demonstrate that the EUOs did not take place as Rigby represented, but they have failed to do so.

Next, the answering defendants claim that Rigby never explicitly stated that the Zoom link was sent to the claimants and/or their counsel and that there is no evidence that anyone was present at the physical EUO location. However, Rigby's affirmation establishes that the EUO Zoom link was sent and that the claimants did not show for the virtual EUO. Additionally, the affirmation establishes that both claimants requested that their EUOs be taken virtually rather than in person, so there was no need for a representative of State Farm to be present at the physical location. The affirmation of Rigby is sufficient to establish that neither claimant appeared for their EUO.

Based on the foregoing, plaintiff has established a *prima facie* case that a condition precedent to coverage was breached thereby relieving plaintiff of the duty to pay no-fault benefits in connection with the underlying accident and the motion for summary judgment is granted in its entirety.

In light of the court's decision on motion sequence 3, the OSC for an order staying the answering defendants form commencing any further actions or prosecuting any currently pending action is granted.

In accordance herewith, it is hereby

ORDERED that motion sequence numbers 002 and 003 are granted in their entirety.

Settle judgment.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: October 16, 2023
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.