SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

JAMES LEWIS,

Defendant.

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INDEX NO. 655109/2021

MOTION DATE 01/20/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28

were read on this motion and cross-motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied, for the reasons set forth hereinafter.

Background

In this action, plaintiff seeks, pursuant to Insurance Law § 5106(c), trial *de novo* of an award rendered in a no-fault automobile insurance arbitration proceeding brought against it by defendant. The underlying arbitration arose out of an automobile accident on December 17, 2018, in which defendant was a passenger in a taxicab struck by another vehicle (arbitration award, NYSCEF Doc. No. 16). Defendant sought lost wages from plaintiff of $6,075.00, covering the period from the date of the accident through January 15, 2019 (*id.*). Plaintiff argued in the arbitration that it was not required to pay the lost wages, as defendant had not established timely submission of his claim and had also failed to provide requested verification of his lost wages (*id.*). Further, plaintiff claimed that the amount sought is in excess of the policy limits for lost wages. The arbitrator found in favor of defendant, in part, due to the fact that plaintiff had

failed to submit an affidavit by a person with knowledge, or independent documentary evidence, to establish any of its defenses (*id.* at 3-5). The arbitrator held in defendant's favor and awarded him the full amount sought (*id.* at 5), which award was confirmed by a master arbitrator (master arbitration award, NYSCEF Doc. No. 16).

Following the award of a master arbitrator, where the award is $5,000 or more, either the insurer or the claimant "may institute a court action to adjudicate the dispute de novo" (Insurance Law § 5106[c]). Here, plaintiff argues that the dispute is premature, as plaintiff's requested verification from defendant is outstanding. Moreover, the amount of defendant's claims is in excess of the policy limits for lost wages claims. Defendant argues in response that he promptly responded to all requests for verification and provided ample documentation of his claim.

Discussion

An insurer is required to pay or deny claims for no-fault benefits within 30 days of receipt (11 NYCRR 65-3.8[a][1]). An insurer may toll that time by seeking verification of the claim from the claimant (11 NYCRR 65-3.5[b]). "A claim need not be paid or denied until all demanded verification is provided" (*New York & Presbyt. Hosp. v Progressive Cas. Ins. Co.*, 5 AD3d 568, 570 [2d Dept 2004]).

Here, there is no dispute as to whether the initial claim or the requests for verification were sent and received by each party. Plaintiff acknowledged that defendant did provide *some* documentation in the form of Forms W-2, and a Form NF-7 (i.e., a verification of self-employment income form) (*see*, request for additional verification dated August 21, 2019 [NYSCEF Doc. No. 19 at last page] [". . . we are in receipt of your verification response"]). However, plaintiff informed defendant that it needed "additional verification" in the form of the Schedule C to defendant's taxes for any self-employment income or in the form of a Form NF-6

(i.e., an employer's wage verification report) (*id.*). Plaintiff also had, prior to its final request for additional verification on August 21, 2019, sent Forms NF-6 directly to defendant's two employers (*see*, NF-6 forms [contained within NYSCEF Doc. No. 19]).

Plaintiff's claims supervisor, Cheryl Glaze, avers that plaintiff never received a completed NF-6 form from defendant's employers, or the Schedule C to his tax returns, and that the verification requests were timely sent (*see*, Glaze aff., NYSCEF Doc. No. 18, ¶¶ 19-24; *Island Life Chiropractic, P.C. v Travelers Ins. Co.*, 64 Misc 3d 143[A], 2019 WL 3756860 [App Term, 2d Dept, 2019] ["Where a no-fault insurer is relying on the defense that an action is premature because verification is outstanding, it is the defendant insurer's prima facie burden at trial to demonstrate (1) that verification requests were timely mailed and (2) that the defendant did not receive the requested verification"]). Plaintiff has satisfied that *prima facie* showing. However, defendant does not meaningfully challenge the assertion that no Form NF-6 or Schedule C was sent to plaintiff. Accordingly, plaintiff is not obligated to pay the claim, as complete verification remains outstanding (*New York & Presbyt. Hosp.*, *supra*).

Defendant argues that, from a practical standpoint, in its view, plaintiff has sufficient information to determine defendant's entitlement to lost wages. However, defendant provides no authority for the proposition that its technically incomplete type of compliance with plaintiff's verification request is sufficient. The Form NF-6 requested by plaintiff is to be completed by defendant's employers, rather than defendant, and "[t]he insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested" (11 NYCRR 65-3.5[c]). To the extent defendant attempts to argue that the court should follow the decisions of the arbitrator and master arbitrator as the decisions were not "arbitrary and capricious" (Ahlers affirmation, NYSCEF Doc. No. 24, ¶¶ 21-21), that argument

distorts the standard applicable here, which is not confirmation/rejection review (CPLR 7511); but rather, *de novo* review (Insurance Law § 5106[c]; *see*, *Allstate Ins. Co. v Nalbandian*, 89 AD3d 648, 649 [2d Dept 2011] ["once the plaintiff properly invoked its right to de novo review, the issue of whether the award was arbitrary and capricious was rendered academic"]).

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted, and the defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that defendant's claim for lost wages against plaintiff is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of the costs and disbursements of this action, as taxed by the Clerk, upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

ENTER:

3/1/2024								
DATE					LOUIS L. NOCK, J.S.C.			
CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE