

**Mapfre Ins. Co. of N.Y. v McKnight**

2013 NY Slip Op 31297(U)

June 11, 2013

Sup Ct, NY County

Docket Number: 151980/2012

Judge: Carol R. Edmead

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failed to appear for a scheduled EUO as a matter of law or on the merits. Indeed, no such finding was made, no relief for summary judgment was sought in the Notice of Motion, and a default motion granted on default, which is based on a party's nonappearance in an action, is not "similar" to a motion granted on summary judgment. It is noted that the affirmation in support of the prior motion for default judgment set forth the facts giving rise to plaintiff's declaratory judgment action, and asserted that McKnight's failure to appear at an EUO constituted a breach of a condition precedent to coverage. And, the Acupuncture Defendants argued that issues of fact existed precluding summary relief. However, notwithstanding the affidavit of plaintiff's investigator "made in support of [plaintiff's] motion seeking a Default Judgment against Defendant . . . and seeking Summary Judgment against Defendants," the Notice of Motion and affirmation in support thereof indicate that plaintiff merely requested a default judgment, and not summary judgment against any defendant (see Notice of Motion, which was "based upon [McKnight's] failure to appear and/or serve an Answer . . ."; counsel's affirmation ¶25). In any event, there was no finding that McKnight breached such a condition precedent to coverage. Thus, the Court's prior order is not "law of the case" (see *Martinez v. Nguyen*, 102 A.D.3d 555, 959 N.Y.S.2d 29 [1<sup>st</sup> Dept 2013]).

Proceeding to the merits of plaintiff's instant motion for summary judgment against the Acupuncture Defendants, the Court finds summary judgment is warranted.

The submissions establish that plaintiff's telephonic and letter requests for McKnight to appear at an EUO were reasonable, and that her failure to so appear constituted a breach of a condition precedent to coverage. Subsequent to various attempts by telephone to schedule an EUO of McKnight, two letters were sent requesting her appearance to no avail.

"No-Fault" benefits derive from New York State Regulation 68A, 11 NYCRR § 65-1.1, which requires that policies issued pursuant thereto contain certain provisions. These provisions are as follows:

Conditions

Action Against Company. No action shall lie against the Company [insurer] unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

\* \* \* \* \*

Proof of Claim. Medical, Work Loss, and Other Necessary Expenses. . . .

Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

\* \* \* \* \*

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same; . . . .

Under First Department caselaw, the failure to appear for an EUO "requested by the insurer 'when, and as often as, [it] may reasonably require' (Insurance Department Regulations [11 NYCRR] § 65-1.1) is a breach of a condition precedent to coverage under the No-Fault policy . . ." (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 918 N.Y.S.2d 473 [1<sup>st</sup> Dept. 2011]). And, an "insurer may retroactively deny claims on the basis of defendants' assignors' failure to appear" for an examination requested by plaintiff, "even

though plaintiff initially denied the claims on the ground of lack of medical necessity” (*Unitrin supra*, stating that the insurer may retroactively deny claims based on a failure to appear for an Independent Medical Examination, “even though plaintiff initially denied the claims on the ground of lack of medical necessity”) citing *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2006]).

It is noted that the Acupuncture Defendants’ submissions indicate, *inter alia*, that (1) McKnight appeared for three separate physical examinations and (2) three denial of benefit letters were sent to such defendants on October 13 and October 14, 2011 based on the claim that “there is not disability nor need for further treatment at this time.” As pointed out by the Acupuncture Defendants, by “repudiating liability for the loss, [an insurer] has excused the insured from performance of its obligations” (*Lentini Bros. Moving & Stor. Co. v. New York Prop. Ins. Underwriting Assn.*, 53 N.Y.2d 835, 440 N.Y.S.2d 174 [1981]; *Raymond v. Allstate Ins. Co.*, 94 A.D.2d 301, 464 N.Y.S.2d 155 [1<sup>st</sup> Dept 1983] (a repudiation of an insurance claim “operate[s] to relieve the insured from further compliance with conditions precedent to suit”).

However, in response to the defense that plaintiff repudiated coverage, plaintiff asserts that “While same is true for bills subsequently received after the negative medical examinations it is not true for bills from before the IME. There were still bills being delayed, pursuant to the regulation, for services that predated the IMEs. As such, [plaintiff] had no basis to deny those bills without the subject EUO. [Plaintiff’s] repudiation of coverage was prospective from the date of IME denial, not retrospective”(emphasis added) (Reply, ¶13). As there were “three months of treatment before the IME which could not be denied based upon the negative IME,” plaintiff “had every right to request the EUO of McKnight to verify coverage and treatment in this matter.”

As to the discovery ordered by the Court on January 18, 2013, such discovery was ordered as a matter of course in light the fact that the decision did not resolve the remainder of the action against the Acupuncture Defendants.

And, the claim that the Acupuncture Defendants are not subject to plaintiff’s defense of McKnight’s failure to appear for an EUO as they took the assignment prior to McKnight’s breach is unavailing. The Acupuncture Defendants took their assignments subject to all the defenses available against its assignor, McKnight (*Madison Liquidity Investors 119, LLC v. Griffith*, 57 A.D.3d 438, 869 N.Y.S.2d 496 [1<sup>st</sup> Dept 2008] (The assignment grants [the assignee] the same rights and interests with regard to the wage claim to which [the assignor] had been entitled with all of its ‘infirmities, equities, and defenses’”)).

Based on the above, the Court finds that plaintiff satisfied its *prima facie* burden on summary judgment of establishing that McKnight did not appear pursuant to plaintiff’s reasonable requests for an EUO, which were made in accordance with the procedures and time frames set forth in the no-fault rules, and that the Acupuncture Defendants failed to raise an issue of fact that the requests were unreasonable. Thus, summary judgment is warranted in favor of plaintiff.

#### *Conclusion*

Based on the foregoing, it is hereby  
it is hereby

ORDERED that the branch of plaintiff’s motion pursuant to CPLR 305(c) to amend the

caption to correct a misnomer changing "Miriam Kanter, M.D." to "Miriam Kanter, M.D., P.C." is granted, as unopposed, and the caption shall be amended as follows:

-----X  
MAPFRE INSURANCE COMPANY OF NEW YORK

Plaintiff,

-against-

MARTHA MARQUEZ MCKNIGHT, ACCURATE  
ACUPUNCTURE, P.C., CHIROPRACTIC ASSOCIATES  
OF RICHMOND HILL, and MIRIAM KANTER, M.D., P.C.,

Defendants.  
-----X

and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3212 granting plaintiff summary judgment against Accurate Acupuncture, P.C., Chiropractic Associates of Richmond Hill, and Miriam Kanter, M.D., P.C. on its first cause of action, based on the failure of Martha Marquez McKnight to appear for an Examination Under Oath, and for costs and disbursements, is granted, together with costs and disbursements upon a submission of an appropriate bill of costs; and it is further

ORDERED and DECLARED that State-Wide Insurance Company is not obligated to provide any coverage, reimbursements or pay any invoices, sums or funds to any of the Defendants named herein for any and all no-fault related services for which claims/bills have been or may in the future be submitted by Defendants to the Plaintiff for which an Examination Under Oath of the Defendant, MCKNIGHT was requested and Defendant, MCKNIGHT, failed to appear; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter Judgment accordingly.

DATED: 6/11/13

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*[Handwritten Signature]*

J.S.C.  
*[Faint Stamp]*

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED

MOTION IS:  GRANTED  DENIED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

SUBMIT ORDER

REFERENCE