

Eveready Ins. Co. v Campbell
2014 NY Slip Op 31909(U)
July 8, 2014
Supreme Court, New York County
Docket Number: 100876/12
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 100876/2012
EVEREADY INSURANCE COMPANY
vs.
CAMPBELL, KAMESHA
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision, order and judgment in part.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: July 8, 2014

_____, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
EVEREADY INSURANCE COMPANY,

INDEX NO. 100876/12

Plaintiff,

-against-

KAMESHA CAMPBELL, JAHEEM IBRAHEL, JR.,
JAMES MARTINO, AMD CHIROPRACTIC, P.C.,
BROMER MEDICAL P.C., CENTRAL PAIN MEDICINE
PLLC, CITY CHIROPRACTIC, P.C., COMPREHENSIVE
PSYCHOLOGICAL EVALUATION, P.C., CORE REHAB
& P.T., P.C., CORTLAND MEDICAL SUPPLY, INC.,
EMPIRE CITY LABORATORIES, INC., EXCEPTIONAL
MEDICAL CARE, P.C., JANAA PHYSICAL THERAPY, P.C.,
NEW CAPITAL SUPPLY, INC., OPTIMAL WELL-BEING
CHIROPRACTIC, P.C., PLAZA OBS MEDICAL, PLLC,
PRECISION MEDICAL DIAGNOSTICS OF NY, P.C.,
SUCCESS ACUPUNCTURE P.C. and SYNERGY PHYSIOTHERAPY, PLLC

Defendants.

-----X
JOAN A. MADDEN, J.:

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Plaintiff Eveready Insurance Company ("Eveready") moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Cortland Medical Supply, Inc. ("Cortland") and New Capital Supply Inc. ("New Capital").¹ Cortland and New Capital oppose the motion.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York

¹By an order dated May 6, 2013, this court granted plaintiff's prior motion for a default judgment against all defendants in this action, with the exception of Cortland and New Capital.

University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp, 70 AD3d 508, 510 (1st Dept 2010). Once such showing is made, the opposing party must “show facts sufficient to require a trial of any issue of fact.” CPLR 3212(b); see Zuckerman v. City of New York, *supra* at 562.

Plaintiff has failed to establish prima facie entitlement to judgment as a matter of law with respect to any claims for non-fault benefits on behalf of defendants Kamesha Campbell and Jaheem Ibrahel. Plaintiff’s submissions show that issues of credibility exist as to the grounds for plaintiff’s denial of coverage to Campbell and Ibrahel.

According to plaintiff, neither Campbell nor Ibrahel is entitled to coverage, since they made “fraudulent statements” in their examinations under oath (EUOs) that the vehicle involved in the underlying accident was used with the permission of the owner/policy holder, non-party Jennifer Prepetit. The police report indicates that the underlying accident occurred on February 3, 2010, and that defendant Campbell was the driver of the vehicle, with two passengers, defendants Ibrahel and James Martino. It is undisputed that non-party Jennifer Prepetit was the owner of the vehicle at the time of the accident. Campbell, Ibrahel and Martino submitted applications for no-fault benefits, but only Campbell, Ibrahel and Prepetit appeared for EUOs. Relying on their EUO testimony, plaintiff asserts that “it is clear that Jennifer Prepetit did not give permissive use of her car to Kamesha Campbell or Jaheem Ibrahel,” and that Campbell and Ibrahel “have each made fraudulent statements concerning their eligibility for reimbursement” in connection with the underlying accident. Notwithstanding such assertions, plaintiff

acknowledges that the EUO transcripts “illustrate the discrepancies” between Prepetit’s testimony and the testimony of Campbell and Ibrahel.

Specifically, Prepetit testified that she loaned her vehicle to James Martino at end of January 2010 “to go back and forth to work,” and she did not know either Campbell or Ibrahel. Campbell, on the other hand, testified she knew the owner of the vehicle, Jennifer, for two years (but could not remember her last name), and on the day of the accident, February 3, 2010, she called Jennifer to request the use of her vehicle that day, and took the subway and a bus to Jennifer’s house in Queens to pick up the vehicle. Ibrahel likewise testified that on the day of the accident, his girlfriend Campbell picked up her friend Jennifer’s vehicle, and that he went with Campbell on the subway and bus to Jennifer’s house to get the vehicle.

The foregoing conflicting testimony raises issues of credibility as to whether Campbell had Prepetit’s permission to use her vehicle and, therefore, whether the statements by Campbell and Ibrahel at the EUOs were fraudulent. Such issues of credibility can only be resolved by the trier of fact, and not by summary judgment. See S.J. Capelin Assoc. Inc v. Globe Mfg Corp, 34 NY2d 338 (1974); Shapiro v. Boulevard Housing Corp, 70 AD3d 474 (1st Dept 2010). Thus, since triable issues exist as to the basis for plaintiff’s denial of coverage to defendants’ assignors, Campbell and Ibrahel, plaintiff is not entitled to summary judgment with respect to claims for non-fault benefits submitted on their behalf by defendants Cortland and New Capital.

With respect to claims submitted on behalf of James Martino, plaintiff has denied coverage based on Martino’s failure to appear for three scheduled EUOs. Plaintiff submits copies of letters from plaintiff’s attorney addressed to James Martino scheduling EUOs for

May 4, 2010, May 24, 2010 and June 17, 2010, at the attorney's office at 52 Duane Street, 7th Floor, New York, New York. Plaintiff also submits copies of the certified mail receipts for each letter addressed to Martino, as well as an affidavit of David Kelly, supervising attorney employed by the Law Office of James F. Sullivan, as to the procedures for creating, generating and mailing the EUO letters. Kelly also states that he was the attorney scheduled to conduct Martino's EUO on each of the three scheduled dates, he has personal knowledge that Martino did not appear, and he personally placed notations in the office computer systems as to Martino's non-appearance. The foregoing documents and affidavit are sufficient to establish that the EUO letters were mailed to Martino and Martino did not appear on any of the scheduled dates.

The failure to appear for an EUO is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such breach voids the policy ab initio. See Insurance Department Regulation 11 NYCRR §65-1.1; IDS Property Casualty Insurance Co v. Stracar Medical Services, PC, 116 AD3d 1005 (2nd Dept 2014); Interboro Insurance Co v. Clennon, 113 AD3d 596 (2nd Dept 2014); Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept), lv app den 17 NY3d 705 (2011); Olmour Medical, P.C. v. Nationwide General Insurance Co, 41 Misc3d 143(A) (App Term 2nd Dept 2013); Arco Medical New York, PC v. Lancer Insurance Co, 37 Misc3d 90 (App Term 2nd Dept 2012). Since it is undisputed that Martino failed to appear for the three scheduled EUOs, plaintiff has a right to deny claims submitted on his behalf based on breach of a condition precedent to coverage. See IDS Property Casualty Insurance Co v. Stracar Medical Services, PC, *supra*; Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, *supra*. Plaintiff, therefore, has met its burden of establishing prima facie entitlement to judgment as a matter of law with respect to no-

fault claims submitted on behalf of Martino, and the burden shifts to defendants to raise a triable issue of material fact.

In opposing the motion, defendants Cortland and New Capital fail to raise a material issue as to Martino's non-appearance for the EUOs. Contrary to the defendants' assertion, Kelly's affidavit based on personal knowledge and the supporting documents are sufficient to establish that the letters scheduling the EUOs were sent to Martino and Martino did not appear on any of the three scheduled dates. Defendants' objections as to the content of the EUO letters are without merit. Notably, the EUO letters were sent to Martino at the address he provided on his application for no-fault benefits, and defendants neither show nor suggest that he in any way objected or responded to the EUO requests. Moreover, plaintiff is not required to make a showing of willful non-compliance. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, *supra*; Arco Medical New York PC v. Lancer Insurance Co, *supra*.

Thus, plaintiff's motion for summary judgment is granted only to the extent of declaring that defendants Cortland Medical Supply, Inc. and New Capital Supply Inc. are not entitled to non-fault benefits or coverage for claims submitted on behalf of defendant James Martino.

Accordingly, it is

ORDERED, ADJUDGED AND DECLARED that plaintiff's motion for summary judgment is granted in part only to the extent that defendants Cortland Medical Supply, Inc. and New Capital Supply Inc., are not entitled to any no-fault benefits or coverage for claims submitted on behalf of defendant James Martino, as assignees of defendant James Martino, under Eveready Insurance Company policy 04430852, Claim No. 368464-04, in connection with the alleged accident of February 3, 2010, and all pending and future no-fault suits and arbitrations

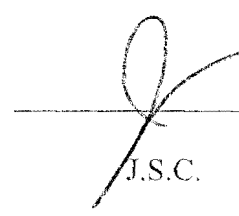
proceedings brought by defendant James Martino, and defendants Cortland Medical Supply, Inc. and New Capital Supply Inc., as assignees of James Martino, with respect to the February 3, 2010 accident, are permanently stayed; and it is further

ORDERED that plaintiff's motion for summary judgment is denied to the extent of any no-fault claims submitted by defendants Cortland Medical Supply, Inc. and New Capital Supply Inc., as assignees and on behalf of Kamesha Campbell and Jaheem Ibrahel, Jr., and to the extent plaintiff seeks a declaratory judgment as to such no-fault claims, the action is severed and shall continue; and it is further

ORDERED that the parties are directed to appear for a status conference on August 14, 2014 at 9:30 am, in Part 11, Room 351, 60 Centre Street, New York, New York.

DATED: July 8, 2014

ENTER:



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).