

Infinity Ins. Co. v Rhodes
2016 NY Slip Op 30351(U)
February 29, 2016
Supreme Court, New York County
Docket Number: 154498/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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INFINITY INSURANCE COMPANY, INFINITY AUTO
INSURANCE COMPANY, INFINITY CASUALTY
INSURANCE COMPANY, INFINITY INDEMNITY
INSURANCE COMPANY, INFINITY NATIONAL
INSURANCE COMPANY, INFINITY GROUP,
INFINITY SELECT INSURANCE COMPANY and
INFINITY STANDARD INSURANCE COMPANY,

Index No. 154498/14

DECISION/ORDER

Plaintiffs,

-against-

TAMIKA RHODES a/k/a TAMIC RHODES a/k/a
TAMIKA DEVELLE RHODES a/k/a TAMIKA
RHODES-DEVELLE, A.R.A MEDICAL CARE P.C.,
ALL KIND PHYSICAL THERAPY P.C., GLEN COVE
RADIOLOGIC IMAGING, LLC, GOOD ENERGY
ACUPUNCTURE, P.C., DR. KSENIA PAVLOVA,
NBC CHIROPRACTIC P.C., SYNOPTIC PHYSICAL
THERAPY P.C., T & S MEDICAL SUPPLY
CORPORATION and ZGY MEDICINE &
ACUPUNCTURE,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action against defendants seeking a declaratory

judgment that there is no coverage as to the defendant-assignor Tamika Rhodes a/k/a Tamica Rhodes a/k/a Tamika Develle Rhodes a/k/a Tamika Rhodes-Develle ("Rhodes") or her assignee provider defendants who seek no-fault coverage from plaintiffs. Defendants Dr. Ksenia Pavlova and T & S Medical Supply Corporation (hereinafter collectively referred to as the "answering defendants") have brought the present motion for renewal and reargument of this court's decision granting plaintiffs summary judgment against them. For the reasons set forth below, the court grants renewal and reargument but it adheres to its original determination granting plaintiffs summary judgment.

The relevant facts are as follows. Rhodes was allegedly involved in a motor vehicle accident on July 27, 2013 (the "accident") while riding in a vehicle insured by plaintiffs. Afterwards, Rhodes sought treatment for injuries she allegedly sustained during the accident and assigned her right to collect no-fault benefits to her treating medical providers. Additionally, Rhodes submitted a claim to plaintiffs for no-fault benefits. On August 8, 2013, plaintiffs, pursuant to their rights under the no-fault regulations, requested an Examination Under Oath ("EUO") of Rhodes to confirm the legitimacy of the loss and the necessity of any alleged treatment and referrals. Specifically, according to the affidavit of plaintiffs' Litigation Specialist, Tamara Sharpe, plaintiffs requested that Rhodes attend an EUO due to concerns regarding Rhodes' residency. Rhodes' policy is a Pennsylvania policy and when she applied for her policy, she advised plaintiffs that the vehicle would be garaged in Pennsylvania and that the vehicle would not be used to commute into New York or New Jersey more than three times per month. However, after the accident occurred in New York, plaintiffs began an investigation into the matter, which revealed that Rhodes had a New York State driver's license and that the

insured vehicle was routinely in New York. Thus, plaintiffs requested the EUO of Rhodes for the purpose of confirming the true garaging address of the insured vehicle.

Plaintiffs allege that Rhodes failed to appear for the EUO. Thereafter, plaintiffs again requested and scheduled an EUO but Rhodes again failed to appear. Thus, based on Rhodes' failure to appear at the scheduled EUOs, plaintiffs disclaimed coverage and commenced the instant action seeking a declaration that there is no coverage as to Rhodes or her assignee provider defendants who seek no-fault coverage from plaintiffs. Plaintiffs then moved for summary judgment against the answering defendants. In a decision dated July 27, 2015, this court granted plaintiffs' motion for summary judgment against the answering defendants holding that "plaintiffs have made out their *prima facie* case for summary judgment as they have shown that they properly mailed the notices for EUOs to answering defendants' assignor Rhodes and that she failed to appear for said EUOs" (the "Decision"). The answering defendants now move to renew and reargue this court's Decision.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. *See* CPLR 2221(d)(2). Further, on a motion for leave to renew, the movant must allege new facts not offered on the prior motion and a reasonable justification for the failure to present those facts on the prior motion. *See* CPLR 2221(e)(2) and (3). The answering defendants assert that this court erred in granting plaintiffs' motion for summary judgment because plaintiffs failed to demonstrate, as part of their *prima facie* case, that they timely requested the EUOs pursuant to the no-fault insurance regulations, which, the answering defendants assert, is required by the recent case *National Liab. & Fire Ins. Co. v. Tam Med. Supply Corp.*, 131 A.D.3d 851 (1st Dept 2015) decided by the First Department in

September 2015. The answering defendants point to 11 NYCRR § 65-3.5, which sets forth time limits for an insurer to request an EUO. Specifically, 11 NYCRR § 65-3.5(a) provides that “[w]ithin 10 business days after receipt of the completed application for motor vehicle no-fault benefits (NYS form NF-2) or other substantially equivalent written notice, the insurer shall forward, to the parties required to complete them, those prescribed verification forms it will require prior to payment of the initial claim.” Further, 11 NYCRR § 65-3.5(b) provides that “[s]ubsequent to the receipt of one or more of the complete verification forms, any additional verification required by the insurer to establish proof of claim,” including an EUO, “shall be requested within 15 business days of receipt of the prescribed verification forms.” As this court’s Decision failed to properly address said argument, which was made by the answering defendants in opposition to plaintiffs’ original motion, the court grants renewal and reargument but adheres to its original decision granting plaintiffs summary judgment.

The court need not address whether plaintiffs were required to establish, as part of their *prima facie* case, that they timely requested an EUO of Rhodes pursuant to 11 NYCRR § 65-3.5 as the facts put forth in plaintiffs’ original motion papers establish that plaintiffs did timely request said EUOs. It is undisputed that Rhodes’ accident occurred on July 27, 2013. It is also undisputed that plaintiffs first requested that Rhodes appear for an EUO in a letter sent to Rhodes on August 8, 2013, a mere nine business days after the accident occurred. Thus, even if Rhodes first made a claim to plaintiffs for no-fault benefits on the date of her accident, July 27, 2013, plaintiffs’ EUO request was timely made pursuant to the no-fault regulations.

The court has reviewed the answering defendants’ remaining argument for renewal and reargument and finds it unavailing.

Accordingly, the answering defendants' motion for renewal and reargument of this court's Decision is granted solely to the extent set forth herein and upon renewal and reargument, this court adheres to its original decision granting plaintiffs summary judgment against the answering defendants. This constitutes the decision and order of the court.

Dated: 2/29/16

Enter: _____

CK
J.S.C.
CYNTHIA S. KERN
J.S.C.