Unitrin Advantage Ins. Co. v Better Health Care Chiropractic, P.C.
2015 NY Slip Op 30126(U)
January 22, 2015
Supreme Court, New York County
Docket Number: 158463/12
Judge: Joan A. Madden
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[* 1]

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

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UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

INDEX NO. 158463/12

-against-

BETTER HEALTH CARE CHIROPRACTIC, P.C., BRONX ACUPUNCTURE THERAPY, P.C., GARDEN MEDICAL DIAGNOSTICS, P.C., GREEN HEIGHTS PHYSICAL THERAPY, P.C., LONGEVITY MEDICAL SUPPLY, INC., MRJA RADIOLOGY, P.C., PARK AVENUE MEDICAL CARE, P.C., SK PRIME MEDICAL SUPPLY, INC., MERCEDES BEATO and SABRINA JIMENEZ,

Defendants.

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JOAN A. MADDEN, J.:

In this action for declaratory relief as to no-fault insurance coverage, plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Bronx Acupuncture Therapy, P.C. ("Bronx Acupuncture"), Longevity Medical Supply, Inc. ("Longevity Medical") and SK Prime Medical Supply ("SK Prime") (collectively the "Answering Defendants"). Defendants Longevity Medical and SK Prime oppose the motion and cross-move for an order pursuant to CPLR 3124 compelling plaintiff to serve "proper and complete reponses to defendants' demands for discovery and inspection." Defendant Bronx Acupuncture opposes the motion, and adopts and incorporates" co-defendants' opposition and cross-motion.[1]

[1]In a decision and order dated November 1, 2013, this court granted plaintiff's prior motion for a default judgment against all defendants except the Answering Defendants, Bronx Acupuncture, Longevity Medical and SK Prime.

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 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 established prima facie entitlement to judgment as a matter of law against the Answering Defendants. In support of the motion, plaintiff submits an affirmation of attorney Jason Eson; an affirmation of attorney Harlan Schreiber; an affidavit of Denise Winat, a no-fault claims examiner for plaintiff; the pleadings; the police accident report; the applications for no-fault benefits submitted by defendants Mercedes Beato and Sabrina Jiminez; letters from plaintiff's attorney Harlan Schreiber addressed to defendants Mercedes Beato and Sabrina Jiminez scheduling EUOs for February 8, 2011 and March 3, 2011, and rescheduling the EUOs to March 24, 2011 at their attorney's request; a letter giving Jiminez one last chance to appear for an EUO on April 26, 2011; plaintiff's EUO scheduling letters sent to the attorney for Beato and Jiminez; affidavits as to the mailings of all those EUO letters; the transcript of defendant Beato's EUO held on March 24, 2011; Verification of Treatment forms signed and submitted by Longevity Medical, Bronx Acupuncture and SK Prime; letters from plaintiff's attorney Harlan Schreiber to defendants Longevity Medical, Bronx Acupuncture and SK Prime, scheduling EUOs on May 25, 2011 and June 14, 2011; affidavits as to the mailings of those EUO letters;

plaintiff's Denial of Claim Forms denying claims submitted by Bronx Acupuncture, SK Prime and Longevity Medical, based on, *inter alia*, the EUO non-appearances of Jimenez on March 24 and April 26, 2011, and the EUO non-appearances of Longevity Medical, Bronx Acupuncture and SK Prime on May 25 and June 14, 2011.

The foregoing affidavits and documents are sufficient to establish that EUO scheduling letters were mailed to claimant Jiminez and her attorney, and she failed to appear on the three scheduled dates, February 8, March 24 and April 26, 2011. The affidavits and documents are also sufficient to establish that EUO scheduling letters were mailed to Longevity Medical, Bronx Acupuncture and SK Prime, and none of them appeared on the two scheduled dates, May 25 and June 14, 2011. 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; Hertz Corp v. Active Care Medical Supply Corp, ___ AD3d ___, 2015 WL 59095 (1st Dept 2015); 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). Since it is undisputed that Jiminez, Longevity Medical, Bronx Acupuncture and SK Prime did not appear for the scheduled EUOs, plaintiff has a right to deny claims, based on breach of a condition precedent to coverage. See Hertz Corp v. Active Care Medical Supply Corp, supra; Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra. Plaintiff therefore has met its burden on the motion and the burden shifts to the Answering Defendants to raise a triable issue of material fact.

In opposing the motion, the Answering Defendants do not dispute that they did not appear for the EUOs on the two scheduled dates, and that Jiminez did not appear on the three scheduled dates. They also do not dispute that they never objected to the EUO requests, and neither did Jiminez or her attorney. Rather, the Answering Defendants argue, *inter alia*, that: 1) plaintiff has not shown that it complied with New York insurance law and regulations regarding timely and proper denial of non-fault claims; 2) plaintiff has not shown that it had a "specific objective justification" for requesting the EUOs; 3) plaintiff's motion includes unredacted social security numbers; 4) plaintiff waived and is precluded from raising the "EUO no-show defense" as a matter of law, since it did not issue timely and proper denials within the statutory period; 5) summary judgment is premature as discovery is outstanding; 6) issues of fact exist as to whether the EUO scheduling letters were mailed to Longevity and SK Prime; and 7) plaintiff's affidavits as to its mailing procedures are conclusory and not based on personal knowledge.

The foregoing arguments are without merit. Plaintiff submits competent proof that the letters scheduling the EUOs were mailed to Jiminez and her attorney on three separate occasions, and were mailed to Bronx Acupuncture, Longevity Medical and SK Prime on two separate occasions. Plaintiff provides a separate sworn affidavit from the individual who personally mailed each EUO scheduling letter to Jiminez, Longevity Medical, Bronx Acupuncture and SK Prime. Contrary to the Answering Defendants' assertion, the affidavits of mailing are based on the personal knowledge of the individual who actually mailed each letter. These affidavits attesting to service by mail on various dates, create a rebuttable presumption of proper delivery and receipt. See American Transit Insurance Co v. Lucas, 111 AD3d 423 (1st Dept 2013); Northern v. Hernandez, 17 AD3d 285 (1st Dept 2005). The vague and conclusory statements in

the affidavits submitted by Longevity Medical and SK Prime, that "I do not see a record that there was an EUO request that was every submitted to and received by Longevity" and "I do not see a record that there was a request for an EUO of SK Prime that was ever submitted to and received by SK Prime," are insufficient to rebut the presumption that a proper mailing occurred. See id. Notably, the EUO letters were mailed to Longevity Medical and SK Prime at the addresses listed on the Verification of Treatment forms and documents, which they signed and submitted in response to plaintiff's request for such verification.

Plaintiff likewise submits competent proof that Jiminez, Bronx Acupuncture, Longevity Medical and SK Prime did not appear for EUOs on the scheduled dates. Plaintiff's attorney, Harlan Schreiber, who was assigned to the file and who would have conducted the EUOs if Jiminez, Bronx Acupuncture, Longevity Medical or SK Prime had appeared "certainly was in a position to state" that they did not appear in his office on the dates indicated. Hertz Corp v. Active Care Medical Supply, supra. He specifically states that on each scheduled date, he personally waited for Jiminez, Bronx Acupuncture, Longevity Medical and SK Prime to appear, and each of them failed to do so.

In the absence of evidentiary proof that Jiminez, her attorney, Bronx Acupuncture, Longevity Medical or SK Prime, objected to plaintiff's EUO scheduling letters when they received them in 2011, the Answering Defendants will not now be heard to object that no reasonable basis existed for the EUO requests. See Natural Therapy Acupuncture, PC v. State Farm Mutual Automobile Insurance Co, 42 Misc3d 137(A) (App Term 2nd Dept 2014); Canarsi Chiropractic PC v. State Farm Mutual Automobile Insurance Co, 40 Misc3d 140(A) (App Term 2nd Dept 2013); Flatlands Medical, PC v. State Farm Mutual Automobile Insurance Co, 38

Misc3d 135(A) (App Term 2nd Dept 2013); Viviane Etienne Medical Care, PC v. State Farm Mutual Automobile Insurance Co, 35 Misc3d 127(A) (App Term 2nd Dept 2011); Crescent Radiology PLLC v. American Transit Insurance Co, 31 Misc3d 134 (A) (App Term 2nd Dept 2011). Moreover, plaintiff is not required to make a showing of willful non-compliance with the EUO requests. See Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra; Arco Medical New York, PC v. Lancer Insurance Co, 37 Misc3d 90 (App Term 2nd Dept 2012).

Plaintiff need not establish that it timely denied defendants' claims, since a timely denial is not required. See American Transit Insurance Co v. Leon, 112 AD3d 441 (1st Dept 2013); American Transit Insurance Co v. Lucas, 111 AD3d 423 (1st Dept 2013); Unitrin Advantage Insurance Co v. Bayshore Physical Therapy, PLLC, supra.

While the Answering Defendants object that plaintiff's motion includes unredacted social security numbers, they provide no binding legal authority to support their assertion that the submission of an unredacted copy of a claimant's application for non-fault insurance benefits, provides a basis for denying plaintiff's summary judgment motion. However, within 10 days of the date of this decision and order judgment, plaintiff's counsel shall contact the e-filing clerk to have the exhibits with the unredacted social security numbers removed from the e-filing system and to substitute redacted copies. Within 30 days of the date of this decision, order and judgment, plaintiff's counsel shall write a letter to this court confirming that the removal and substitution have occurred. In the future, plaintiff is cautioned to ensure that all social security numbers are redacted from any court papers.

As to any outstanding discovery, the absence of discovery does not require denial of plaintiff's motion, as the Answering Defendants fail to show that facts essential to oppose the

motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc, 61 AD3d 418 (1st Dept 2009). Thus, defendants' cross-motion to compel discovery is denied.

The court has considered the balance of the Answering Defendants' arguments, and concludes that they are lacking in merit. Thus, in the absence of an issue of material fact, plaintiff is entitled to summary judgment against the Answering Defendants.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendants Bronx Acupuncture Therapy, P.C., Longevity Medical Supply, Inc., and SK Prime Medical Supply, Inc., is granted; and it is further

ORDERED that defendants' cross-motion to compel discovery is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiff Unitrin Advantage Insurance Company is not obligated to provide, pay or honor any current or future claims for no-fault benefits submitted by defendants Bronx Acupuncture Therapy, P.C., Longevity Medical Supply, Inc., and SK Prime Medical Supply, Inc., with respect to the October 31, 2010 collision involving claim number 331AZ492018; and it is further

ORDERED, ADJUDGED AND DECLARED that all pending and future non-fault lawsuits and arbitration proceedings brought by defendants Bronx Acupuncture Therapy, P.C., Longevity Medical Supply, Inc., and SK Prime Medical Supply, Inc., with respect to the October 31, 2010 collision involving claim number 331AZ492018, are permanently stayed; and it is further

ORDERED that within 10 days of the date of this decision and order judgment, plaintiff's

counsel shall contact the e-filing clerk to have the exhibits with unredacted social security numbers (the no-fault applications of Mercedes Beato and Sabrina Jiminez) removed from the e-filing system and to substitute redacted copies of the exhibits; and it is further

ORDERED that within 30 days of the date of this decision, order and judgment, plaintiff's counsel shall write a letter to this court confirming that the unredacted exhibits have been removed from the e-filing system and substituted with a redacted copies.

DATED: January 22, 2015

ENTER:

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