

Hertz Vehs, LLC v Delta Diagnostic Radiology, P.C.

2015 NY Slip Op 30242(U)

February 18, 2015

Supreme Court, New York County

Docket Number: 158504/12

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER
Justice
PART 5

Hertz Vehicles, LLC,

Plaintiff,

- v -

INDEX NO. 158504/12
MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

Delta Diagnostic Radiology, P.C., Steven W. Winter, MD, P.C., Vladenn Medical Supply, Corp., Alleviation Medical Services, P.C., Velocity Chiropractic, P.C., Azure Acupuncture, PC, Linden Medical Care, PC, Gaetane Physical Therapy, PC, Fiss Chiropractic, PC, Phildov Anesthesiology Group, PC, Park Avenue Comprehensive Medicine, PLLC, Nexray Medical Imaging, P.C., Brij K. Mittal, MD, Gold Star Equipment, Inc., Aee Medical Diagnostic, PC, Cblpath, Inc., S. Ramchandran, MD, PC, Five Boro Psychological and Licensed Master Social Work Services, PLLC, Adelaida M. Laga, PT, JCC Medical, PC, Charles Deng Acupuncture, PC, Dr. Vladimir Shur, MD, T&J Chiropractic, P.C., Calox Laurent, Contalex Laurent and Michelaine Bellany,

Defendants.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Replying Affidavits

Cross-Motion: Yes No

This case arises from an alleged motor vehicle accident on October 18, 2011 where defendants Calox Laurent, Contalex Laurent, Michelaine Bellany (collectively, "Claimants") allegedly received personal injuries and made claims as a purported eligible persons under an insurance policy issued by plaintiff Hertz Vehicles, LLC ("Plaintiff") and assigned the rights to collect no-fault benefits to co-defendants, the Medical Provider Defendants.

Plaintiff brings this action seeking a declaration that there is no coverage for any and all first benefits claimed by Claimants and Medical Provider Defendants.

By Order dated February 4, 2014, the Court granted Plaintiff's motion for leave to enter a default judgment, pursuant to CPLR §3215, against the following defendants: Steven W. Winter, MD, P.C., Velocity Chiropractic, P.C., Azure Acupuncture, PC, Linden Medical Care, PC, Gaetane Physical Therapy, PC, Fiss Chiropractic, PC, Phildov Anesthesiology Group, PC, Cblpath, Inc., S.

Ramchandran, MD, PC, Dr. Vladimir Shur, MD, and T&J Chiropractic, P.C., (collectively, "Defaulting Defendants") (all defendants except Nexray Medical Imaging, P.C. ("Nexray"), Gold Star Equipment, Inc. ("Gold Star"), Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro"), Delta Diagnostic Radiology, P.C. ("Delta"), Vladenn Medical Supply, Corp. ("Vladenn"), Alleviation Medical Services, P.C. ("Alleviation Medical"), Adelaida M. Laga, PT ("Laga"), JCC Medical, PC ("JCC"), Charles Deng Acupuncture, PC, Calox Laurent, Contalex Laurent, Michelaine Bellany, Brij K. Mittal, MD, AEE Medical Diagnostic, PC, and Park Avenue Comprehensive Medicine, PLLC). The action has been discontinued as against Nexray.

Plaintiff moves, pursuant to CPLR §3212, for summary judgment against defendants Delta, Vladenn, Laga, Charles Deng, JCC, Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro"), Gold Star, AEE and Alleviation Medical (collectively, "Answering Defendants"), declaring there is no coverage for the No-Fault claims of each of them on the grounds that (1) Answering Defendants violated a condition precedent to coverage by failing to appear for duly scheduled Examinations Under Oath on two occasions each, and therefore, they have no right to collect No-Fault benefits with respect to the October 18, 2011 accident pursuant to No-Fault regulation 11 N.Y.C.R.R. 65-2.4 and (2) Vladimir Grinberg, the co-owner of Five Boro, has signed a general release of claims on behalf of Five Boro pursuant to his pleading guilty to conspiracy to commit healthcare fraud and conspiring to commit money laundering in 2013.

Plaintiff also moves for an Order dismissing the first counterclaim of AEE, which seeks attorneys' fees from Plaintiff. Plaintiff also seeks sanctions against Five Boro for refusing to abandon its claims after its owner plead guilty to insurance fraud and signed a general release of all claim.

Alternatively, Plaintiff seeks an Order, pursuant to CPLR 3126, striking Defendants' Answers based on their failure to appear for depositions or provide any discovery responses in violation of Court orders.

Plaintiff provides: the attorney affirmation of Aaron F. Fishbein; the affirmation of Joseph R. Federici, Esq., the affidavit of Maureen Stromberg, a claims representative, and the affirmation of Harlan R. Schreiber, Esq.

In their respective affidavits, Mr. Federici and Mr. Schreider, attorneys retained by Plaintiff to take the EUOs of the Answering Defendants, aver to their office's regular office procedures with respect to the mailing and scheduling of

EUOs, that the EUOs were mailed to Answering Defendants and scheduled in accordance with those procedures, and that Answering Defendants' failed to appear for their scheduled EUOs. Annexed to Federici and Schreiber's affirmations are copies of the letters sent by Plaintiff to Answering Defendants scheduling their EUOs, along with affidavits of service attesting to the mailing of those documents.

Ms. Stromberg, a claims representative employed by Plaintiff, avers that Plaintiff received claims from Defendants in connection with the October 18, 2011 motor vehicle accident, and sought to verify the alleged injuries through EUOs of the Claimants. Stromberg further avers that Plaintiff denied Answering Defendants' claims based on Answering Defendants' failure to appear for their scheduled EUOs, a violation of a condition precedent to coverage for the no-fault claims submitted.

Plaintiff also submits General Release signed by Vladimir Grinberg, individually and as an Officer of Five Boro, on June 28, 2013, which states as follows:

Vladimir Grinberg, an officer and shareholder of Five Boro Psychological and Licensed Master Social Work Services PLLC ("Five Boro"), hereby releases and discharges his interest in any and all outstanding, pending and unpaid insurance claims filed by any patients of Five Boro or any assignment of rights by patients to Five Boro against any and all insurance companies, including, but not limited to no-fault insurance claims. This release is provided in connection with a resolution to *United States v. Grinberg*, S14 12 Cr. 171 (JPO), in the United States District Court for the Southern District of New York.

In addition, Grinberg agrees not to serve as an officer, shareholder, employee, or agent of Five Boro, or to associate with Five Boro in any way. Grinberg agrees that any insurance company may present a copy of this release to the American Arbitration Association or arbitrator, or to any other forum in which a claim for reimbursement of insurance benefits is pending or has been filed in connection with claims being pursued on behalf of Five Boro, or by anyone or any entity acting on their behalf.

Grinberg is represented by attorneys and has discussed the contents of this release with his attorneys. By signing below, Grinberg is executing this release voluntarily, with full knowledge of its consequences.

Defendants Delta, Vladenn, Adelaida, JCC, and Charles Deng oppose. Defendants submit the attorney affirmation of Oleg Rybak.

Defendants Alleviation Medical, Goldstar, AEE, and Five Boro oppose. Defendants submit the attorney affirmation of Daniel Grace.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

The No-Fault Regulations provide that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

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

The Regulation mandates at 11 NYCRR 65-1.1 that:

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.

The failure to appear for a scheduled examination under oath is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dep't 2011];

Hertz Corp. v. V.S. Care Acupuncture, P.C., 2013 NY Slip Op 30895(U), *3 [N.Y. Sup. Ct. April 19, 2013]; *Bath Ortho Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 34 Misc. 3d 150(A), *1 [N.Y. App. Term 2012]. Accordingly, when the claimants or the assignors fail to appear for the requested exams, “the defendant insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the 30 day period . . . Since the contract has been vitiated, defendant may deny all the claims retroactively to the date of loss.” *See LK Health Care Prods. Inc. v. GEICO Gen. Ins. Co.*, 39 Misc. 3d 1230(A), *5 [N.Y. Civ. Ct. 2013]. An insurer need not demonstrate that a EUO request was reasonable to satisfy its prima facie burden on a motion for summary judgment. *See Unitrin*, 82 A.D.3d at 560; *Bath Ortho Supply*, 34 Misc. 3d 150(A) at *1.

“[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption.” *American Transit Insurance Company v. Lucas*, 111 A.D. 3d 423, 424 [1st Dept 2011]. A presumption of mailing “may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed.” *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D. 679, 680 [2nd Dept 2001]).

Here, through the affidavits submitted by Plaintiff and exhibits thereto, Plaintiff has demonstrated prima facie entitlement to summary judgment as against the Answering Defendants, and an Order declaring that the Answering Defendants are not entitled to No-Fault Coverage for the assigned claims arising from the alleged collision in the Complaint based on Answering Defendants’ failure to appear for their duly noticed and scheduled examinations under oath, thereby breaching a condition precedent to coverage under no-fault regulations.

Answering Defendants fail to raise a triable issue fact in opposition to Plaintiff’s motion for summary judgment. Answering Defendants argues that Plaintiff’s motion should be denied because Plaintiff has failed to show that it timely issued denials and that the EUOs were warranted here. However, as stated above, the failure to appear for a scheduled examination under oath is a breach of a condition precedent to coverage under a no-fault policy, and a denial of coverage premised on such a breach voids the policy ab initio. Furthermore, an insurer need not demonstrate that a EUO request was reasonable to satisfy its prima facie burden on a motion for summary judgment. *See Unitrin*, 82 A.D.3d at 560. Defendants also contend that the motion is premature in light of the fact that discovery has not been completed. However, “[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212(f), for

postponing a decision on a summary judgment motion.” *Kennerly v. Campbell Chain Co.*, 133 A.D. 2d 669, 670 [2nd Dept 1987]).

Lastly, Plaintiff's request for sanctions and attorneys' fees against Five Boro is denied as the alleged conduct does not rise to a level that would justify such sanctions against Five Boro.

Wherefore, it is hereby,

ORDERED that plaintiff, Hertz Vehicles LLC's motion for summary judgment against defendants Delta Diagnostic Radiology, P.C., Vladenn Medical Supply Corp., Adelaida M. Laga, P.T., Charles Deng Acupuncture, P.C., JCC Medical, P.C., Five Boro Psychological and Licensed Master Social Work Services, PLLC, Gold Star Equipment, Inc., AEE Medical Diagnostic, P.C. and Alleviation Medical Services, P.C., is granted; and it is further

ORDERED and ADJUDGED that defendants Delta Diagnostic Radiology, P.C., Vladenn Medical Supply Corp., Adelaida M. Laga, P.T., Charles Deng Acupuncture, P.C., JCC Medical, P.C., Five Boro Psychological and Licensed Master Social Work Services, PLLC, Gold Star Equipment, Inc., AEE Medical Diagnostic, P.C. and Alleviation Medical Services, P.C., are not entitled to no-fault coverage for the motor vehicle accident that occurred on October 18, 2011 involving Claimants as referenced in the Complaint; and it is further

ORDERED and ADJUDGED that defendant AEE Medical Diagnostic, P.C.'s counterclaim against Plaintiff for attorneys' fees is dismissed; and it is further

ORDERED that the action shall proceed against the remaining defendants.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: FEBRUARY 18, 2015


J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE