

Mapfre Ins. Co. of N.Y. v Aubry
2016 NY Slip Op 31017(U)
March 30, 2016
Supreme Court, New York County
Docket Number: 152023/2012
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

MAPFRE INSURANCE COMPANY
OF NEW YORK,
Plaintiff,

-against-

JACQUES AUBRY, ACTIVE CARE MEDICAL
SUPPLY CORPORATION, et al.,
Defendants.

DECISION AND
ORDER

Index No.
152023/2012

HON. ANIL C. SINGH, J.:

Plaintiff Mapfre Insurance Company moves for summary judgment pursuant to CPLR 3212 against defendants Active Care Medical Supply Corporation and New Millennium Psychological Services, P.C., contending that Jacques Aubry, defendants' assignor, failed to attend duly scheduled examinations under oath ("EUOs"). Defendants oppose the motion.¹

Plaintiff commenced the instant no-fault insurance action by filing a summons and complaint on April 20, 2012. The complaint alleges that defendant Jacques Aubry was injured in an automobile accident on August 3, 2011; Aubry made an assignment of benefits to defendant medical providers; and Aubry

¹A default judgment was previously entered against the other named defendants in this action.

breached a condition precedent to coverage by failing to appear for EUOs.

Plaintiff seeks a judgment declaring that, as a result of Aubry's failure to appear, the defendant medical providers, as assignees, have no legal right to receive any no-fault reimbursements from plaintiff for the subject claim.

New York's no-fault insurance regulations state in pertinent part as follows:

65-3.5 Claim procedure.

(a) Within 10 business days after receipt of the completed application for motor vehicle no-fault benefits (NYS Form N-F 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.

(b) Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms....

(d) If the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms.

An insurer may establish that verification requests were timely made by presenting a claims examiner's affidavit showing how the examiner personally prepared verification requests and mailed them and that the regular office practice was that the mail person collected and stamped mail each afternoon and delivered

it to the post office that day (Lenox Hill Radiology v. Global Liberty Ins., 20 Misc.3d 434 [Civ. Ct. N.Y.C., 2008]).

In opposition to plaintiff's motion for summary judgment, defendants assert that an insurance company's time to request an EUO begins to run from the time it receives a claim. In other words, an insurance company must establish when it received the defendants' claims before demonstrating proper mailing of the EUO requests.

Defendants assert that none of the sworn affidavits submitted by the plaintiff identify when plaintiff received defendants' claims, claimed dates of service, and procedures. Because plaintiff has failed to establish the necessary time frames, defendants contend that plaintiff cannot sustain its burden of demonstrating compliance with the 15-day time frame period mandated by the no-fault regulations in which to submit a timely and proper EUO request.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires

denial of the motion (id.)

Summary judgment is a drastic remedy and will be granted only if the moving party has sufficiently established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992]).

“The primary goals of New York’s no-fault automobile insurance system are to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists” (New York and Presbyterian Hosp. v. Country-Wide Ins. Co., 17 N.Y.3d 586, 587 [2011] (internal quotation marks and citation omitted)). “In furtherance of these objectives, the Superintendent of Insurance has adopted regulations implementing No-Fault Law (Insurance Law art 51), including *circumscribed time frames for claim procedures*” (id.) (internal citation and quotation marks omitted) (emphasis in original).

To satisfy its prima facie burden on summary judgment, an insurer must establish that it requested IMEs in accordance with the procedures and time frames

set forth in the no-fault implementing regulations, and the defendants' assignors did not appear (Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 560 [1st Dept., 2011]). Even where an insurer establishes that the notices of the scheduled IMEs were properly mailed and defendants' assignor did not appear, on a motion for summary judgment, an insurer must show that IMEs are scheduled in compliance with Insurance Department Regulations (11 NYCRR) section 65-3.5(d) (American Transit Ins. Co. v. Vance, 131 A.D.3d 849, 850 [1st Dept., 2015]). The 30-day period within which the IME is supposed to be scheduled is measured from the date on which the plaintiff received the prescribed verification form from defendant (American Transit Ins. Co. v. Longevity Medical Supply, Inc., 131 A.D.3d 841, 842 [1st Dept., 2016]).

Here, plaintiff contends that it received an application for no-fault benefits (NF-2) dated August 9, 2011, and a letter of representation dated August 31, 2011 (Motion, exhibit E).

It is important to note that the moving papers state only that plaintiff received the NF-2 and letter of representation. The moving papers do not state the precise date when the plaintiff received the documents (Affirmation in Support of Motion, p. 3, para. 8).

Plaintiff exhibits three sworn affidavits in support of the motion.

Edward Kurathowski states in a sworn affidavit that he is a supervisor in the Special Investigative Unit of plaintiff. He states that plaintiff received the NF-2 form dated August 9, 2011, and the letter of representation dated August 31, 2011. However, just like the moving papers, Mr. Kurathowski states only that plaintiff received the documents. He does not state the precise date when plaintiff received them. He states further that on October 6, 2011, he reviewed a recorded statement of Jacques Aubry; he discovered discrepancies between the statement and certain bills received by plaintiff; and, as a result of the discrepancies, plaintiff retained the law firm Bruno, Gerbino & Soriano, LLP to schedule and conduct an EUO of Aubry.

Vincent F. Gerbino, Esq., a partner at Bruno, Gerbino & Soriano, states in a sworn affidavit that the law firm mailed correspondence to Jacques Aubry and to his assigned attorneys, on October 27, 2011, requesting Aubry's appearance at an EUO to be held on November 10, 2011, at 2:00 p.m. Mr. Gerbino states further that he has personal knowledge that Aubry never appeared for his EUO on November 10, 2011.

Michael A. Soriano, Esq., a partner at Bruno, Gerbino & Soriano, states in a sworn affidavit that the law firm mailed a second letter to Aubry and his assigned attorneys on November 7, 2011, requesting Aubry's appearance at an EUO to be

held on November 22, 2011, at 2:00 p.m., Mr. Soriano states further that, based on his personal knowledge, Aubry never appeared for his EUO on November 22, 2011.

To prevail on its motion for summary judgment, plaintiff must establish that: 1) notices of the scheduled EUOs were properly mailed; 2) defendant did not appear; and 3) the scheduling of the EUOs complied with Insurance Department Regulation 11 NYCRR 65-3.5(b), which prescribes that any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the verification forms (National Liability & Fire Ins. Co. v. Tam Medical Supply Corp., 131 A.D.3d 851 [1st Dept., 2015] (holding that although the failure of a person to appear for a properly noticed EUO constitutes a breach of a condition precedent for coverage, an insurance company's motion for summary judgment must be denied if plaintiff has not established that it had requested the EUO within the time frame set by 11 NYCRR 65-3.5(b)).

Insurance Regulation 65-3.5(a) states unambiguously that, "within 10 business days after receipt" of an NF-2 form, an insurer shall forward, to the parties required to complete them, the verification forms it will require prior to payment of the initial claim. Here, neither the sworn affidavits nor the documentary evidence indicates the date when plaintiff received the NF-2.

Plaintiff has not submitted an affidavit from anyone with personal knowledge stating when the form was received or how the claim was processed.

In short, there is a significant gap of information between August 31, 2011 (the date of the letter of representation) and October 6, 2011 (the date Edward Kurathowski reviewed the recorded statement of Jacques Aubry). Plaintiff has not shown what happened between these dates, and when it happened. Accordingly, the Court finds that plaintiff has failed to make a prima facie showing that it complied with the mandatory time requirements of insurance regulation 11 NYCRR 65-3.5.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied.

Date: March 30, 2016
New York, New York



Anil C. Singh