Unitrin Advantage Ins. Co. v Advanced Orthopedics and Joint Preserv. P.C.
2018 NY Slip Op 33296(U)
December 20, 2018
Supreme Court, New York County
Docket Number: 153564/2018
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

Index No.: 153564/2018
Motion Sequence No.: 002

- against -

DECISION/ORDER

ADVANCED ORTHOPEDICS AND JOINT PRESERVATION P.C. a/k/a ADVANCED ORTHO AND JOINT PRESERVATION, BROOKLYN MEDICAL PRACTICE, P.C., ECLIPSE MEDICAL IMAGING P.C., FRIENDLY RX, INC. a/k/a FRIENDLY RX PHARMACY, INC., NORTH SHORE FAMILY CHIROPRACTIC, P.C. a/k/a NORTHSHORE FAMILY CHIRO, P.C., UNICORN ACUPUNCTURE P.C., WELLNESS EXPRESS PT P.C., ADVANCED SURGERY CENTER LLC, ORTHO-MED EQUIP INC., PROTECHMED INC., RAMAPO VALLEY ANESTHESIA ASSOCIATES, LLC a/k/a RAMAPO VALLEY ANESTHESIA ASSOC., BIG APPLE PAIN MANAGEMENT, PLLC, NU AGE MED SOLUTIONS INC., NAVARO SANDALIO, VERONICA BARROSO, JOSE CARLOS SUAREZ ESTEVES, CATALINA SUAREZ SANCHEZ and TERESA TLAPA DE LA ERA,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In the instant motion, plaintiff Unitrin Advantage Insurance Company ("Unitrin") moves for an order, pursuant to CPLR § 3215, granting it a default judgment against defendants Brooklyn Medical Practice, P.C., Eclipse Medical Imaging P.C., Friendly RX, Inc. a/k/a Friendly RX Pharmacy, Inc., North Shore Family Chiropractic, P.C. a/k/a North Shore Family Chiro, P.C., Unicorn Acupuncture P.C., Advanced Surgery Center, LLC, Ortho-Med Equip Inc., Protechmed Inc., Ramapo Valley Anesthesia Associates, LLC a/k/a Ramapo Valley Anesthesia Assoc., Big Apple Pain Management, PLLC, Nu Age Med Solutions Inc., (collectively "medical provider-

defendants"), Jose Carlos Suarez Esteves ("Esteves"), Catalina Suarez Sanchez ("Sanchez"), and Teresa Tlapa De La Era ("Era") on its first, second, and fourth causes of action.[1] No opposition is submitted. After a review of the papers presented, as well as the relevant statutes and case law, the motion is denied with leave to renew upon proper papers.

This action arises from a motor vehicle collision which occurred on January 23, 2017, in which defendants Esteves, Sanchez and Era (collectively "claimant-defendants" or "claimants") were allegedly injured. The claimants were the occupants of a 2004 Pontiac, insured by Unitrin in the name of Navaro Sandalio. According to plaintiff, Sandalio was not in the insured vehicle at the time the collision occurred. The medical provider defendants (as the claimants' assignees) thereafter sought no-fault benefits for treatment rendered to the claimants for their alleged injuries. Plaintiff further alleges that the medical provider-defendants have submitted over $72,000 in bills for treatment provided to the claimant-defendants related to the collision.

Unitrin apparently questioned the legitimacy of the charges because Sanadlio was not in the insured vehicle at the time of the alleged accident and because the claimants had no apparent relationship with Sandalio. Additionally, the claimants were submitting elaborate and mirrored treatment from the same providers. Further, Esteves prepared his own motor vehicle report that listed himself as the only occupant of the insured vehicle. Thus, in order to confirm the legitimacy of the claims and injuries, plaintiff sought to compel the claimants to submit to examinations under oath ("EUO").

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[1] Plaintiff does not move against defendants Advanced Orthopedics and Joint Preservation, Wellness Express PT P.C., Navaro Sandalio, and Veronica Barroso. Defendant Advanced Orthopedics and Joint Preservation P.C. a/k/a Advanced Ortho and Joint Preservation has answered the complaint (Boucher Aff. fn 1). While this motion was pending, the Court granted plaintiff's motion seeking an extension of time to serve Wellness Express PT, P.C. Plaintiff indicates that Navaro Sandalio was discontinued from the action (*Id.*). Likewise, plaintiff states that Veronica Barroso never submitted any no-fault claims to Unitrin and Unitrin will discontinue the action against her as moot (*Id.* at fn 3).

Harlan Schreiber, Esq., an attorney associated with the plaintiff's law firm, stated that he reviewed the logs for this case and can attest the EUOs were scheduled for Esteves, Sanchez, and Era. On or around April 4, 2017, plaintiff allegedly sent Sanchez and Era each a notice by mail which stated that plaintiff required they each appear for an EUO on April 18, 2017. On or around May 3, 2017, plaintiff allegedly sent Esteves a notice by mail which stated that plaintiff required him to appear for an EUO on May 12, 2017. Schreiber stated that the claimants appeared for the EUOs but that they never responded to his requests that they subscribe the transcripts from those proceedings.

On or about May 31, 2017, plaintiff, through Alternative Consulting Examinations ("ACE") requested that Esteves appear for an orthopedic IME on June 21, 2017. When Esteves failed to appear on June 21, 2017, the IME was rescheduled by notice dated June 21, 2017, which directed Esteves to appear on July 5, 2017. According to the plaintiff, Esteves failed to appear for the IME on July 5, 2017.

Plaintiff commenced this action on April 18, 2018, and now moves pursuant to CPLR § 3215, for a default judgment against the claimants as well as against the medical provider-defendants due to their failure to answer or otherwise appear in this matter. Upon default, plaintiff seeks a declaration that it is under no obligation to pay any claims in connection with the January 23, 2017 accident based on a founded belief that the alleged injuries were not causally related to the insured incident and the claimants' failure to comply with conditions precedent to coverage. Specifically, plaintiff asserts that claimants breached conditions precedent to coverage by failing to subscribe their EUO transcripts and Esteves failing to appear for an IME. In support of the motion, plaintiff submits, *inter alia*, the summons and complaint, affidavits of service, two attorneys' affirmations, an affidavit of its claim representative Denise Winant, the police report,

an affidavit of Navaro Sandalio, letters from Schreiber to the claimants requesting that they appear for EUOs, transcripts of claimants EUOs with letters by Schreiber requesting that the transcripts be executed, documentation from ACE to Esteves requesting that he appear for an IME and his respective failures to appear, and proof of the additional mailing of the summons and complaint.

CPLR § 3215 provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead, or proceed to trial..., the plaintiff may seek a default judgment against him." Where a plaintiff moves for leave to enter a default judgment, he or she is required to submit proof of service of the summons and complaint, proof of facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (*see* CPLR § 3215[g]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). "CPLR § 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see* 4 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 3215.22-3215.27)." It is well settled that "a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" shall suffice (*Beltre v Babu*, 32 AD3d 722,723 [1st Dept 2006]). Further, "a complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR § 3215" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]) *citing Joosten v Gale*, 129 AD2d 531, 534 [1st Dept 1987]). Such a complaint is "purely hearsay" and "devoid of any evidentiary value" (*Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]).

Here, plaintiff established presumptive valid proof of service on the claimants and medical provider-defendants. Plaintiff has also demonstrated that the claimant and medical provider-defendants have defaulted in answering and that it complied with CPLR § 3215 (g) and BCL §

306 (b)(1). The only remaining question is whether the plaintiff submitted sufficient proof of the facts constituting its claim. Since the complaint is verified by plaintiff's attorney, it is incumbent upon the plaintiff to submit an affidavit by one with such knowledge setting forth facts constituting the claim (*Nedeltcheva v MTE Transportation Corp.*, 157 AD3d 423, 423 [1st Dept 2018]). For the reasons set forth below, the facts submitted in support of the motion are insufficient to warrant the granting of a default judgment in favor of plaintiff.

I. Founded Belief

Plaintiff alleges in its first cause of action that none of the defendants are entitled to collect no fault benefits under the policy because it "maintains a founded belief that the alleged injuries of the claimants and any subsequent [n]o-[f]ault [t]reatments submitted by the [m]edical [p]rovider-[d]efendants were not causally related to an insured accident" (Complaint ¶ 44). An insurer may disclaim coverage based upon "the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Grp. of Ins. Co.*, 90 NY2d 195,199 [1997]). In meeting this burden, a no-fault insurer is "not required to establish that the subject collision was the product of fraud, which would require proof of all elements of fraud, including scienter, by clear and convincing evidence'" (*V.S. Med. Servs. P.C. v All State Ins. Co.*, 25 Misc 3d 39, 41 [App Term, 2d Dept 2009]). Rather, the no fault insurer must demonstrate the facts elicited during an investigation that make up the founded belief. Circumstantial evidence may be used to prove such facts if a party's conduct "may be 'reasonably inferred' based upon 'logical inferences to be drawn from the evidence'" (*Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2d Dept 2005]).

Plaintiff argues that there is significant evidence to support such a founded belief. In his affirmation in support of the motion, Boucher represents that the "claimants had no apparent

relationship," "the medical treatment allegedly provided was not consistent with the testimony," and "claimants provided conflicting testimony as to their plans of the alleged loss" (Boucher Aff ¶ 33). Plaintiff further contends that it referred the MRIs of the claimants to expert radiologist Dr. Audrey Eisenstadt, who determined that any claims of injury were not related to the collision. Plaintiff also focuses on the fact that "Esteves allegedly borrowed the insured vehicle under false pretenses" (*Id.*). Plaintiff alleges that "Esteves told Sandalio that there were no injuries and that there were only two occupants of the insured vehicle at the time of the alleged collision" (*Id.*). Given these factors, Boucher maintains that there exists a valid foundation upon which to form a belief that the claims were not causally related to the collision.

Plaintiff further submits an affidavit of Denise Winant, the claims representative assigned to the no-fault claims arising from the January 23, 2017 collision. Winant avers that the facts presented suggest that the collision was not accidental and that any claims of injury or treatment were not related to the underlying collision. Winant lists the same factors identified in the Boucher affirmation as a basis for its founded belief.

The plaintiff's submissions, however, fail to demonstrate a founded belief that the alleged injuries did not arise from an accident covered under its policy. For one thing, the statements made in the Winant affidavit are nearly identical to those in Boucher's affirmation.[2] Winant repeats, almost verbatim the conclusory language set forth by Boucher regarding the claimants' medical treatment not being consistent with their testimony. Specifically, both Boucher and Winant state that the claimants' testimony as to treatment received was not consistent with the bills submitted to Unitrin. While plaintiff submits the transcripts of the claimants' EUOs, it does not cite to any

[2] So much so that both the Boucher Affirmation and Winant Affidavit have the same typographical error. Both allege that "Unitrin received several claims from the remaining defendants, who are medical provider defendants seeking to recover No-Faults benefits as the alleged assignees of ***Steele***" (*see* Boucher Aff ¶ 8; Winant ¶ 17). The Court assumes this was a typographical error as there is no named defendant by that name.

line or page of the claimants' testimony to support such claims. The Court should not have to undertake the toilsome task of reading through pages and pages of testimony in order to ascertain which portions support plaintiff's supposed contentions. Regardless, even if plaintiff was diligent enough and pointed to the relevant testimony, it would not matter because this Court would have almost nothing to compare it with. Indeed, though plaintiff alleges that the medical provider-defendants "have submitted over $72,000 in no-fault claims as alleged assignees of the claimants," plaintiff submits only four claim forms -- relating to Esteves' treatment only. Plaintiff does not specify if these were the only claims submitted by the medical provider-defendants as to Esteves. Nevertheless, plaintiff has not submitted any documentation proving that any of the medical provider-defendants submitted claims for the treatment of Sanchez and Era.

The Court considers plaintiff's remaining arguments regarding its "founded belief" and finds said arguments to be unavailing. The mere fact that claimant-defendants provided conflicting testimony as to where and how they met does not imply that the collision was not accidental. While Dr. Eisenstadt's report does offer some probative value, without the relevant medical claim forms, this Court is unable ascertain if Dr. Eisenstadt addressed all of the claimants' alleged injuries. As such, the Court cannot determine on the proof submitted in this case that there exists a founded belief that the alleged injuries of the claimants and any subsequent no-fault treatment submitted by the medical provider-defendants were not causally related to an insured accident.

II. Claimant-Defendants' Breach of Conditions Precedent to Coverage

To be entitled to declaratory judgment, an insurer must affirmatively demonstrate that it requested the EUOs and IMEs in accordance with the procedures and time frames set forth in 11 NYCRR 65-3.5 (*see American Tr. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 [1st Dept 2015]; *see also Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]). EUOs and IMEs are

considered to be part of an insurer's "entitlement to additional verification" following receipt of a provider's statutory claim forms. 11 NYCRR 65-3.5 sets forth the claim procedure that applies to insurers who seek to verify claims. "The Claim Procedure regulations mandate the following time frames: 1) within 10 business days of receipt of an application for no-fault benefits, the insurer shall forward the prescribed verification forms to the parties required to complete them; 2) after the insurers receipt of the completed verification forms, any additional verification, i.e., an IME or EUO, required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of one or more of the completed verification forms; and 3) if the request for additional verification is an IME, the insurer shall schedule the IME to be held within 30 calendar days from the date of receipt of the prescribed verification forms" (*Unitrin Advantage Ins. Co v Better Health Care Chiropractic, P.C.*, 2016 WL 2606744 [NY Sup May 4, 2016], *2). "The phrase 'prescribed verification forms' apparently refers to certain of the forms enumerated in ... 11 NYCRR 65-3.4[3] and set forth in Appendix 13 to the Insurance Department regulations" (*American Tr. Ins. Co.*, 131 AD3d at 849).

[3] 11 NYCRR 65-3.4 provides: (b) Unless the insurer will pay the claim as submitted within 30 calendar days, then, within five business days after notice is received by the insurer at the address of its proper claim processing office, either orally pursuant to subdivision (a) of this section or in any other manner, the insurer shall forward to the applicant the prescribed application for motor vehicle no-fault benefits (NYS form N-2) accompanied by the prescribed cover letter (NYS form N-F 1). If notice is initially received by the insurer at an address other than the proper claims processing office, the five-day period for forwarding of the prescribed forms shall commence on the day such notice is received at the proper clams processing office, but in no event shall the prescribed forms be forwarded later than 10 business days after receipt of the original notice.
(c) Attached is an appendix (Appendix 13, infra), which includes the following prescribed claim forms that must be used by all insurers, and shall not be altered unless approved by the superintendent: (1) Cover letter (NYS form NF-1A)– to be used with policies effective on or after September 1, 2001; (2) Cover letter (NYS form NF-1B)-to be used with policies effective prior to September 1, 2001; (3) Application for motor vehicle no-fault benefits (NYS form NF-2); (4) Verification of treatment by attending physician or other provider of health service (NYS from NF-3); (5) Verification of hospital treatment (NYS form NF-4); (6) Hospital facility form (NYS form NF-5); (7) Employer's wage verification report (NYS form NF-6); (8) Verification of self-employment income (NYS form NF-7); (9) Agreement to pursue social security disability benefits (NYS form NF-8); (10) Agreement to pursue workers' compensation or New York State disability benefits (NYS form NF-9); (11) Denial of claim form (NYS form NF-10); (12) Subrogation agreement (NYS form NF-11); (13) Lump-sum settlement agreement (NYS Form NF-12); and (14) Election-optional basic economic loss (NYS form NF-13).

However, "the notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply to EUOs that are scheduled prior to the insurance company's receipt of a claim form" (*Mapfre Ins. Co. of N.Y. v Manoo*, 140 AD3d 468, 469-470 [1st Dept 2016]). Therefore, only when an insurer receives a claim, must it comply with the follow-up provisions of 11 NYCRR 65-3.6(b) (*Mapfre Ins. Co. of N.Y.*, 140 AD3d at 469).

A. Esteves' Failure to Appear for an IME

"The failure to appear for IMEs requested by the insurer "when, and as often, as [it] may reasonably require (11 NYCRR 65-1.1) is a breach of a condition precedent to coverage under the [n]o-[f]ault policy (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). "A denial premised on breach of a condition precedent to coverage voids the policy ab initio" (*Unitrin Advantage Ins. Co.*, 82 AD3d at 560). To meet its prima facie burden, plaintiff must establish not only a failure to appear, but also that it requested the IME in accordance with the procedures and time frames set forth in the no-fault implementing regulations discussed above (*see* 11 NYCRR 65-3.5[d]; *American Tr. Ins. Co.*, 131 AD3d at 841; *Unitrin Advantage Ins. Co.*, 82 AD3d at 560).

Here, although plaintiff submitted evidence that the notices of the scheduled IMEs were properly mailed and that Esteves did not appear, plaintiff failed to show prima facie proof that it complied with the timeliness requirements of 11 NYCRR 65-3.5(d). According to the record before this Court, plaintiff received a bill from North Shore Family Chiro on June 15, 2017 (plaintiff's exhibit I). Boucher maintains that "the IMEs were timely scheduled as Unitrin received bills on behalf of Esteves after the IME requests" (Boucher Aff ¶ 20). Inasmuch as plaintiff appears to be arguing that the 11 NYCRR 65-3.5 notification requirements do not apply because it first requested that Esteves appear for an IME by correspondence dated May 31, 2017, prior to the June

15, 2017 bill (verification), this Court is not convinced. Plaintiff has not adequately shown that the June 15, 2017 bill from North Shore Family Chiro was the first claim it received. The Court notes that neither Boucher nor Denise Winant specifically state when Unitrin received its first bill in connection with Esteves' treatment – or any other claimant for that matter. With respect to Esteves' IME, the Court finds that plaintiff has failed to show when it first received a bill (or verification) relating to his treatment. Without such a showing, the Court cannot ascertain whether plaintiff's IME requests of Esteves were pre-claim or post-claim and therefore whether the timeliness requirements apply (*see American Tr. Ins. Co.*, 131 AD3d at 842; *American Tr. Ins. Co. v Vance*, 131 AD3d 849, 850 [1st Dept 2015]). Consequently, the Court cannot determine on the proof submitted in this case whether Esteves' failure to appear for an IME was a breach of a condition precedent that vitiated the policy ab initio (*Unitrin Advantage Ins. Co.*, 82 AD3d at 560).

Contrary to plaintiff's contention, 11 NYCRR 65-3.5(p) does not excuse it of its obligation to demonstrate, on a motion for leave to enter a default judgment, that it timely requested the non-answering claimant to appear an IME. Plaintiff sets forth no authority for its assertion which would require this Court to disregard the holdings of the Appellate Division, First Department (*see Kemper Indep. Ins. Co. v Adelaida Phys. Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]; *see also Natl. Liab. & Fire Ins. Co. v Tam Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015]). "Those cases expressly hold that, where an insurer disclaims coverage based on an applicant's failure to appear for a scheduled EUO, or to provide other additional requested verification (i.e. IME), proof of timely mailing of a request for that additional verification is an integral part of an insurer's prima facie burden" (*Hertz Vehicles, LLC v Cliffside Park Imaging & Diagnostic Ctr.*, 2017 WL 5972806 [NY Sup November 29, 2017], *2).

B. Claimant-Defendants Alleged Failure to Subscribe Their Respective EUO Transcripts

Similarly, "[t]he failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage" as to the eligible person, including all related billing from medical providers assigned to the insurer (*Natl. Liab. & Fire Ins. Co.*, 131 AD3d at 851). Further, as a "condition precedent" to no-fault coverage, an eligible injured person or that person's assignee or representative shall … as may be required submit to examinations under oath by any person named by the [insurer] and subscribe the same" (11 NYCRR 65-2.4[c][2]). Moreover, the First Department recently held that the failure to submit to an EUO and subscribe the same "violated a condition precedent to coverage and warranted denial of the claims" (*Hertz Vehicles, LLC v Gejo, LLC*, 161 AD3d 549, 549-550 [1st Dept 2018]; *Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 618 [1st Dept 2018]).

In the instant case, the claimants have attended their EUOs, but have allegedly breached a condition precedent by failing to subscribe and return their respective EUO transcripts. Notwithstanding this, Unitrin has "failed to supply sufficient evidence to enable this court to determine whether the notices it had served on the claimants for EUOs were subject to the timeliness requirements of 11 NYCRR 65-3.5 (b) and 11 NYCRR 65-3.6 (b) (*see Mapfre Ins. Co. of N.Y.*, 140 AD3d at 469) and, if so, whether the notices had been served in conformity with those requirements (*see Natl. Liab. & Fire Ins. Co.*, 131 AD3d at 851)" (*Kemper Indep. Ins. Co.*, 147 AD3d at 438). As set forth above, plaintiff submits only four claims forms (verifications) despite alleging that the medical-providers submitted over $72,000 in no fault claims as assignees of the claimants. Additionally, of import, is that the four claim forms relate to Esteves' treatment only and not to the other claimants. The Court reiterates that plaintiff has neither definitively stated nor demonstrated that the claim forms submitted were the first claims it received with respect to

Esteves. Just as plaintiff has failed to show that it scheduled Esteves' IME in accordance with the procedures and timeframes in the no-fault implementing regulations to the extent applicable, so, too has plaintiff failed to show whether the timeliness requirements apply to plaintiff's EUO request of Esteves.

Plaintiff also fails to provide sufficient proof of facts constituting its claim against claimant-defendants Sanchez and Era. It offered no evidence reflecting supporting dates (i.e., NF-2 or NF-10 forms) upon which plaintiff received verification forms with respect to Sanchez and Era and thus failed to show that it properly noticed their EUOs within the timeframes set forth in 11 NYCRR 65 3.5(b). In light of this, there is no such showing by plaintiff pursuant to 11 NYCRR 65-1.1 that Esteves, Sanchez and Era were "required to submit to examinations under oath by any person named by [plaintiff] *and subscribe the same*." Therefore, the Court cannot determine on the plaintiff's submissions whether the claimants' failure to subscribe their EUO transcripts was a breach of a condition precedent that vitiated the policy ab initio.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the motion by plaintiff Unitrin Advantage Insurance Company is denied with leave to renew upon proper papers; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: 12/20/2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.