DTG Operations Inc. v Big Apple Ortho Med. Supply, Inc.

2013 NY Slip Op 31773(U)

August 2, 2013

Sup Ct, New York County

Docket Number: 110731/2011

Judge: Cynthia S. Kern

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[* 1] SCANNED ON 8/5/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 110731/2011
DTG OPERATIONS, INC.
vs.
BIG APPLE ORTHO MEDICAL
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

Dated: 8/2/13

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

DTG OPERATIONS INC. d/b/a DOLLAR RENT-A-CAR,

Plaintiff,

Index No.110731/2011

-against-

DECISION/ORDER

BIG APPLE ORTHO MEDICAL SUPPLY, INC., et al.,

Defendants.

----------x

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.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking a declaration that it owes no duty to pay no-fault benefits to defendants arising from an alleged motor vehicle accident on October 22, 2010. On or about June 1,2012, default judgment was entered against all defendants, with the exception of defendants By Med, P.C. ("BY"), Cortland Medical Supply, Inc. ("Cortland") and Markeda Barnes, who could not be located for service. Plaintiff now moves for an order pursuant to CPLR § 3212 for summary judgment against BY and Cortland. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. On October 22, 2010, defendants Starshima McCord ("McCord"), Markeda Barnes ("Barnes") and Latisha McCord ("McCord") (hereinafter collectively referred to as the "claimants") were allegedly the occupants of a 2012 Ford, self-

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insured by plaintiff, which allegedly collided with another vehicle, causing that vehicle to make contact with a third vehicle that was parked near the intersection of East 7th Street and Cortelyou Road in Brooklyn, New York. According to the Police Accident Report, no injuries were reported at the scene of the collision. However, thereafter the claimants sought treatment for injuries allegedly sustain in the October 22, 2010 collision and plaintiff received several claims from the defendant medical providers seeking to recover no-fault benefits as the alleged assignees of the claimants.

Based on the magnitude of the claims submitted, the fact that the Police Accident Report indicates that no injuries were reported at the time of the accident and the fact that there was only minor damage sustained by car at the time of the collision, plaintiff had concerns as to the claims' legitimacy. Thus, plaintiff, pursuant to its rights under the no-fault regulations, sought verification of these claims by requesting EUOs of the claimants to confirm the legitimacy of the loss and the necessity of any alleged treatment and referrals. The claimants appeared for their duly scheduled EUOs, but provided conflicting testimony concerning the alleged collision and the subsequent treatment rendered. Due to claimants conflicting testimony and other suspicious matters surrounding the claims, plaintiff, pursuant to its rights under the no-fault regulations, sought further verification of the claims by requesting EUOs of the medical provider defendants, including BY and Cortland. However, despite due demand, the medical provider defendants did not appear or in any way respond to the requested EUOs. Accordingly, plaintiff deemed the medical provider defendants to be in breach of a condition precedent to coverage under the no-fault regulations and denied all no-fault claims, including those of BY and Cortland.

The failure to appear for a duly scheduled EUO is a breach of a condition precedent to

coverage under the no-fault policy. *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dept 2011); *see also Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*, 27 Misc.3d 141 (App. Term 2nd, 11th and 13th Jud. Dists. 2010) ("the appearance of plaintiff's assignor at an EUO [is] a condition precedent to coverage"). Accordingly, a no-fault insurer makes a prima facie showing of entitlement to summary judgment by establishing that it properly mailed the notices for an examination under oath to the provider and that the provider failed to appear. *Bath Ortho Supply, Inc. v. New York Cen. Mut. Fire Ins. Co.*, 34 Misc.3d 150 (App. Term. 1st Dept 2012).

In the instant action, plaintiff has made out its prima facie case for summary judgment as it has shown that it properly mailed the notices for EUOs to BY and Cortland and that they failed to appear for said EUOs. BY and Cortland's assertion that summary judgment should be denied because plaintiff's EUO requests were untimely is without merit. "[A]n EUO need not be scheduled within 30 days of defendant-insurer's receipt of the claim." *Dover Acupuncture, P.C. v. State Farm Mut. Auto. Ins. Co.*, 28 Misc.3d 140 (App. Term 1st Dept 2010). Rather, the no-fault regulations require only that the EUOs be reasonably scheduled. *See* 11 NYCRR 65-1.1. As BY and Cortland have not provided evidence that the EUOs were scheduled unreasonably, plaintiff's disclaimer must be upheld and its motion for summary judgment granted.

Additionally, BY and Cortland's assertion that summary judgment should be denied because plaintiff's affidavit in support of its motion bears an out-of-state notary without the requisition certificate of conformity as required by CPLR 2309(c) is also without merit. The failure to provide a certificate of conformity for oaths taken out of this state is not a fatal defect and "authentication of the oathgiver's authority can be secured later, and given nucn pro tunc

effect if necessary." *Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dept 2009). Here, plaintiff has obtained a certificate of conformity for the affidavit and annexed it to its reply papers.

Accordingly, plaintiff's motion is granted. The Clerk is directed to enter judgment in favor of plaintiff and against defendants BY and Cortland and it is

ADJUDGED and DECREED that defendant BY and Cortland are not entitled to no-fault coverage for the motor vehicle accident involving defendants Starshima McCord, Markeda Barnes and Latisha McCord on October 22, 2010; and it is further

ORDERED that all pending and future no-fault lawsuits and arbitration proceedings brought by defendants BY and Cortland with respect to the October 22, 2010 motor vehicle accident are permanently stayed. This constitutes the decision and order of the court.

Dated: 8/2/13

Enter: _____

J.S.C.

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