

American Tr. Ins. Co. v Curry

2013 NY Slip Op 32497(U)

October 8, 2013

Supreme Court, New York County

Docket Number: 109130/2011

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

AMERICAN TRANSIT INSURANCE COMPANY

INDEX NO. 109130/2011

-v-
CHRISTINA CURRY, et al.

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion ~~to~~for a default judgment and summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1

Answering Affidavits — Exhibits _____ No(s) 2

Replying Affidavits _____ No(s) 3

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

The court denies plaintiff's motion for a default declaratory judgment and a summary declaratory judgment pursuant to the accompanying decision. C.P.L.R. §§ 3001, 3212(b), 3215 (F).

FILED

OCT 17 2013

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COUNTY CLERK'S OFFICE

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

Dated: 10/8/13

Lucy Billings, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

LUCY BILLINGS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

AMERICAN TRANSIT INSURANCE COMPANY,

Index No. 109130/2011

Plaintiff

- against -

DECISION AND ORDER

CHRISTINA CURRY, BETTER HEALTH CARE
CHIROPRACTIC, P.C., BRONX ACUPUNCTURE
THERAPY, P.C., FIVE BORO PSYCHOLOGICAL
AND LICENSED MASTER SOCIAL WORK
SERVICES, PLLC, GARDEN MEDICAL
DIAGNOSTICS, P.C., GREEN HEIGHTS
PHYSICAL THERAPY, P.C., LINCOLN
MEDICAL AND MENTAL HEALTH CENTER, NEW
YORK CITY HEALTH AND HOSPITALS
CORPORATION, LONGEVITY MEDICAL SUPPLY,
INC., NEW CENTURY DIAGNOSTICS, P.C.,
PARK AVENUE MEDICAL CARE, P.C.,
STAND-UP MRI OF THE BRONX, P.C., STAR
MEDICAL & DIAGNOSTICS, PLLC, and
TRANSCARE AMBULANCE CORP.,

FILED

OCT 17 2013

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Defendants

-----X

APPEARANCES:

For Plaintiff

Giovanna Tuttolomondo Esq.
Law Offices of James F. Sullivan, P.C.
52 Duane Street, New York, NY 10007

For Defendant Stand-Up MRI of the Bronx, P.C.

Melissa R. Abraham-Lofurno Esq.
Law Offices of Robert E. Dash, P.C.
8 Corporate Center Drive, Melville, NY 11747

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves for a default judgment against all
defendants except Five Boro Psychological and Licensed Master
Social Work Services, PLLC, Lincoln Medical and Mental Health

Center, New York City Health and Hospitals Corporation, Stand-Up MRI of the Bronx, P.C., and Transcare Ambulance Services.

C.P.L.R. § 3215. Plaintiff moves for summary judgment against Stand-Up MRI. C.P.L.R. § 3212(b). On each ground, against both Stand-Up MRI and the remaining nine defendants, plaintiff's motion seeks a judgment declaring that plaintiff owes no duty to compensate them pursuant to New York Insurance Law § 5103 for expenses incurred from a collision November 15, 2009, involving defendant Curry and a motor vehicle for which plaintiff issued an insurance policy. C.P.L.R. §§ 3001, 3212(b), 3215(e). For the reasons explained below, the court denies all the relief sought by plaintiff's motion.

Plaintiff bases both prongs of its motion on Curry's nonappearance for an examination under oath (EUO), to which plaintiff is entitled under the policy. See 11 N.Y.C.R.R. § 65-1.1(d). The policy's mandatory personal injury protection provisions condition the insurer's payment of a claim on "full compliance with the terms of this coverage." Id. Upon the insurer's request, "the eligible injured person or that person's assignee or representative shall . . . as may reasonably be required submit to examinations under oath" Id.

II. PLAINTIFF SCHEDULED THE EUO AT REASONABLY CONVENIENT TIMES.

11 N.Y.C.R.R. § 65-3.5(e) requires that an EUO be "held at a place and time reasonably convenient to the applicant" for insurance coverage. Plaintiff scheduled Curry's EUO at two different times on different days of the week, both during

business hours. Although business hours may be inconvenient for applicants who work during those hours, § 65-3.5(e) also required plaintiff to notify Curry, as it did, that she would be reimbursed for any earnings lost by complying with the EUO request. Plaintiff notified her further that, if she advised plaintiff that the scheduled time was in fact inconvenient, plaintiff would reschedule the EUO. In light of these available accommodations, and absent any notice from Curry that the scheduled time was inconvenient, the scheduling during business hours was reasonable.

III. THE MISSING EVIDENCE

Yet 11 N.Y.C.R.R. § 65-3.5(e) requires further that plaintiff's request for the EUO, to establish Curry's or her assignee's claim "must be based upon the application of objective standards so that there is specific objective justification supporting the use of such exam." Nowhere do plaintiff's admissible documents or its witnesses, including the claims representative assigned to defendants' claims for coverage and a supervisor of plaintiff's legal department, responsible for EUO requests, indicate any justification, need, or explanation for Curry's EUO. The director of plaintiff's special investigations unit (SIU) attests simply that it "was requested to conduct an investigation" of the motor vehicle collision in which Curry was involved. Aff. in Supp. of Giovanna Tuttolomondo Ex. J ¶ 6. "As part of SIU's investigation," an SIU investigator "attempted to examine the claimant, CHRISTINA CURRY, under oath." Id.

Moreover, even though only four months elapsed between when Curry provided her address on her application for insurance coverage and plaintiff's mailing of its EUO requests to that address, no witness attests that Curry did not notify plaintiff of an address change in the interim. Nor does plaintiff present any evidence that the applicant was notified of any obligation to inform the insurer of her change in address, particularly when she has assigned her rights to insurance benefits to her medical care providers and retains no more interest in obtaining benefits paid to her. This incomplete record leaves a question whether plaintiff mailed its EUO requests to Curry's current address and whether she ever received them.

More importantly, no witness attests to Curry's nonappearance at either of the scheduled EUOs. The director of plaintiff's SIU just lays the foundation for business records that he claims show her nonappearances. While these records may be admissible, plaintiff does not present them. The SIU director's recitation of their contents is hearsay. E.g., People v. Joseph, 86 N.Y.2d 565, 570 (1995); Lapin v. Atlantic Realty Apts. Co., LLC, 48 A.D.3d 337, 338 (1st Dep't 2008); Kane v. Triborough Bridge & Tunnel Auth., 8 A.D.3d 239, 241 (2d Dep't 2004); Wagman v. Bradshaw, 292 A.D.2d 84, 87-88 (2d Dep't 2002). See Giordano v. Berisha, 45 A.D.3d 416, 417 (1st Dep't 2007); Washington v. Montefiore Medical Ctr., 9 A.D.3d 271, 272 (1st Dep't 2004); National State Elec. Corp. v. Marina Towers Assocs., 203 A.D.2d 49, 50 (1st Dep't 1994).

IV. CONCLUSION

The absence of justification for the EUO as required by 11 N.Y.C.R.R. § 65-3.5(e) and of admissible evidence that the eligible injured person Curry actually failed to appear for the EUOs requested by plaintiff, see 11 N.Y.C.R.R. § 65-1.1(d), precludes a summary declaratory judgment to plaintiff at this stage. Ahead Realty LLC v. India House, Inc., 92 A.D.3d 424, 425 (1st Dep't 2012); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 100-101 (1st Dep't 2009); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253, 254 (1st Dep't 2006). See United States Fire Ins. Co. v. American Home Assur. Co., 19 A.D.3d 191, 192 (1st Dep't 2005); 319 McKibben St. Corp. v. General Star Natl. Ins. Co., 245 A.D.2d 26, 29-30 (1st Dep't 1997). Absent a showing of plaintiff's compliance with the governing regulation, 11 N.Y.C.R.R. § 65-3.5(e), and Curry's noncompliance with the regulations and policy, 11 N.Y.C.R.R. §§ 65-1.1(d), 65-3.5(e), plaintiff has failed to present facts establishing its prima facie claim and thus a basis for summary judgment as sought against Stand-Up MRI, C.P.L.R. § 3212(b); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Chubb Natl Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d 352 (1st Dep't 2006), or a default judgment as sought against the nine other defendants. C.P.L.R. § 3215(f); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 203 (2013); Martinez v. Reiner, 104 A.D.3d 477, 478 (1st Dep't

2013) Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011);
Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010).

Consequently, the court denies plaintiff's motion for a default declaratory judgment and for a summary declaratory judgment. C.P.L.R. §§ 3001, 3212(b), 3215(f). This decision constitutes the court's order.

DATED: October 8, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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