Hertz Vehs., LLC v Star Med. & Diagnostic, PLLC
2014 NY Slip Op 33298(U)
December 17, 2014
Supreme Court, New York County
Docket Number: 108445/11
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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HERTZ VEHICLES, LLC,

Plaintiff,

-against-

STAR MEDICAL & DIAGNOSTIC, PLLC, et al.,

Defendant.

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DECISION AND ORDER

Index No. 108445/11

HON. ANIL C. SINGH, J.:

Plaintiff in this no-fault automobile insurance matter moves pursuant to CPLR 3212 for an order: 1) awarding summary judgment against defendants Five Boro Psychological and Licensed Master Social Work Services, PLLC ("Five Boro"), and Med Equipments Service, Inc. ("Med Equipments"), contending that defendant/claimants Dellashuan Gillespie and Cyphus France failed to appear for EUOs; and 2) pursuant to CPLR 3126 and 22 NYCRR 130-1.1 imposing sanctions and attorneys' fees against Five Boro for refusing to abandon its claims after its owner pled guilty to insurance fraud and signed a general release of all claims. Defendants oppose the motion.

Plaintiff exhibits the sworn affidavit of Kathleen Jones, who states that she is a no-fault claims representative employed by plaintiff Hertz Vehicles, LLC, the

self-insured owner of the motor vehicle involved in this action. She states that the claimants were occupants of a Toyota automobile owned by Hertz that allegedly rear-ended an Acura automobile on August 24, 2010, at the intersection of Foch Boulevard and 130th Street in Queens. According to Ms. Jones, plaintiff denied the claims in issue pertaining to Five Boro based on claimant Dellashuan Gillespie's failure to appear for an EUO, and denied the claims in issue pertaining to Med Equipments based on claimants Dellashuan Gillespie's and Cyphus France's failure to appear for EUOs.

Defendants have not submitted an affidavit in opposition to the motion. Instead, defendants assert that the affidavit of the claims representative is inadmissible. They point out that the affidavit bears an out-of-state notary's stamp without an accompanying certificate of conformity, as required by CPLR 2309(c).

The Court finds that defendants' contention is meritless, for a certificate of conformity is annexed as an exhibit to plaintiff's reply papers.

Discussion

The standards for summary judgment are well settled. "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]). Summary judgment is a drastic remedy and should only be granted 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]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion could 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], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]).

In Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559 [1st Dept, 2011], the First Department explicitly found that "the failure to appear for IMEs requested by an insurer ... is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine" (id. at 560, citing Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195 [1997] (defense that injured person's condition and hospitalization were unrelated to the accident was non-precludable)). The First Department justified the finding that an IME no-show

was a non-precludable defense on the basis that a "breach of a condition precedent to coverage voids the policy *ab initio*." Accordingly, the failure to appear for an IME cancels the contract as if there was no coverage in the first instance, and the insurer has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely (id.).

Based on the reasoning of Unitrin Advantage, it is clear that a claimant's failure to comply with a condition precedent to coverage voids the insurance contract *ab initio*, and the insurer is not obligated to pay the claim, regardless of whether it issued denials beyond the thirty-day period. Further, since the contract has been nullified, the insurer may deny all claims retroactively to the date of loss.

Here, the Court finds that the sworn affidavit of Kathleen Jones makes out a prima facie case in favor of plaintiff that defendants' breached a material condition precedent to coverage. The Court finds further that the defendants have failed to show the existence of a genuine issue of material fact or otherwise rebutted plaintiff's prima facie case.

Finally, the Court in its discretion declines to impose sanctions or award attorneys' fees.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on its first,

second, and fourth causes of action seeking a declaration that there is no coverage for the no-fault claims of defendants Five Boro Psychological and Licensed Master Social Work Services, PLLC, and Med Equipments Service, Inc., is granted; and it is further

ADJUDGED and DECLARED that plaintiff is not obligated to provide any coverage, reimbursements or pay any invoices, sums or funds to defendants Five Boro Psychological and Licensed Master Social Work Services, PLLC, and Med Equipments Service, Inc., for any and all no-fault related services.

The foregoing constitutes the decision and order of the court.

Date: 12/17/14
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE