Hertz Vehs., LLC v Healthmakers Med. Group. P.C.
2014 NY Slip Op 33305(U)
December 17, 2014
Supreme Court, New York County
Docket Number: 159197/12
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-

HEALTHMAKERS MEDICAL GROUP, P.C. et al.,

Defendant.

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DECISION AND ORDER

Index No. 159197/12

HON. ANIL C. SINGH, J.:

Plaintiff in this no-fault automobile insurance matter moves pursuant to CPLR 3212 for summary judgment in favor of plaintiff and against defendant Richard Seldes, M.D., P.C. ("Seldes"), on the grounds that Seldes failed to appear for an EUO. Defendant opposes the motion.

Plaintiff exhibits the sworn affidavit of Karen Layne, who states that she is a Senior No-Fault Examiner employed by Hertz Vehicles, LLC, the self-insured owner of the motor vehicle involved in this action. She states that claimants Shawana Haidara and Kenneth Nesmith were occupants of a 2011 Nissan passenger van, owned by Hertz, that was allegedly involved in a collision with another motor vehicle on December 13, 2011, on Middle Neck Road in Great Neck Estates, New York. According to Ms. Layne, plaintiff denied the claims based on Seldes' failure

to appear for duly-scheduled EUOs on June 27, 2012, and July 31, 2012.

Defendant has not submitted an affidavit in opposition to the motion. Instead, defendant asserts that plaintiff has failed to present a reasonable basis for the EUO of the medical provider.

Contrary to defendant's contention, the Court finds that the record in this matter establishes ample justification for such an EUO.

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 Karen Layne makes out a prima facie case in favor of plaintiff that defendant breached a material condition precedent to coverage. The Court finds further that defendant has failed to show the existence of a genuine issue of material fact or otherwise rebutted plaintiff's prima facie case.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on its first, second, and third causes of action seeking a declaration that there is no coverage for the no-fault claims of defendant Richard Seldes, M.D., P.C., 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 defendant Richard Seldes, M.D., P.C., 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