SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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AMERIPRISE INSURANCE COMPANY,

Plaintiff,

- v -

INDIVIDUAL DEFENDANTS
MAXINE JHAGROO TAYLOR, MARILYN TAYLOR, LUIS ARGUELLES, WILLIE MORRISON, REGINALD GOODING, OMAR LEGEMAN,

HEALTHCARE DEFENDANTS
TOP TAP ACUPUNCTURE, P.C., KSENIA PAVLOVA, D.O., ALL KIND PHYSICAL THERAPY, P.C., ET. AL.,

Defendants.

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Index No. 162364/2014

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This is an action arising from an alleged motor vehicle incident, which occurred on December 20, 2013, under policy number BX07517159. On that date, it is alleged that the vehicle insured ("the Insured Vehicle") by Maxine Jhagroo Taylor ("Maxine Taylor") with Amerprise Insurance Company ("Ameriprise" or "Plaintiff") was involved in a motor vehicle incident. At the time of the alleged accident, the Insured Vehicle was being operated by defendant, Marilyn Taylor, and contained passenger Luis Arguelles. The Insured Vehicle was allegedly involved in an accident with a vehicle owned and operated by Willie Morrison, which contained passengers Reginald Gooding and Omar Legeman. Ameriprise alleges that Defendants, healthcare providers, submitted claims to Ameriprise for medical and other services provided to some of the individual Defendants, as their alleged assignees

In this action, Ameriprise seeks a declaration (1) that Ameriprise is not obligated to pay No-Fault benefits for any services rendered on behalf of Maxine Jhagroo Taylor, Marilyn Taylor, or Luise Arguelles; (2) that Defendants lack standing to seek or receive No-Fault benefits for claims submitted on behalf of Maxine Taylor and Marilyn Taylor on the ground that these defendants breached a policy condition by failing to appear for an EUO; and (3) that Amerprise owes no duty to duty to pay No-Fault benefits to any of the named defendants on the grounds that the alleged incident was the product of a staged and/or intentional event.

Defendants, Ksenia Pavlova, D.O., All Kind Physical Therapy, P.C., and A.R.A. Medical Care, P.C., (collectively, "Defendants") now move for an Order to dismiss the Complaint against, pursuant to CPLR §§3211(a)(7) and 3013. Defendants argue that the Complaint fails to state a justiciable controversy and fails to sufficient facts to support its defenses. Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex. rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D. 2d 91 [1st Dept 2003])(see CPLR 3211[a][7]).

CPLR § 3013 provides, "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

An insurer is entitled to commence an action seeking a declaratory judgment that there is no coverage under the policy of insurance for No-Fault benefits if an applicant for benefits breached a condition precedent to coverage pursuant to the No-Fault Regulation. (*See generally American Tr. Ins. Co. v. Solorzano*, 968 N.Y. 3d 449 [1st Dept. 2013[). "To the extent the petitioner seeks a declaration of the rights and obligations of plaintiff under New York's No-Fault Regulation (11 NYCRR 65 et. seq.), the complaint states a justiciable controversy between the

parties, and is not subject to dismissal for failure to state an action." (*Eveready Ins. Co. v. Felder*, 2013 WL 1212748 [N.Y. Sup. July 18, 2013]).

The No-Fault regulation contains explicit language in 11 NYCRR 65-1.1 that there shall be no liability on the part of the No-Fault insurer if there has not been full compliance with the conditions precedent to coverage. Specifically, 11 NYCRR 65-1.1 states:

> No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

The Regulation mandates at 11 NYCRR 65-1.1 that:

> Upon request by the Company, the eligible injured person or that person's assignee or representative shall:
>
> > (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same.

The failure to attend duly scheduled medical exams voids the policy ab initio. (*See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [1st Dept 2011]).

In the Verified Complaint, Ameriprise that Defendants, as assignees of some of the individual defendants, have submitted claims to Ameriprise under a policy issued by Ameriprise. Ameriprise alleges and there is no basis for coverage under the policy because claimants Maxine Taylor and Marilyn Taylor breached a policy condition by failing to appear for a EUO, and because the alleged incident was the product of a staged and/or intentional accident. Accepting the allegations as true, the four corners of the Complaint state a claim for a declaration of rights concerning the subject insurance policy. Accordingly, Defendants' motion to dismiss is denied.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED that Defendants shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief is decided.

DATED: APRIL 30, 2015

EILEEN A. RAKOWER, J.S.C.