

Hertz Vehs., LLC v Alluri
2017 NY Slip Op 32578(U)
December 6, 2017
Supreme Court, New York County
Docket Number: 154077/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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HERTZ VEHICLES, LLC,

INDEX NO. 154077/2015

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 003, 004

JAGGA ALLURI, M.D., ATLAS ORTHOSURGERY, P.C., FRANKLIN HOSPITAL, INNOVTIVE MEDICAL, P.C., VENKATESAN SIVARAMAN, ADVANCED ORTHOPEDICS, P.C., PHILIP ABESSINIO, D.C., NORTHSHORE LIJ MEDICAL, P.C., CAROLE LM SCHUSTER, PRECISION IMAGING OF NEW YORK, P.C., NORTH AMERICAN PARTNERS IN ANESTHESIA, L.L.P., NASIR ISMAIL, LAKEISHA HINTON, KEYION CHEAIRS

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 104, 105

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment (motion sequence 004) is granted and the motion for summary judgment by defendant Advanced Orthopedics, P.C. (motion sequence 003) is denied.

Motion sequence numbers 003 and 004 are consolidated for disposition.

In this declaratory judgment action commenced by plaintiff Hertz Vehicles, LLC, defendant Advanced Orthopedics, P.C. ("Advanced") moves, pursuant to CPLR 3211(a)(1) and (a)(5) and Insurance Law section 5106(b), to dismiss the summons and complaint and for

attorneys' fees (motion sequence 003), and plaintiff moves, pursuant to CPLR 3212, for summary judgment against Advanced (motion sequence 004). After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, plaintiff's motion is granted and Advanced's motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

This action was commenced by plaintiff Hertz Vehicles, LLC against defendants Jagga Alluri, M.D. ("Alluri"), Atlas Orthosurgery, P.C. ("Atlas"), Franklin Hospital ("Franklin"), Innovative Medical, P.C. ("Innovative"), Venkatesan Sivaraman ("Sivaraman"), Advanced Orthopedics, P.C. ("Advanced"), Philip Abessinio, D.C. ("Abessinio"), North Shore LIJ Medical, P.C. ("North Shore"), Carole LM Schuster ("Schuster"), Precision Imaging of New York, P.C. ("Precision"), North American Partners in Anesthesia, L.L.P. ("North American"), Nasir Ismail, Lakeisha Hinton, and Keyion Cheairs on or about April 22, 2015.

In the complaint, plaintiff alleged, inter alia, that defendants Ismail, Hinton and Cheairs ("claimants") were involved in an automobile accident in Queens, New York on August 20, 2014 and that, given that the police report indicated that the vehicles involved did not sustain visible damage and that the claimants did not require medical attention at the scene, there was a "strong possibility" that the "loss was staged or intentionally caused and/or that the treatment [claimants underwent as a result of the incident] was not related to the collision." Doc. 1, at pars. 16, 23.¹ Plaintiff further alleged that, given the foregoing, as well as the testimony by claimants Ismail and Hinton at their examinations under oath ("EUOs"), it had a "founded belief" that claimants'

¹ Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with the captioned action.

injuries and the treatment they allegedly received were not causally related to the accident allegedly covered by an insurance policy it issued. Doc. 1, at par. 33. The remaining defendants named were medical providers which treated claimants following the alleged incident. Of those medical providers, only Alluri, Innovative, Sivaraman, Abessinio, Schuster, and Advanced have answered. Atlas settled with plaintiff.

In an attempt to explore the causality and necessity of the treatment rendered to claimants, plaintiff mailed demands for an EUO of Advanced pursuant to the No-Fault Regulations on January 7 and February 6, 2015. Doc. 95. The EUOs were noticed for January 27 and February 20, 2015, respectively, and the letters warned Advanced that its failure to appear “will be a breach of the policy of insurance and may result in the denial of all claims.” *Id.* Despite these demands and warnings, Advanced failed to appear for an EUO. See *Boucher Aff.*; *Schreiber Aff.*; *Rothenberg Aff.* On March 10, 2015, plaintiff disclaimed coverage to Advanced. Doc. 96. In doing so, plaintiff advised Advanced that it “breached a condition precedent to coverage by failing to appear for [the EUOs].” Doc. 96. On April 10, 2015, plaintiff received a bill from Advanced for treatment rendered on March 16, 2015. See *Rothenberg Aff.*; *Ex. I.*

LEGAL CONCLUSIONS

Motion Sequence 004

In motion sequence 004, plaintiff moves, pursuant to CPLR 3212, for summary judgment against Advanced based on its failure to appear for an EUO. Doc. 86. In support of the motion, plaintiff argues that, because it first requested an EUO of Advanced in January of 2015, before it received a bill from Advanced on April 10, 2015, its EUO request was timely and proper.

In opposition to the motion, Advanced asserts that plaintiff's motion must be denied since Advanced has already "secured arbitration awards and master arbitration awards" against plaintiff and that granting the motion would render those awards meaningless. This Court notes that, in a separate proceeding styled *Hertz Vehicles, LLC v Advanced Orthopaedics, P.L.L.C.*, New York County Index Number 152551/2017, plaintiff sought a trial de novo of the issues between the parties following arbitration, including whether Advanced is entitled to recover the amounts it charged for medical treatment. Index No. 152551/17, Doc. 2.

The affirmations and documents submitted in support of plaintiff's motion establish that, despite twice advising Advanced that it was required to appear for an EUO as condition precedent to having plaintiff honor its claims, it failed to appear. Indeed, Boucher averred that he personally waited for Advanced to appear for the EUOs and that it failed to do so. See Boucher Aff. Thus, plaintiff established, prima facie, that it is entitled to a declaration that it is under no obligation to pay claims related to the alleged incident.

Plaintiff also establishes that its denial of Advanced's claims was timely. In *Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468 (1st Dept 2016), the Appellate Division, First Department held that, if a claim is received by an insurer after EUO letters are sent out, the EUO letters are not subject to the time frames of 11 NYCRR §65-3.5. Here, since plaintiff demanded EUOs in January and February of 2015 and it received a bill from Advanced in April of 2015, its denial of coverage was timely. Further, Advanced's failure to appear for an EUO is a breach of a condition precedent which voids the policy *ab initio*, precludes recovery and need not be asserted in a timely denial.

See *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D. 3d 559 (1st Dept 2011).

Although Advanced submits written opposition to the motion, it relies on Second Department case law in asserting that plaintiff's denial of Advanced's claims was untimely. However, this argument is without merit, as *Mapfre* has not been applied in the Second Department. Additionally, Advanced's attorney essentially conceded at oral argument that, given the authority cited above, he could not set forth any reason why plaintiff's motion should not be granted. Although Advanced also argues that plaintiff should not be allowed to move for summary judgment after it has received a final arbitration award because it upsets the legislature's intention to promote arbitration in order to resolve no-fault matters expeditiously, this Court notes that a summary judgment motion is not only permitted, but that the legislative scheme specifically allows an insurer to move for a trial *de novo* where, as here, the prayed for amounts are over \$5,000.00.

Motion Sequence 003

Given that plaintiff's motion for summary judgment as against Advanced is granted, Advanced's motion for summary judgment dismissing the complaint (motion sequence 003) is necessarily denied as moot.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Hertz Vehicles, LLC's motion, pursuant to CPLR 3212, for summary judgment against defendant Advanced Orthopedics, P.C. (motion sequence 004) is granted; and it is further,

ORDERED that the motion by defendant Advanced Orthopedics, P.C., pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence 003), is denied as moot; and it is further

ORDERED and ADJUDGED that plaintiff Hertz Vehicles, LLC has no contractual duty to defendant Advanced Orthopedics, P.C to defend or indemnify said defendant under the policy issued by plaintiff in any action or proceeding brought for damages arising out of personal injury or property damage as a result of the alleged accident of August 20, 2014; and it is further

ORDERED and ADJUDGED that plaintiff Hertz Vehicles, LLC is not obligated to provide coverage for any claim or honor or pay claims for reimbursement submitted by defendant Advanced Orthopedics, P.C. arising from the alleged accident of August 20, 2014 under New York Insurance Regulation 68; and it is further

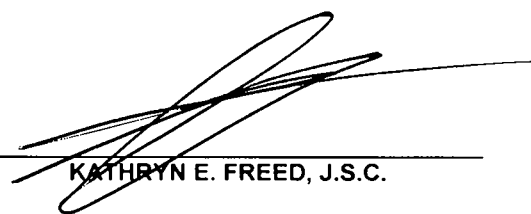
ORDERED that plaintiff Hertz Vehicles, LLC is to serve a copy of this order with notice of entry upon all parties and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision and order of this Court.

12/6/2017

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE