

Nationwide Affinity Ins. Co. of Am. v Thomas

2018 NY Slip Op 30559(U)

March 28, 2018

Supreme Court, New York County

Docket Number: 157816/2016

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

NATIONWIDE AFFINITY INSURANCE
COMPANY OF AMERICA,

Plaintiff,

-against-

Index No: 157816/2018
DECISION/ORDER
Motion sequence 003

INDIVIDUAL DEFENDANTS

JAMES THOMAS,
JERMAINE VICTORIAN,
RASHIDA BELL,
VLADMIR TAYLOR

HEALTHCARE PROVIDER DEFENDANTS

ACH CHIROPRACTIC, P.C.,
CHARLES DENG ACUPUNCTURE, P.C.,
ELIEZER OFFENBACHER, M.D., PLLC,
ISLAND LIFE CHIROPRACTIC PAIN CARE, PLLC,
JULES FRANCOIS PARISIEN, M.D.,
NEW YORK MEDICAL & DIAGNOSTIC CARE, P.C.,
QUALITY HEALTH SUPPLY CORP.,
QUALITY CUSTOM MEDICAL SUPPLY, INC.,
RA MEDICAL SERVICES, P.C.,
HANK ROSS MEDICAL, P.C.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's
CPLR 3212 motion for summary judgment.

Papers

NYSCEF Documents Numbered

Plaintiff's Notice of Motion.....	89-127
Defendant Quality Custom Medical Supply, Inc's Affirmation in Opposition	129-130
RyBek Defendants' Affirmation in Opposition	136
Plaintiff's Affirmation in Reply.....	131-133, 137

Bruno Gerbino & Soriano, LLP, New York (Vincent F. Gerbino of counsel), for plaintiff.

The Rybak Firm, PLLC, Brooklyn (Oleg Rybak of counsel), for defendants Jermaine Victorian,
Rashida Bell, Vladimir Taylor, ACH Chiropractic, P.C., Charles Deng Acupuncture, P.C., Island
Life Chiropractic Pain Care, PLLC, Jules Francois, M.D., Quality Health Supply Corp., and RA
Medical Services (Rybak Defendants).

Gary Tsirelman P.C., Brooklyn (Douglas Mace of counsel), for defendant Quality Custom Medical Supply, Inc.

Law Offices of Jillary Blumenthal, P.C., New York, for defendant Eliezer Offenbacher, M.D.

Gerald Lebovits, J.

In this declaratory-judgment action, plaintiff moves for summary judgment under CPLR 3212 on the supposed ground that defendants James Thomas, Jermaine Victorian, Rashida Bell, and Vladimir Taylor¹ (the individual defendants) breached a material condition precedent to coverage under James Thomas's policy of insurance and the No-Fault Regulations by failing to appear for duly scheduled examinations under oath (EUO). Plaintiff moves for summary judgment against the following defendants:² Jermaine Victorian, Rashida Bell, Vladimir Taylor, ACH Chiropractic, P.C., Charles Deng Acupuncture, P.C., Eliezer Offenbacher, M.D., PLLC, Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Quality Health Supply Corp., Quality Custom Medical Supply, Inc., and RA Medical Services, P.C.³ Plaintiff argues that it is under no obligation to pay the individual defendants and the healthcare providers for the claims submitted to plaintiff. In the alternative, plaintiff moves for partial summary judgment as to plaintiff's prima facie case.

Preliminarily, defendant Eliezer Offenbacher, M.D. does not oppose plaintiff's motion. That aspect of plaintiff's motion against defendant Offenbacher is granted without opposition.

Summary Judgment

Plaintiff establishes its prima facie entitlement to summary judgment. A party's failure to appear for two scheduled EUOs constitutes a material breach of the insurance policy; therefore, the insurer may deny coverage. (*Unitrin Advantage Ins. Co. v Baysshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011]) ["A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage."], *lv denied* 17 NY3d 705 [2011]; *accord Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468, 469 [1st Dept 2016] ["The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage."]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721-722 [2d Dept 2006] [holding that an insurer may retroactively deny claims on the basis of assignor's failure to appear for additional verification requested by insurer].)

On a summary-judgment motion, the moving party must establish that it timely and

¹ The parties sometimes refer defendant Taylor as "Vladimir" Taylor and sometimes refer to him as "Vladmir." The complaint refers to defendant Taylor as "Vladmir."

² Plaintiff does not move for summary judgment against defendant James Thomas.

³ Plaintiff moved under CPLR 3215 for a default judgment against defendant New York Medical & Diagnostic Care, P.C. and Hank Ross Medical, P.C. The motion was granted without opposition on May 10, 2017. (NYSCEF document number 82.)

properly mailed the notices for EUOs to defendants and that the defendants failed to appear. (*Bath Ortho Supply, Inc. v New York Central Mut. Fire Ins. Co.*, 2012 NY Slip Op 50271[U], *1 [App Term 1st Dept 2002], citing *Unitrin*, 82 AD3d at 560; *Fogel*, 35 AD3d at 721; see *Repwest Ins Co. v Advantage Radiology, P.C.*, 42 Misc 3d 1210 [A], **2-4, 2014 NY Slip Op 50016 [U], **2-4, 2014 WL 127915, at **2-4 [Sup Ct NY County 2014] [“In support of its motion, plaintiff . . . proffers . . . the [EUO] letters . . . the affidavits of service for all such letters, and an affidavit from Joseph R. Federici, Esq. stating that on each scheduled EUO date, he waited for the Defendants . . . [who] failed to attend the scheduled EUOs.”].)

Plaintiff proved that it timely and properly sent the EUO letters to defendants Thomas, Victorian, Bell, and Taylor. Allan Hollander, Esq. sufficiently explains how plaintiff generates and mails the EUO letters. (Exhibit KK.) Plaintiff provides as exhibits to its summary-judgment motion the EUOs letters. (Exhibits N, P, T, V, Z, BB, FF, and HH.) Plaintiff sent these letters by certified mail return receipt requested and by first-class mail.

Plaintiff also proved that the following defendants failed to appear for two EUOs: (1) defendant Taylor failed to appear for EUOs on June 22 and July 29, 2016 (Exhibits O, Q); (2) defendant Victorian failed to appear on June 24 and July 25, 2016 (Exhibits U, W); (3) defendant Bell failed to appear on June 24 and July 25, 2016 (Exhibit AA, CC); and (4) defendant Taylor failed to appear on June 24 and July 29, 2016 (Exhibit GG, II). Plaintiff provides affirmations from the attorneys who would have conducted the EUOs and who waited for these defendants to appear on the above-mentioned dates. (*Id.*) Plaintiff also provides the transcripts in which the attorneys made statements on the record about the non-appearance of these defendants to appear for EUOs on each respective date. (*Id.*)

Also, plaintiff proved that it properly denied defendants’ claims. (Exhibits R, X, DD, JJ Exhibit 1 to its Reply.) Plaintiff proved that it generated and mailed the denials, NF-10s, to defendants. (Exhibits L, K.) Each of the denials provides that the various defendants were carbon copied on these denials. (Exhibits R, X, DD, JJ, Exhibit 1 to its Reply.)

Plaintiff also explained the reasons for requesting the EUOs. (Exhibit K.)

Thus, plaintiff’s summary-judgment motion is granted. Plaintiff has no duty to pay no-fault claims with respect to the April 9, 2016, incident for defendants Jermaine Victorian, Rashida Bell, Vladimir Taylor, ACH Chiropractic, P.C., Charles Deng Acupuncture, P.C., Eliezer Offenbacher, M.D., PLLC, Island Life Chiropractic Pain Care, PLLC, Jules Francois Parisien, M.D., Quality Health Supply Corp., Quality Custom Medical Supply, Inc., and RA Medical Services, P.C. Defendants Thomas, Victorian, Bell, and Taylor failure to appear for two duly scheduled EUOs constitutes a breach of a condition precedent to coverage.

Opposition

Defendants’ counsels’ affirmations, coming from individuals without personal knowledge, have no probative value. In any event, counsels’ affirmations create no material issue of fact for trial. (See *GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985] [“As we have previously noted, an affidavit or affirmation of an attorney without personal

knowledge of the facts cannot 'supply the evidentiary showing necessary to successfully resist the motion.'" [citations omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] ["[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing."]; *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 [1st Dept 1981] ["The affirmation of counsel without requisite knowledge of the facts is without probative value. Moreover, the attorney's affirmation sets forth conclusory allegations rather than evidentiary facts and, even if it could be considered, is insufficient."] [citations omitted], *affd* 54 NY2d 715 [1981].)

Defendants' counsels' affirmations contain legal arguments. The legal arguments that counsels assert contradict the evidence that plaintiff submits in support of its summary-judgment motion and in reply. Plaintiff's summary-judgment motion is not premature; no additional disclosure is needed. Defendants' remaining arguments are irrelevant, unpersuasive, or both. In any event, the affirmations do not create material issues of fact for trial.

Accordingly, it is hereby

ORDERED that plaintiff's summary-judgment is granted and a declaratory judgment is granted and plaintiff shall settle order; that aspect of plaintiff's motion against defendant Eliezer Offenbacher, M.D. is granted without opposition; and it is further

ORDERED that plaintiff's counsel must serve a copy of this decision and order on defendants.

Dated: March 28, 2018



J.S.C.

HON. GERALD LBOVITS
J.S.C.