

**Permanent Gen. Assur. Corp. of Ohio v Lewis**

2018 NY Slip Op 32243(U)

September 13, 2018

Supreme Court, New York County

Docket Number: 156565/2014

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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PERMANENT GENERAL ASSURANCE CORPORATION OF OHIO,

Plaintiff,

- v -

WAYNE LEWIS, 3Y ACUPUNCTURE P.C., AEGIS SCIENCES CORPORATION, ALL HEALTHY STYLE MEDICAL P.C., BENTO ORTHO INC., FRIENDLY RX PHARMACY, GENESIS ORTHO SUPPLY CORP., KINGS COUNTY HOSPITAL CENTER, LENOX HILL ANESTHESIOLOGY PLLC, LENOX HILL HOSPITAL, LILIYA VEKSLER, LCSW, P.C., M & M MEDICAL P.C., MARK MCMAHON, MIAMI EXECUTIVE PHARMACY, NEW MILLENNIUM MEDICAL IMAGING, P.C., NYC COMMUNITY EMS VOLUNTEER AMBULANCE CORP., PHOENIX MEDICAL SERVICES, P.C., PRAVEL INC, PRECISION IMAGING OF NEW YORK, P.C., SADYK FAYZULAYEV, SERGE CHIROPRACTIC SERVICES, P.C., SUNRISE MEDICAL CARE SERVICES P.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105 were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary declaratory judgment against the answering defendants on the complaint is denied; and it is further

ORDERED that the cross motion of defendants All Healthy Style Medical, P.C., Liliya Veksler, LCSW, P.C., and Serge Chiropractic Services, P.C. for summary judgment dismissing the complaint is denied.

DECISION

Plaintiff Permanent General Assurance Corp. of Ohio (Permanent General) moves for summary judgment on its declaratory judgment complaint.

Defendants All Healthy Style Medical, P.C. (All Healthy), Liliya Veksler, LCSW, P.C. (Veksler), and Serge Chiropractic Services, P.C. (Serge) (collectively, Moving Defendants) cross-move for summary judgment dismissing the complaint against them.

In this action, Permanent General seeks a declaration that defendant Wayne Lewis violated the terms of the auto insurance policy covering the car he was driving, by failing to appear for duly scheduled independent medical examinations (IMEs). It also seeks a declaration deeming that it timely denied all existing and future no-fault benefit claims of Lewis and the various medical services provider defendants. The Moving Defendants argue that Permanent General failed to abide by the procedures and time frames for notifying defendant Lewis of the IMEs, as set forth in the no-fault regulations.

Background

On May 3, 2013, Permanent General issued a Virginia auto policy to non-party Aaron Gholston, covering a 2007 Nissan Altima, effective May 3, 2013 to May 3, 2014, identified by policy number VA 1523625 (the Policy). On November 27, 2013,

defendant Lewis was driving that car, was in an accident, and suffered injuries.

From December 3, 2013 through March 21, 2014, defendant Lewis sought treatment for injuries that he sustained in the accident from the various medical service provider defendants named in the complaint at bar.

On December 12, 2013, defendant Lewis' counsel sent a letter to Permanent General, indicating that he was representing Lewis on his no-fault benefits claim.

On April 15, 2014, Permanent General received a bill from defendant Mark MacMahon, MD, regarding medical services to Lewis for injuries from the accident.

On April 25, 2014, Certified Medical Consultants, Inc. (CMC), on behalf of Permanent General, sent defendant Lewis a letter notifying him of an IME scheduled on May 7, 2014, at 5 p.m., with Frank Oliveto, MD. In this letter, CMC referred to the Florida No Fault statute, and indicated only that the insurer would cover the fees for the examination. This letter was mailed to both Lewis and his counsel.

On May 7, 2014, defendant Lewis failed to appear for the IME.

By letter dated May 14, 2014, CMC notified defendant Lewis that he was scheduled for an IME on May 28, 2014, at 4:45 p.m., with Thomas P. Nipper, MD. In such second letter, CMC stated

that "[y]our client will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with this notice". Such letter was mailed to Lewis and his counsel.

On May 28, 2014, defendant Lewis failed to appear for the IME.

Permanent General moves for summary judgment, asserting that it is entitled to judgment because of defendant Lewis' failure to appear for the IMEs. It cites to New York's No-Fault insurance regulations, specifically, 11 NYCRR § 65-1.1, which states that an eligible person "shall submit to medical examination by physicians selected by, or acceptable to, [the insurer], when, and as often as, the [insurer] may reasonably require" (11 NYCRR § 65-1.1 [Mandatory Personal Injury Protection Endorsement, Section I]). Permanent General states that defendant Lewis' failure to appear for the IMEs was a breach of a condition precedent to coverage which voids the policy, and that it may assert a defense of no irrespective of whether its denial is timely. It asserts that its requests for the IMEs were scheduled in compliance with the no-fault regulations (11 NYCRR § 65-3.5 [d]), which prescribe a 30-calendar-day time frame for scheduling.

In opposition and in support of their cross motion, the Moving Defendants urge that plaintiff failed to make a prima

facie showing that it is entitled to such relief. They argue that there was no foundation for the documents plaintiff relies upon, and that it failed to establish the proper mailing of the IME notices, or that defendant Lewis did not appear for the IMEs. They also contend that plaintiff's first IME notice lacked the language required under 11 NYCRR § 65-3.5 (e). They further argue that the IME notices were untimely because IMEs are timely only where the examination is scheduled within 30 calendar days "from the date of [the insurer's] receipt of the prescribed verification forms" (11 NYCRR § 65-3.5 [d]). They submit affidavits affirming that plaintiff received bills from them more than 30 calendar days before plaintiff sought to schedule the IMEs on May 7, 2014.

For example, defendant All Healthy submits an affidavit by its owner, shareholder, and corporate officer, Boris Ripa, that he mailed claims for no-fault benefits for Lewis, including bills for dates of service (DOS), as follows: for DOS 12/26/13 to 1/18/14, he mailed the bills to Permanent General on 1/28/2014; for DOS 1/8/14 in the amount of \$1,333.26, he mailed the bill to Permanent General on 1/27/14; for DOS 1/8/14 in the amount of \$1,573.24, he mailed the bill to Permanent General on 1/27/14; for DOS 1/23/14, he mailed the bill to Permanent General on 2/17/14; for DOS 2/21/14, he mailed the bill to

Permanent General on 2/24/17; and for DOS 3/21/14, he mailed the bill to Permanent General on 3/24/14.

Defendant Serge submits an affidavit by its owner and corporate officer, Galina Groysman, in which she attests that she was responsible for overseeing the submission of no-fault claims, and that for DOS 2/1/14 and 2/8/14 for Lewis, she mailed the bills to Permanent General on 3/7/14.

Defendant Veksler submits an affidavit by its principal, Liliya Veksler, in which she attests that for DOS 12/3/13, she mailed a bill to plaintiff in the amount of \$457.67 on 3/7/14.

Finally, the Moving Defendants argue that plaintiff failed to provide any facts indicating that the IMEs were reasonably required, as required under 11 NYCRR § 65-3.5 (e).

### Discussion

Neither plaintiff on its motion nor defendants on their cross motion have established entitlement to summary judgment in their respective favors.

The first question that must be addressed concerns the Virginia automobile insurance policy and a New York accident, and choice of law.

Where there is a potential choice of law issue, the court must first determine whether there is an actual conflict between the laws of the jurisdictions involved (see Matter of Allstate Ins. Co. [Stolarz v New Jersey Mfrs. Ins. Co.], 81 NY2d 219, 223

[1993]; see Elmaliach v Bank of China Ltd., 110 AD3d 192, 200 [1st Dept 2013]). To constitute an actual conflict, the "laws in question must provide different substantive rules in each jurisdiction that are relevant to the issue at hand and have a significant possible effect on the outcome of the trial" (Elmaliach v Bank of China Ltd., 110 AD3d at 200 [internal quotation marks, citations and emphasis omitted]).

Under New York law, where an injured party is seeking no-fault auto insurance benefits, but fails to appear for an IME reasonably requested by the insurer, it is a breach of a condition precedent to coverage under the no-fault insurance policy (see American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841, 841 [1st Dept 2015]; Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 [1st Dept 2011] ). Similarly, under Virginia law, an insured's refusal to submit to a reasonably requested IME is a breach of a condition precedent to coverage, and relieves the insurer of its duty under the auto policy (see Allstate Ins. Co. v Eaton, 248 Va 426, 430-431 [Va 1994] [Va Code § 38.2-2201, 2202 (A), the medical payments statutes, do not conflict with insurance policy requiring IMEs, and insured's refusal to appear for IME was a breach of insurance policy]). Therefore, the court does not find that there is any conflict. In fact, the parties fail to



even address that issue. This court will apply New York law to the dispute.

In order to make a prima facie showing that it is entitled to summary judgment, an insurer must submit proof of its request for an IME in accordance with the procedures and time frames set forth in the no-fault regulations (11 NYCRR § 65-3.5), and that the defendant assignor did not appear (see American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d at 842; Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d at 560). The 30-calendar-day period within which the IME is supposed to be scheduled is measured from the date on which the insurer receives the prescribed verification form from the defendant service provider (see American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d at 842).

Here, plaintiff fails to submit evidence, in affidavit or any other form, indicating the date upon which it received the verification from the Moving Defendants. Thus, it fails to demonstrate, or even present prima facie proof, that it in fact complied with the 30-calendar-day requirement in 11 NYCRR § 65-3.5 (d) (see American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d at 842; American Tr. Ins. Co. v Vance, 131 AD3d 849, 850 [1st Dept 2015]; Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d at 560; Bronx Acupuncture

Therapy, P.C. v Hereford Ins. Co., 53 Misc 3d 137 [A], 2016 NY Slip Op 51479 [U] [App Term, 1st Dept 2016]).

Plaintiff contends that the health insurance claim form it received from nonmoving defendant Dr. McMahon on April 15, 2014 was the verification form triggering the IME notice, but completely fails to address the forms and bills that it received from the Moving Defendants long before the April 15, 2014 date. Moreover, the Moving Defendants have submitted their affidavits, based on personal knowledge, that they mailed the no-fault verification forms to Permanent General starting in late December 2013 and continuing through March 24, 2014, and that Permanent General did not send the first notice for an IME until April 25, 2014, more than 30 calendar days after all those forms and bills. While the Moving Defendants' proof raises a triable issue of fact, it does not conclusively establish the date on which plaintiff received their verification forms. Therefore, neither side has come forward with the requisite proof for a summary declaratory judgment in their favor.

9/13/2018  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE