

Country-Wide Ins. Co. v Taylor
2018 NY Slip Op 32931(U)
November 19, 2018
Supreme Court, New York County
Docket Number: 150809/2018
Judge: Carmen Victoria St. George
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

Index No.: 150809/2018

Motion Sequence No.: 002

- against -

Decision, Order, and Judgment

SHAVON V TAYLOR
("Eligible Injured Party Defendant")

And

WESTCHESTER RADIOLOGY & IMAGING,
P.C., LIDA'S MEDICAL SUPPLY INC., YUMI
ACUPUNCTURE P.C., RX FOR YOU CORP,
ORANGE CHIROPRACTIC, P.C., BRONX
COUNTY MEDICAL CARE P.C.,
PRIMAVERA PHYSICAL THERAPY, P.C.,
EXPERT MEDICAL SUPPLIES INC,
WELCOME CHIROPRACTIC, P.C.,
SUTTER PHARMACY INC, STARRY
LIGHT ACUPUNCTURE, P.C., WILLIAM
CHANDLE COOPER DC and COOPER
CHIROPRACTIC P.C.,

("Medical Provider Defendants")
Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In this declaratory judgment action, plaintiff Country-Wide Insurance Company ("Country-Wide") seeks a judgment declaring that it has no obligation to pay no-fault claims arising out of an April 23, 2017 motor vehicle accident involving defendant Shavon V. Taylor. By stipulation dated September 25, 2018, plaintiff has discontinued against defendant Welcome Chiropractic, P.C. In addition, in this Court's decision and order resolving motion sequence 001,

the Court granted default judgment against Westchester Radiology & Imaging, P.C., Lida's Medical Supply Inc., Yumi Acupuncture P.C., RX For You Corp, Orange Chiropractic P.C., Primavera Physical Therapy P.C., Expert Medical Supplies Inc, Sutter Pharmacy Inc, Starry Light Acupuncture P.C., William Chandle Cooper DC, Cooper Chiropractic P.C., and Shavon V. Taylor.

Currently, plaintiff moves for summary judgment under CPLR § 3212 against Bronx County Medical Care P.C. ("Bronx County Medical"). Country-Wide bases its motion on Shavon V. Taylor's ("Taylor") failure to appear for two scheduled Examinations Under Oath (EUO). Specifically, Country-Wide claims that Taylor's failure to attend the EUOs constitutes a breach in the applicable insurance policy issued by plaintiff to Taylor. Plaintiff also moves to dismiss Bronx County Medical's counterclaims for attorney's fees. The basis for the counterclaim is that Bronx County Medical Care hired an attorney to defend it in this declaratory judgment action. Further, in the event that Bronx County Medical Care prevails, it seeks attorney's fees.

Plaintiff submits: (1) an affidavit from Jessica Mena-Sibrian, No-Fault Litigation/ Arbitration Supervisor at Country-Wide, who handled the no-fault claims in this case and attests to Country-Wide's policy and procedures for the generation, issuance, and mailing denials of no-fault claims; (2) an affidavit from Deedra Moore, EUO Clerk at Country-Wide, who attests to the timely and proper mailing of the EUO scheduling letters to Taylor; and (3) EUO transcripts from plaintiff's attorney, who attests to the non-appearance of Taylor on September 11, 2017 and September 26, 2017. Plaintiff also proffers the EUO letters and corresponding affidavits of service.

A party's failure to appear at two scheduled EUOs constitutes a material breach of the insurance policy; therefore, the insurer may deny coverage (*Unitrin Advantage Ins. Co. v Bayshore 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 motion for summary judgment, the moving party must establish that it timely and properly mailed the notices for EUOs to the defendant and that the defendant 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 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 [plaintiff’s counsel] stating that on each scheduled EUO dated, he waited for defendants... [who] failed to attend the scheduled EUOs.”]).

Plaintiff has demonstrated prima facie entitlement to summary judgment against Bronx County Medical. Deedra Moore’s affidavit, establishes timely and properly mailing of the EUO notices. Likewise, the EUO transcripts from plaintiff’s attorney establish that defendant Taylor failed to appear for her EUOs on September 11, 2017 and September 26, 2017. By failing to oppose plaintiff’s motion for summary judgment, Bronx County Medical has failed to raise a triable issue of fact. Since it is undisputed that Taylor did not appear for the scheduled EUOs, plaintiff has no duty to Bronx County Medical to pay no-fault claims with respect to the April 23, 2017 incident,

based on breach of a condition precedent to coverage (*Hertz Corp v Active Care Medical Supply Corp.*, 124 AD3d 411 [1st Dept 2015]). Therefore, plaintiff's motion for summary judgment is granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against Bronx County Medical Care P.C., is granted without opposition; and it is further

ORDERED and ADJUDGED that plaintiff owes no duty to Bronx County Medical Care P.C., to pay No-Fault claims submitted in relation to the April 23, 2017 loss, Claim No.:000326179-002, Policy No.: RS8126735 16; and it is further

ORDERED that defendant Bronx County Medical Care P.C.'s counterclaims for attorney's fees against Country-Wide Insurance Company are dismissed; and it is further

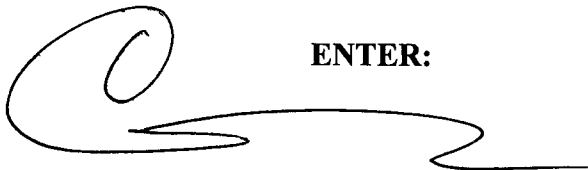
ORDERED that plaintiff Country-Wide Insurance Company is to serve a copy of this order with notice of entry upon the defendants within 30 days of the date hereof.

This constitutes the decision and order of the Court.

Dated:

11/19/2018

ENTER:


CARMEN VICTORIA ST. GEORGE, J.S.C.
HON. CARMEN VICTORIA ST. GEORGE
J.S.C.