Nationwide Affinity Ins. Co. of Am. v FJL Med. Servs., P.C.
2018 NY Slip Op 33842(U)
May 3, 2018
Supreme Court, Onondaga County
Docket Number: 2017EF2166
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on March 28, 2018.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE & CASUALTY COMPANY, VICTORIA AUTOMOBILE INSURANCE COMPANY and any and all of their subsidiaries, affiliates and/or parent companies,

Plaintiffs,

v.

FJL MEDICAL SERVICES , P.C.,

Defendant.

DECISION AND ORDER ON MOTION

Index No.: 2017EF2166
RJI No.: 33-17-2261

APPEARANCES: **ALLAN S. HOLLANDER, ESQ., OF HOLLANDER LEGAL GROUP, PC**
For Plaintiffs

OLEG RYBAK, ESQ., OF THE RYBAK GROUP, PLLC
For Defendant

The plaintiffs move for summary judgment in this matter. The complaint contains one cause of action seeking a declaratory judgment pursuant to CPLR section 3001, declaring that defendant breached a material condition precedent to coverage under the subject insurance policies and Insurance No Fault regulations by refusing and failing to appear for certain Examinations Under

Oath (EUO's) and thus plaintiffs are under no obligation to pay on or reimburse any of defendant's claims as listed in the complaint. As the proponents of the motion for summary judgment, the plaintiffs are required to establish their entitlement to summary judgment through the tender of admissible evidence before the burden shifts to the defendant to raise an issue of fact. *See, Hunt v. Kostarellis*, 27 AD3d 1178 (4th Dept. 2006). The plaintiffs have met their burden here.

Plaintiffs have met their burden of demonstrating that defendant failed to meet a critical and material condition precedent to coverage by failing to appear for the EUO's that were reasonably requested and thus breached a material condition precedent to coverage under the No Fault regulations and applicable insurance polies. Plaintiffs have also shown that said failure negated their obligation to pay any of the bills submitted by the defendant under the claim numbers listed in the complaint wherein a EUO was noticed and defendant failed to appear. Plaintiffs have demonstrated a reasonable basis to request the EUO's in order to determine whether or not defendant is eligible to collect No Fault benefits. *See, 11 NYCRR § 65-3.16(a)(12); see also, Insurance Law § 3102(a)(1).* With respect to reasonable basis, they have shown that the listed owner of defendant, Frances J. Lacina, D.O., moved to New York in July of 2016 after residing in Alabama. He is the listed owner of multiple entities in Florida and there are questions as to his ownership and control of the New York clinic as he owns medical entities in other states. Plaintiffs contend that it is questionable how much control Lacina exercised over the defendant's Brooklyn clinic. Lacina's website allows patients to make appointments at his practice in Florida, which creates a question of how he can be practicing in Florida and New York at the same time. Plaintiffs also believe that the defendant does not maintain a Workers' Compensation policy although billing has been submitted to plaintiffs on behalf of alleged employees. No phone number is listed on any

of the bills sent by defendant to plaintiffs or on its official letterhead. The treatment notes sent by Lacina to plaintiffs appeared to be boilerplate and clinic inspections by plaintiffs' investigator of Lacina's medical facility have been refused. Plaintiffs allege that as a result it needs to determine whether or not defendant was eligible to collect New York State No Fault benefits.

Plaintiffs' submissions in support of the motion includes affidavits setting forth the various dates each EUO was requested for each individual claim and that each was refused. Affidavits from plaintiffs' counsel and its representative, Linda Arnold, show that the claims are grouped under multiple batches. Plaintiffs further set forth all of the facts with respect to the claims in the affidavits as well as all of the documents mailed concerning the EUO's. Plaintiffs have also demonstrated that the failure to meet the condition precedent leaves defendant ineligible to receive No Fault reimbursements, as there is no liability on the part of a No Fault insurer if there has not been full compliance with condition precedence to coverage. *See, 11 NYCRR § 65-1.1.* The regulations provide that "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"; one such condition being the appearance of the eligible injured person or that person's assignee or representative at an EUO. *Id.* The regulation further provides that "upon request by the company the eligible injured person or that person's assignee or representative shall: ... (b) as may reasonably be required to submit to examinations under oath by any person named by the company and subscribed the same". *Id.* Thus, the appearance of an eligible person's assignee at an EUO is a condition precedent to coverage. *See, Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co.*, 35 AD3d 720 (2d Dept. 2006). In addition, the regulation also places an unconditional obligation on the provider to appear for the EUO, thus requiring the defendant to do so and a refusal and failure to

appear is thus a violation of the regulation. Where there is a failure to comply with a condition precedent to coverage, an insurer has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued. *See, Unitrin Advantage Insurance Co. v. Bay Shore Physical Therapy, PLLC*, 83 AD3d 559 (1st Dept. 2011). Plaintiffs have likewise shown that they had the right to request the EUO under the subject policies and the regulations and that defendant's failure to appear renders it ineligible to receive reimbursement from plaintiffs for any services or supplies allegedly provided by defendant for the subject claims. Therefore, defendant's failure to comply with the provision requiring the insured to submit to an EUO is a material breach of the policy precluding recovery of the policy proceeds. *See, Argento v. Aetna Casualty & Surety Co.*, 184 AD2d 487 (2d Dept. 1992). Thus, plaintiffs have met their burden in showing that defendant's breach voided any coverage at its inception and upon failure to comply with the condition precedent, the plaintiff carriers' requirement to timely deny the bill was vitiated and the policies are voided *ab initio*. *See, Unitrin Advantage, supra*.

Plaintiffs have met their burden in the first instance of showing its entitlement to a declaration that defendant is not entitled to the No Fault benefits by submitting sufficient proof of mailing correspondence to defendant regarding the schedule of the EUO"s on separate occasions and defendant's failure to appear. *See, Hertz Corp. v. Active Care Medical Supply Corp.*, 124 AD3d 411 (1st Dept. 2015). An affidavit is provided which sets forth that the notices were mailed and the standard practices and procedures in the office for mailing the EUO scheduling letters, thus creating the presumption of receipts. *See, Longevity ME. Supply, Inc. v. IDS Prop. & Casualty Insurance Co.*, 44 Misc.3d 137(A) (2d Dept. 2014). In addition, objective proof of mailing was provided by the notices which contain the same certified mail number in their captions that was

reflected on the certified mail return receipts. *See, Hertz Corp., supra*. There is no dispute that defendant received said notices as defense counsel sent objection letters on multiple occasions. In addition, plaintiffs have demonstrated the non-appearances by affidavits of the attorney that was present on the dates of the scheduled examinations and who would have conduced the exam had the witness appeared. *See, Hertz Corp., supra*. Thus, plaintiffs have demonstrated their entitlement to summary judgment in the first instance and the burden shifts to defendant to raise an issue of fact. *See, Hunt, supra*.

Defendant opposes, contending that plaintiffs have failed to establish a prima facie showing of entitlement to summary judgment as a matter of law by eliminating all factual issues. *See, Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986). Defendant's opposition fails insofar as defendant does not provide an affidavit from a party with knowledge of the facts of this case. When opposing a motion for summary judgment, defendant as the opposing party is required to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *See, Alvarez, supra*. Defendant, however, has failed to offer an affidavit of an individual with personal knowledge of facts in opposition to the motion. An affidavit by opposing counsel, who lacks personal knowledge of the facts, is without probative value. *See, Deronde Products, Inc. v. Steve General Contractor, Inc.*, 302 AD2d 989 (4th Dept. 2003). However, defendant has established that plaintiffs' summary judgment motion is premature as there has not been adequate time for discovery as this argument is based upon the personal knowledge of defense counsel. This Court may deny the plaintiffs' motion "should it appear from affidavits submitted in opposition ... that facts essential to justify opposition may exist but cannot then be stated..." *CPLR § 3212 (f)*. Defendant served its demands for discovery and inspection with its answer in August of 2017. Plaintiffs failed to

respond to said demands and instead filed their motion for summary judgment in October of 2017. Inasmuch as plaintiffs were required to object to the demands and failed to do so, they were obligated to produce the information sought. *See, CPLR §§ 3120 and 3122; see also, Fausto v. City of New York*, 17 AD3d 520 (2d Dept. 2005). Defendant has shown that by making th emotion, plaintiff has prevented it from conducting any discovery that would lead to information that would assist in its defense and that no depositions have been conducted and no documentation has been exchanged. It has demonstrated that plaintiffs are in sole possession of all information relating to its defense as plaintiffs purport to have properly scheduled the EUO's and that they have properly conducted investigations concerning the subject motor vehicle accidents. Defendant has shown that without having an opportunity to conduct discovery relating to plaintiffs' handling of the subject claims and investigations, it cannot properly oppose this motion. Defendant has also demonstrated that there is a substantial amount of outstanding discovery relating to plaintiff's handling of the claim. Defendant seeks, *inter alia*, disclosure of plaintiffs' claim file and special investigation unit file so as to ascertain whether plaintiffs complied with the No Fault regulations in requesting the EUO's, as well as the documentation concerning the reasons it had for scheduling the EUO's. It has demonstrated that plaintiffs are in sole possession of all information relating to its defense as plaintiffs purport to having properly scheduled the EUO's and properly conducted investigations concerning the subject motor vehicle accidents and that without having an opportunity to conduct discovery relating to plaintiffs' handling of the subject claims and investigations, defendant cannot properly oppose this motion. It has likewise set forth a sufficient basis for conducting depositions. It has thus shown that it will suffer severe prejudice if it is not allowed to conduct discovery. "The reason for the EUO request is a fact essential to justify opposition to plaintiffs' summary judgment

motion (citation omitted) and such fact is exclusively within the knowledge and control of the movant. Further discovery on plaintiffs' handling of the claim so as to determine whether, *inter alia*, the EUO's were ... properly requested is also essential to justify opposition." *American Transit Insurance Co v. Jaga Medical Services, PC,* 128 AD3d 441 (1st Dept. 2015). As such, plaintiffs' motion is denied and the parties are required to execute a preliminary conference stipulation and order concerning discovery. Plaintiffs may move for a summary judgment after the completion of discovery.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that plaintiffs' motion for summary judgment is denied, and it is further

ORDERED, that counsel is required to execute a Preliminary Conference Stipulation and Order by no later than May 18, 2018.

ENTER

Dated: May 3, 2018
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion for summary judgment dated October 23, 2017.

2. Affirmation of Margaret Adamczak, Esq. in support of plaintiffs' motion, dated October 23, 2017, and attached exhibits.

3. Affidavit of Linda Arnold, dated October 23, 2017, and attached exhibits.

4. Affidavit of Allan S. Hollander, Esq., dated October 23, 2018, and attached exhibits.

5. Affirmation of Oleg Rybak, Esq. in Opposition to Plaintiffs' Motion dated November 2, 2017, and attached exhibits.

6. Reply Affirmation of Brian E. Kaufman, Esq., dated February 8, 2018, and attached exhibits.