SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

JOSHUA RODRIGUEZ, BARNERT SURGICAL CENTER LLC, CHIROPRACTIC HEALTH ONC PC,DIGNITY PT PC, EPIC PAIN MANAGEMENT & ANESTHESIA CONSULTANTS LLC, GDS IMAGING PC,KAZU ACUPUNCTURE PC, LOCKWOOD MEDICAL PC,LONGEVITY MEDICAL SUPPLY INC, MDJ CHIROPRACTIC WELLNESS, RAPID IMAGING CORP, THERAMOVE PHYSICAL THERAPY & REHABILITATION PC,

Defendants.

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INDEX NO. 650688/2019

MOTION DATE 02/21/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is

Upon the foregoing documents, plaintiff's motion for summary judgment is granted for the reasons stated hereinbelow.

Background

This Court presumes the reader's familiarity with the background to this case, which this Court outlined in its November 14, 2019 Decision and Order on plaintiff's first motion (NYSCEF Doc. 37).

In that Decision and Order, this Court granted plaintiff's motion for a declaratory judgment on default as against the following defendants: Joshua Barnert Surgical Center LLC; Dignity PT PC; Epic Pain Management & Anesthesia Consultants LLC; GDS Imaging, PC; Lockwood Medical, PC; MDJ Chiropractic Wellness; and Theramove Physical Therapy & Rehabilitation PC. This Court directed the Clerk to enter judgment declaring that the immediately aforementioned defendants are not entitled to no-fault benefits under the subject insurance policy arising out of the subject August 2, 2017 motor vehicle accident. This Court also directed plaintiff and the answering defendants, Chiropractic Health One, PC; Kazu Acupuncture, P.C.; and Longevity Medical Supply, Inc., to appear for a preliminary conference on December 10, 2019. (NYSCEF Doc. 37.)

On November 18, 2019, plaintiff discontinued the instant action as against defendant Chiropractic Health One, PC (NYSCEF Doc. 40).

On December 9, 2019, this Court so ordered a stipulation, pursuant to which all parties waived discovery and agreed to the subject Preliminary Conference Order (NYSCEF Doc. 42).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against "the remaining medical provider defendants," who, according to plaintiff's proposed order (NYSCEF Doc. 51), are the answering defendants Kazu Acupuncture, P.C. and Longevity Medical Supply, Inc. (NYSCEF Doc. 45).

On March 2, 2020, defendants opposed the instant motion, asserting the following: (1) plaintiff failed to make out its prima facie case for summary judgment as a matter of law; (2) "substantial and necessary" discovery remains outstanding; and (3) the record contains "facially apparent" triable issues of fact: plaintiff's proper mailing of Independent Medical Examination ("IME") notices to Joshua Rodriguez (the "claimant-defendant"); plaintiff's compliance with 11 NYCRR 65-3.5 in requesting additional verification; and plaintiff's issuing a timely and proper denial (NYSCEF Doc. 52).

Discussion

Standard of Review

To prevail in a motion for summary judgment, the movant must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect. Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993). When the movant has met this burden, the burden shifts to the opposing party who must submit evidentiary proof sufficient to create material issues of fact that require a trial. E.g., Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Opposition to and Explanation of Plaintiff's Prima Facie Case for Summary Judgment

In opposition to the instant motion, defendants argue that this Court should deny plaintiff's motion because plaintiff allegedly failed to comply with 11 NYCRR 65-3.8, which essentially requires "an insurer to pay a claim or issue a denial within thirty (30) days of receipt of proof of claim" (NYSCEF Doc. 52, at 2). Defendants assert that, as plaintiff has failed to demonstrate compliance with the immediately aforementioned section, plaintiff has not made out its prima facie case for summary judgment. Defendants also allege that plaintiff has thus demonstrated "the erroneous proposition that plaintiff may request an IME at any time it wishes" (NYSCEF Doc. 52, at 3). However, plaintiff demonstrates that, "as is universally accepted, a defense of lack of coverage is not precluded by an insurer's failure to pay or deny a no-fault claim within the thirty-day period" (NYSCEF Doc. 46, at 6). E.g., St. Vincent's Hosp. & Med. Ctr. v Allstate Ins. Co., 69 AD3d 923 (2d Dept 2010).

Defendants' Claims about Discovery are Unavailing

Defendants' claim that discovery remains outstanding is unavailing, as, on December 9, 2019, this Court so ordered a stipulation, pursuant to which all parties expressly waived discovery (NYSCEF Doc. 42).

This Court Finds No Triable Issues of Fact

The governing no-fault regulations, 11 NYCRR 65, require an eligible injured person claiming no-fault benefits under an insurance policy to participate in an IME (NYSCEF Doc. 46, at 5).

Plaintiff has tendered sufficient evidence to demonstrate the absence of material issues of fact by submitting, inter alia, the following: the Affidavit of Cheryl Glaze, a No-Fault Claims Manager with plaintiff; the correspondence scheduling and rescheduling the claimant-defendant's IME; the Affidavit of Dr. Eric Roth, asserting that the claimant-defendant failed to appear for the IME that Dr. Roth was to conduct; the subject denial of claim forms (NYSCEF Doc. 47). Plaintiff also notes that "where a doctor assigned to conduct the independent medical examinations attests that the assignor failed to appear at the doctor's office, located at the address set forth in the IME scheduling letters, an insurer establishes prima facie entitlement to judgment." See Trimed Med. Supply, Inc. v Elrac, Inc. et al, 920 NYS2d 245 (App Term 2d Dept. 2010).

Plaintiff argues that, as the claimant-defendant failed to appear for his duly scheduled IME, the subject insurance policy is void *ab initio*, pursuant to Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept 2011), which states, in pertinent part:

> When defendants' assigners failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether denials were timely issued.
>
> It is of no moment that the retroactive denials premised on failure to attend IMEs were embodied in blanket denial forms, or that they were issued based on failure to attend IMEs, in a different medical specialty from that which underlies the claims at issue. 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.

(NYSCEF Doc. 46, at 5-6). Plaintiff thus claims that Unitrin "makes the verification time frames irrelevant to the no-show defense" (NYSCEF Doc. 46, at 6).

Defendants have failed to meet their burden to submit evidentiary proof sufficient to create material issues of fact that require a trial.

This Court thus finds that plaintiff has met its burden to establish its entitlement to summary judgment against defendants Kazu Acupuncture, P.C. and Longevity Medical Supply, Inc.

Finally, note that the law presumes that documents that are mailed are received, and that defendant has, understandably, failed to submit an affidavit from claimant-defendant Joshua Rodriguez stating that he did not receive IME scheduling notices or the subject denial of claim forms from plaintiff, or that he attended or attempted to attend the scheduled IME.

Conclusion

Thus, for the reasons stated herein, the motion of plaintiff, American Transit Insurance Company, for summary judgment against defendants Kazu Acupuncture, P.C. and Longevity Medical Supply, Inc. is hereby granted. The Clerk is hereby directed to enter judgment (1) declaring that said defendants are not entitled to no-fault benefits, arising out of the subject August 2, 2017 motor vehicle accident; and (2) awarding costs and disbursements to plaintiff.

7/13/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE