SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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AMERICAN TRANSIT INSURANCE

Plaintiff,

- v -

COLIMON, HOLENS

Defendant.

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INDEX NO. 651489/2019

MOTION DATE 08/12/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, it is

CRANE, J.:

In motion sequence number 001, this court granted a default judgment in favor of American Transit Insurance Company (ATIC) against defendants Holens Colimon (Colimon), Assem Physical Therapy PC, NY Chiropractic Rehabilitation PC, and Trinity Medicine, P.C. ATIC now moves, pursuant to CPLR 3212, for summary judgment in its favor against the remaining "Medical Provider Defendants" (Manli Li LAC, MG Medical Care PC, and New York Wellness PT, PC) (motion sequence number 002).[1]

Background

In support of its motion for summary judgment, ATIC alleges as follows: ATIC issued a New York policy of insurance to Uriel-Chels, Inc. (policy number B706325), that included a no-fault endorsement, providing coverage to any eligible injured person for all necessary medical

[1] The action was discontinued against Medgna Inc. (named as Medigna Inc. in the caption).

expenses, lost wages, and other expenses resulting from a motor vehicle accident, up to the minimum statutory amount of $50,000 (affidavit of Cheryl Glaze, a claim representative with ATIC, sworn to June 10, 2020, ¶¶ 8-9).

On October 1, 2017, Colimon was allegedly involved in a motor vehicle accident, and he notified ATIC of the alleged accident and the claimed resulting injuries (*id.* ¶¶ 11-12). Colimon sought medical treatment from the Medical Provider Defendants, and he assigned the right to collect no-fault benefits to them in exchange for the medical treatment that he allegedly received (*id.* ¶¶ 14-15).

The Medical Provider Defendants submitted no-fault claims to ATIC seeking reimbursement (*id.* ¶ 16). ATIC exercised its rights under the policy of insurance and the governing no-fault regulations to conduct an independent medical examination (IME) of Colimon (*id.* ¶ 19)

By letter dated January 10, 2018, "Examworks," on behalf of ATIC, scheduled an IME of Colimon with Dr. Robert Snitkoff on January 31, 2018 at 2:00 p.m. at the doctor's office located at 717 Church Ave., Brooklyn, New York. Colimon failed to appear for the IME (*id.* ¶ 22).

Subsequently, by letter dated January 15, 2018, Examworks scheduled an IME of Colimon with Dr. Michael Russ on February 7, 2018 at 2:00 p.m. at the doctor's office located at 717 Church Ave., Brooklyn, New York. (*id.* ¶ 25). Colimon failed to appear for the IME (*id.* ¶ 27).

By letter dated February 9, 2018, Examworks scheduled an IME for Colimon with Dr. Michael Russ on March, 6, 2018 at 3:30 p.m. at the doctor's office located at 1331 Shore Parkway, Brooklyn, New York (*id.* ¶ 28). Colimon failed to appear for the IME (*id.* ¶ 30).

Again, by letter dated February 5, 2018, Examworks scheduled an IME for Colimon with Dr. Chester Bogdan on March 8, 2018 at 5:15 p.m. at the doctor's office located at 188 Montague Street, Suite 530, Brooklyn, New York. Colimon failed to appear for the IME (*id.* ¶¶ 31, 33).

Thereafter, ATIC denied all claims received after February 7, 2018 based on Colimon's failure to submit to the IMEs (*id.* ¶¶ 34, 36). ATIC argues that because Colimon failed to appear for the requested IMEs, it had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued.

ATIC also argues that it is irrelevant that the retroactive denials premised on failure to attend IMEs were embodied in blanket denial forms, or that they were issued in a different medical specialty from that which underlies the claims at issue. It contends that 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. ATIC argues that Colimon's failure to cooperate constitutes an absolute coverage defense. ATIC asserts that because the Medical Provider Defendants stand in the shoes of the assignor, they are bound by any violations by the assignor of the insurance policy.

In opposition, the Medical Provider Defendants argue that ATIC is not entitled to summary judgment because (1) it has not demonstrated that the IMEs were scheduled within 30 days of receiving the subject claims, as 11 NYCRR § 65-3.5 (d) requires; (2) ATIC's sent its IME requests beyond 15 days of receipt of the NF-2 form on November 2, 2017, and ATIC has not submitted any further evidence regarding receipt of any verification forms from any of the Medical Provider Defendants and, therefore, it has failed to establish that the IME requests were timely, and (3) the Medical Provider Defendants are entitled to discovery regarding ATIC's receipt of any verification forms pertaining to this action, because they are necessary to determine whether the IME requests were timely.

Discussion

ATIC's motion is denied. ATIC failed to demonstrate its entitlement to summary judgment because of the existence of material issues of fact.

"New York's no-fault automobile insurance system is designed 'to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists'" (*Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 317 [2007] [internal citation omitted]). "These regulations require an accident victim to submit a notice of claim to the insurer as soon as practicable and no later than 30 days after an accident (*see* 11 NYCRR 65-1.1, 65-2.4 [b])" (*id.*).

"Next, the injured party or the assignee ... must submit proof of claim for medical treatment no later than 45 days after services are rendered (*see* 11 NYCRR 65-1.1, 65-2.4 [c])" (*id.*). "Upon receipt of one or more of the prescribed verification forms used to establish proof of claim, such as the NYS Form NF-5, an insurer has 15 business days within which to request 'any additional verification required by the insurer to establish proof of claim' (11 NYCRR 65-3.5 [b])" (*id.*).

"Significantly, an insurance company must pay or deny the claim within 30 calendar days after receipt of the proof of claim (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-3.8 [c]). If an insurer seeks additional verification, however, the 30-day window is tolled until it receives the relevant information requested (*see* 11 NYCRR 65-3.8 [a] [1])" (*id.*).

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" (*Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C.*, 147 AD3d 437, 438 [1st Dept 2017]). It should be noted that although the instant case involves the failure to appear at IMEs, and not Examinations Under Oath

(EUOs), the relevant no-fault rules are equally applicable (*see Allstate Ins. Co. v Pierre*, 123 AD3d 618, 618 [1st Dept 2014] ["Although the instant case involves the failure to appear at EUOs, and not IMEs, this Court's holding in *Unitrin* applies to EUOs"]).

As was the situation in *Kemper Independence Ins. Co.*, ATIC "failed to supply sufficient evidence to enable the court to determine whether the notices it had served on the injury claimants ... were subject to the timeliness requirements of 11 NYCRR 65-3.5 (b) and 11 NYCRR 65-3.6 (b) ... and, if so, whether the notices had been served in conformity with those requirements" (*Kemper Independence Ins. Co.*, 147 AD3d at 438). In *Kemper Independence Ins. Co.*, the Court stated that the insurer

> "failed to provide copies of any completed verification forms it may have received from any of the health service provider defendants or any other evidence reflective of the dates on which plaintiff had received any such verification forms, or otherwise assert that it never received such forms. Thus, plaintiff failed to meet its burden of establishing either that the EUOs were not subject to the procedures and time frames set forth in the no-fault implementing regulations or that it properly noticed the EUOs in conformity with their terms"

(*id.*).

In *Unitrin Advantage Ins. Co. v All of NY, Inc.*, 158 AD3d 449 [1st Dept 2018]), the Court held that "[a]lthough 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, Unitrin was still required to provide sufficient evidence to enable the court to determine whether the notices it served on Dr. Dowd for the EUOs satisfied the timeliness requirements of 11 NYCRR 65–3.5(b) and 11 NYCRR 65–3.6(b)" (*id.* at 449).

Here, ATIC failed to meet its burden of filing "proof of the facts constituting the claim" against the Medical Provider Defendants, i.e., proof establishing that the notices that it served on those defendants complied with the timeliness requirements of 11 NYCRR 65–3.5(b) (*see Hertz Vehicles, LLC v Best Touch PT, P.C.*, 162 AD3d 617, 617 [1st Dept 2018] [the motion papers did

not provide the dates of the prescribed verification forms or other proofs of claim submitted by the medical provider defendants]).

As it relates to timeliness, the factual allegations are of a motor vehicle accident occurring on October 1, 2017; Colimon's no-fault claim on November 2, 2017; IMEs scheduled for January 31, 2018, February 7, 2018, March, 6, 2018, and March 8, 2018, and ATIC's denial of all claims received after February 7, 2018. The sparse facts set forth in ATIC's papers in support of its motion do not permit the court to resolve the timeliness issues. Indeed, as indicative of the scarcity of factual allegations, ATIC does not explain the relationship between the insured entity, Uriel-Chels, Inc. and Colimon. It also does not explain why it is has selected February 7, 2018 as the cutoff date for denying claims.

Apparently, ATIC deems its factual recitation to be adequate in support of its motion because of its reliance on *Central Gen. Hosp. v Chubb Group of Ins. Cos.* (90 NY2d 195 [1997]) for the proposition that "an insurer, despite its failure to reject a claim within the 30-day period prescribed by Insurance Law § 5106 (a) and 11 NYCRR 65.15 (g) (3), may assert a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*id.* at 199). This assertion is unavailing. There is no evidence in the record that the claim does "not arise out of an insured incident." Rather, the alleged failure of defendant to appear at the IMEs constitutes a breach of a condition precedent (*Kemper Independence Ins. Co.*, 147 AD3d at 438). In *Kemper Independence Ins. Co.*, the Court stated

> "Although 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, plaintiff failed to supply sufficient evidence to enable the court to determine whether the notices it had served on the injury claimants for EUOs were subject to the timeliness requirements of 11 NYCRR 65-3.5 (b) and 11 NYCRR 65-3.6 (b) and, if so, whether the notices had been served in conformity with those requirements"

(*id.* [internal citations omitted]).

In *Central Gen. Hosp.* (90 NY2d 195), the Court of Appeals emphasized that its holding pertained to situations where "the subject matter of the underlying litigation fell outside the scope of the policies" and, therefore, "the insurers did not lose their right to the defense of noncoverage by their initial disclaimer of liability based on the three policy exclusions, since that defense is never waived by a failure to assert it in a notice of disclaimer" (*id.* at 201 [internal quotation marks and citation omitted]). The Court distinguished the situation where there is "a breach of a policy condition from the situation in which an insurer claims no contractual relationship with respect to the subject vehicle and incident" (*id.* at 200), the latter of which is not involved in this case (*see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 722 [2d Dept 2006] ["The appearance of the insured for IMEs at any time is a condition precedent to the insurer's *liability on the policy*"] [emphasis added]).

Significantly, in *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC* (82 AD3d 559, 561 [1st Dept 2011], cited by ATIC, the First Department ruled that "[p]laintiff satisfied its prima facie burden on summary judgment of establishing that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations, and that defendants' assignors did not appear" (*id.* at 560). Such is not the case here.

Based on the foregoing, consideration of the adequacy of the supporting documentation, including affidavit evidence, is unwarranted.

Accordingly, it is

ORDERED that the motion (002) by American Transit Insurance Company is denied.

The parties are directed to attend a discovery conference on November 10, 2020 at 3:30 PM via Microsoft Teams.

10/26/2020
DATE

MELISSA ANNE CRANE, J.S.C.

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