

American Tr. Ins. Co. v Phipps
2020 NY Slip Op 33996(U)
December 1, 2020
Supreme Court, New York County
Docket Number: 650108/2019
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,
Plaintiff,

INDEX NO. 650108/2019

MOTION DATE 11/30/2020

MOTION SEQ. NO. 004

- v -

NATASHA PHIPPS, BROOKDALE HOSPITAL,
BROWNSVILLE CHIROPRACTIC PC, COMFORT
PHYSICAL THERAPY PLLC, DYNAMIC MEDICAL IMAGING
PC, ENS MEDICAL PC, HARMONIZED ACUPUNCTURE
PC, METRO PAIN SPECIALISTS PC, MYRTLE DME NYC
INC, REHAB CARE PHYSICAL THERAPY PC, SATYA
DRUG CORP, SMART CHOICE MEDICAL PC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 77, 82, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by plaintiff against the remaining defendants
Brownsville Chiropractic, P.C., Myrtle DME NYC Inc and ENS Medical P.C. ("Remaining
Defendants") is granted.

Background

In this no-fault case, plaintiff seeks a declaration that it need not honor the claims made
by the medical provider defendants because defendant Phipps failed to appear for duly scheduled
IMEs. The Remaining Defendants claim that the default judgment entered against the non-
answering co-defendants has no preclusive effect. They claim that plaintiff has not shown it
timely scheduled the IMEs, that the affidavits plaintiff submits are insufficient to establish

Phipps' non-appearance and that plaintiff did not sufficiently show that it denied the claims from the Remaining Defendants.

In reply, plaintiff explains that the purpose of an IME is to review a patient's current status; it is not tied to treatment that may have been received months ago. Plaintiff insists that the 30-day requirement under 11 NYCRR65-3.5(d) does not apply to all medical exams and is required only to determine when particular claims should be paid. Plaintiff relies upon 11 NYCRR 65 for the notion that it has broad ability to schedule IMEs as may be reasonably required.

Discussion

“The failure to appear for IMEs requested by the insurer ‘when, and as often as, [it] may reasonably require’ (Insurance Department Regulations [11 NYCRR] § 65–1.1) is a breach of a condition precedent to coverage under the No–Fault policy, and . . . when defendants' assignors failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued” (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011] [internal quotations and citation omitted]).

Here, the affidavit of Cheryl Glaze, a claim representative for plaintiff, established that Phipps was provided two opportunities to appear for an IME and failed to appear on two occasions (NYSCEF Doc. No. 72). The Remaining Defendants failed to raise an issue of fact in opposition—there are no affidavits from defendant Phipps about not receiving the IME notices or that she actually showed up for the IMEs.

With respect to the issue of timing, the Remaining Defendants did not specifically identify a claim they made or when it was made. They cannot raise an issue of fact by simply

offering a conclusory allegation that the IMEs were not timely scheduled especially where, as here, there is no dispute that Phipps did not show up for the IMEs (NYSCEF Doc. No. 72, exh B [sworn statements detailing Phipps failure to appear]). 11 NYCRR 65-3.5(d) requires an IME to be scheduled within 30 days of receipt of the prescribed verification forms from the parties seeking no-fault benefits. The Remaining Defendants did not offer any specific proof (such as the forms they sent to plaintiff) about when this timeline began to run.

The Court observes that the timelines in the no-fault regulations are designed to ensure prompt resolution of no-fault benefits applications. But it is also critical to recognize that one of the purposes of an IME is to prevent fraud, such as seeking reimbursement for treatment that is not medically necessary. The Remaining Defendants voluntarily agreed to take an assignment of the injured defendant's rights with the understanding that Phipps' failure to appear for an IME might result in the insurance company denying coverage. The Court sees no reason to continually add to the burden on an insurance company to make its prima facie case while provider defendants raise only vague and unsupported procedural objections.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment against defendants Brownsville Chiropractic, P.C., Myrtle DME NYC Inc. and ENS Medical, P.C. is granted and it is further

DECLARED that plaintiff need not honor or pay any claims from these defendants arising out of plaintiff's insurance policy A200000 with respect to the accident involving defendant Phipps on May 30, 2018.

12/1/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE