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| Country-Wide Ins. Co. v Williams |
| 2021 NY Slip Op 30065(U) |
| January 7, 2021 |
| Supreme Court, New York County |
| Docket Number: 652530/2018 |
| Judge: Nancy M. Bannon |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

INDEX NO. 652530/2018
MOTION DATE 1/5/2021
MOTION SEQ. NO. 002

- v -

TASHA WILLIAMS, NEW YORK CITY HEALTH AND HOSPITALS D/B/A QUEENS HOSPITAL CENTER, NYH-CUMC PATHOLOGISTS, DAMADIAN MRI IN CANARSIE, P.C., METROPOLITAN MEDICAL & SURGICAL P.C., NEW YORK WELLNESS PT, P.C., MANLI LI, NY CHIROPRACTIC REHABILITATION P.C., ASSEM PHYSICAL THERAPY, P.C., AFFINITY ACUPUNCTURE HEALTH CARE, PLLC, SUFFICIENT CHIROPRACTIC CARE, PLLC, MEDIGNA INC., METROPOLITAN SPECIALTY LAB'S, INC., ATLAS PHARMACY LLC, MODERN BROOKLYN MEDICAL, PC, TOTAL CHIROPRACTIC P.C., TRINITY MEDICINE P.C., ADVANCED RECOVERY EQUIPMENT AND SUPPLIES LLC, MILLENNIUM AMBULATORY SURGERY CENTER, L.L.C., NOEL RUPIDO SIAPNO PT, BROOK CHIROPRACTIC OF NY P.C., AMC PSYCHOLOGY, P.C., ARTHUR AVENUE MEDICAL SERVICES, P.C., NEW YORK SPINE SPECIALISTS, LLP, ROXBURY ANESTHESIA, LLC, JAN SCHREUDER, M.D.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for JUDGMENT - SUMMARY

In this declaratory judgment action, the plaintiff moves for summary judgment pursuant to CPLR 3212 against answering defendants New York City Health and Hospitals d/b/a Queens Hospital Center, Total Chiropractic PC, and Brook Chiropractic of NY PC. The plaintiff seeks a declaration that it is not obligated to pay no-fault benefits to it to reimburse the defendants for claims made under insurance policy number RS813817617, claim number 329138-001, for treatment rendered or medical equipment provided to the individual defendant, Tasha Williams, for injuries allegedly sustained in an auto accident on July 21, 2017 on the grounds that

Williams failed to appear for duly scheduled Examinations Under Oath (EUOs). Defendants Total Chiropractic PC and Brook Chiropractic of NY PC oppose. The motion is granted.

It is well settled that the movant on a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

The court granted a previous motion of the plaintiff pursuant to CPLR 3215 seeking leave to enter a default judgment against the non-answering defendants Tasha Williams, NYH-CUMC Pathologists, Damadian MRI in Canarsie PC, Metropolitan Medical & Surgical PC, New York Wellness PT PC, Manli Li, NY Chiropractic Rehabilitation PC, Assem Physical Therapy PC, Affinity Acupuncture Health Care PLLC, Sufficient Chiropractic Care PLLC, Medigna Inc., Metropolitan Specialty Labs Inc., Atlas Pharmacy LLC, Modern Brooklyn Medical PC, Trinity Medicine PC, Advanced Recovery Equipment and Supplies LLC, Millennium Ambulatory Surgery Center LLC, Noel Rupido Siapno PT, AMC Psychology PC, Arthur Avenue Medical Services PC, New York Spine Specialists LLP, and Roxbury Anesthesia LLC (MOT SEQ 001).

In the prior order, the court found that the plaintiff’s submissions established, *prima facie*, that it timely mailed the individual defendant a notice for an EUO, and that the individual defendant failed to appear for the duly scheduled EUO or an additional EUO that was timely rescheduled, and therefore the individual defendant breached a condition precedent to the effectiveness of no-fault insurance coverage, thus vitiating that coverage. See Kemper Independence Ins. Co. v Adelaida Physical Therapy, P.C., 147 AD3d 437 (1st Dept 2017); Unitrin Advantage Insurance Company v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept 2011). The plaintiff now moves for summary judgment against New York City Health and Hospitals d/b/a Queens Hospital Center, Total Chiropractic PC, and Brook Chiropractic of NY PC seeking the same relief and provides the same submissions.

The plaintiff's submissions are also sufficient to establish its entitlement to relief under CPLR 3212 by demonstrating via admissible evidence that the individual defendant failed to appear for duly scheduled EUOs, thereby vitiating her coverage. Specifically, the plaintiff submits, *inter alia*, at least 16 NF-3 claims forms from the health care defendants marked received from September 5, 2017 through October 5, 2017 and its first EUO notice dated September 27, 2017 timely scheduling an EUO for October 11, 2017. The plaintiff also submits the affidavit of Jessica Mena-Sibrian, a no-fault litigation supervisor and former claims examiner for the plaintiff, averring that based upon her personal knowledge of the plaintiff's mailing practice and procedure the EUO notices and claims denials were properly mailed the same day that they were generated. The plaintiff further submits the affidavit of Annie Persaud, the administrative assistant for the plaintiff who prepares and mails the plaintiff's EUO notices, further averring that the EUO notices and claims denials were properly mailed. Also submitted are the transcripts of two EUOs demonstrating that Williams failed to appear on both dates.

Having failed to oppose the motion, defendant New York City Health and Hospitals d/b/a Queens Hospital Center fails to raise a triable issue of fact.

In its opposition, defendants Total Chiropractic PC and Brook Chiropractic of NY PC argue that the proof submitted by the plaintiff does not establish that the plaintiff's EUO scheduling letters were timely or properly mailed within its receipt of all the defendants' NF-3 forms. However, the affidavit of Annie Persaud is sufficient to establish a rebuttable presumption of proper mailing. Timely mailing can be established by an affidavit from an employee with knowledge of the party's standard office practices and procedures designed to ensure the items were properly addressed and timely mailed. See Am. Transit Ins. Co. v Lucas, 111 AD3d 423 (1st Dept. 2013). Once a party has submitted proof in admissible, evidentiary form establishing mailing through either of the aforementioned methods, conclusory denial of receipt is insufficient to raise triable issues of fact regarding the mailing. See Darlington Med. Diagnostics, P.C. v Praetorian Ins. Co., 32 Misc. 3d 142(A) (1st Dept. 2011). Rather, to raise a triable issue of fact, a party must sufficiently demonstrate that that the routine office practice was not followed in this instance or that the scheduling letters were never mailed. See Nassau Ins. Co. v Murray, 46 NY2d 828 (1978). Here, Total Chiropractic PC and Brook Chiropractic of NY PC fails to make any such allegations regarding the plaintiff's mailing practices that would raise a triable issue.

Furthermore, to the extent that the opposing defendants argue that the first EUO letter was not sent within 15 business days of all of the NF-3 claims forms, and thus the claims made

outside of that time limit must be paid, such a position is belied by the Appellate Division's holding in Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011). A failure to request an EUO within the 15-day limit under 11 NYCRR 65-3.5(b) only serves to reduce the 30-day time limit imposed under New York Insurance Law § 5106 and 11 NYCRR 65.15(g)(3). However, under Unitrin, any assignor's failure to appear for a requested EUO voids the policy *ab initio* such that an insurer may retroactively deny claims to the date of loss regardless of whether the denials were timely issued

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted in its entirety; and it is further,


ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to answering defendants New York City Health and Hospitals d/b/a Queens Hospital Center, Total Chiropractic PC, and Brook Chiropractic of NY PC, to reimburse them for claims made under insurance policy number policy number RS813817617, claim number 329138-001, for treatment they rendered or medical equipment they provided to the individual defendant for injuries that she allegedly sustained in the motor vehicle accident on July 21, 2017; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all defendants within 30 days of this order; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.

1/7/2021
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

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| <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART |