

Country-Wide Ins. Co. v Rodriguez

2021 NY Slip Op 30067(U)

January 6, 2021

Supreme Court, New York County

Docket Number: 655263/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**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. 655263/2018

MOTION DATE 11/6/2020

MOTION SEQ. NO. 002

- v -

ADELAIDA RODRIGUEZ, UNIVERSITY DIAGNOSTIC
MEDICAL IMAGING, P.C., LENOX HILL RADIOLOGY AND
MEDICAL IMAGING ASSOCIATES, P.C., THROGS NECK
MULTICARE, P.C., RAMAPO ANESTHESIOLOGISTS, P.
C., PHYSICAL MEDICINE & REHABILITATION OF NEW
YORK, P.C., ST. JOSEPH'S HOSPITAL, DOWNTOWN
BRONX MEDICAL ASSOCIATES, P.C.

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93

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

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3212 against answering defendants Adelaida Rodriguez (the individual defendant) and Physical Medicine & Rehabilitation of New York PC and Throgs Neck Multicare PC (the answering health-care defendants) for a declaration that that it is not obligated to pay no-fault benefits to reimburse the individual defendant for claims made under insurance policy number RS815173818, claim number 336085-001, or claims by the answering health-care defendants for treatment they rendered or medical equipment they provided to the individual defendant for injuries allegedly sustained when the individual defendant, a pedestrian, was struck by a vehicle insured by the plaintiff. The plaintiff moves for this relief on the grounds that Rodriguez failed to appear for duly scheduled Examinations Under Oath (EUOs). Rodriguez and Physical Medicine & Rehabilitation of New York PC oppose the motion and cross-move for summary judgment dismissing the complaint and on their counterclaims. Throgs Neck Multicare PC also opposes the motion. The motion is granted, and the cross-motion is denied.

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).

In the plaintiff’s previous motion seeking leave to enter a default judgment against the non-answering defendants University Diagnostic Medical Imaging PC, Ramapo Anesthesiologists PC, and Downtown Bronx Medical Associates PC (MOT SEQ 001), the court found that the plaintiff’s submissions established, *prima facie*, that it timely mailed the individual defendant a notice for an EUO on August 1, 2018, and that the individual defendant failed to appear for the duly scheduled EUO or an additional EUO that was rescheduled for August 22, 2018, 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 Adelaida Rodriguez, Physical Medicine & Rehabilitation of New York PC and Throgs Neck Multicare PC seeking the same relief. The plaintiff’s submissions are the same, except to the extent that the affidavit of Jessica Mena-Sibrian has been altered to remove any statement that Rodriguez and her attorney failed to contact the plaintiff to confirm their appearance for an August 1, 2018 EUO, as Rodriguez contends that her attorneys’ office did in fact contact the plaintiff and to reschedule the EUO, but that they never received notice of the rescheduled EUO.

The plaintiff’s submissions meet the plaintiff’s *prima facie* burden for summary judgment by demonstrating via admissible evidence that the individual defendant failed to appear for duly scheduled EUOs. Specifically, the plaintiff submits, *inter alia*, at least four NF-3 claims forms from the health care defendants marked received from June 13, 2018 through July 5, 2018 and

its first EUO notice dated July 15, 2018 timely scheduling an EUO for August 1, 2018. 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 are 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. The plaintiff also submits two statements on the record averring that Rodriguez failed to appear for the EUOs.

In opposition, the remaining defendants argue that i) the EUO scheduling letters were not properly mailed within 15 business days of the plaintiff's receipt of Rodriguez's NF-2 form, or the NF-3 forms applicable to the remaining health-care defendants and ii) Rodriguez rescheduled the first EUO but never received any notice of the date to which is was rescheduled, causing her failure to appear.

Contrary to the answering defendants' contentions, the plaintiff was not required to schedule an EUO within 15 business days of its receipt of Rodriguez's NF-2 form or the NF-3 forms specific to the remaining health care defendants. Under the Appellate Division, First Department's holding in Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559 (1st Dept. 2011), any assignor's failure to appear for a requested EUO voids the policy *ab initio* such that an insurer may retroactively deny claims regardless of whether the denials were timely issued. Thus, even if the plaintiff failed to schedule the EUO within 15 business days of a specific NF-2 or NF-3 form a denial following an assignor's failure to appear for an EUO is nonetheless proper.

Moreover, the affidavit of Annie Persaud is sufficient to establish a rebuttable presumption of proper mailing of the second EUO notice, scheduling Rodriguez's EUO to August 22, 2018. 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 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 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, the remaining defendants submit the affidavits of Rodriguez and Cynthia Blandino, the office manager for Rodriguez's personal injury attorneys. Both affidavits aver that Blandino contacted Annie Persaud on July 31, 2018 to reschedule the first EUO and was told that her office and Rodriguez would receive a second EUO scheduling letter. They both further aver that neither Blandino nor Rodriguez ever received the August 6, 2020 letter rescheduling the EUO. These conclusory denials of receipt are insufficient to raise a triable issue of fact.

As summary judgment is granted in favor of the plaintiff, the court denies the cross-motion of Rodriguez and Physical Medicine & Rehabilitation of New York PC's to dismiss the complaint as against them and on their counterclaims seeking attorneys' fees and, in essence, a declaration that the plaintiff is required to pay Physical Medicine Medical PC for the claims made under the policy.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for summary judgment is granted and the cross-motion by defendants Adelaida Rodriguez and Physical Medicine & Rehabilitation of New York PC is denied; and it is further,

ADJUDGED and DECLARED that the plaintiff is not obligated to pay no-fault benefits to answering defendants Adelaida Rodriguez or to Physical Medicine & Rehabilitation of New York PC and Throgs Neck Multicare PC to reimburse them for claims made under insurance policy RS815173818, claim number 336085-001, for treatment they rendered or medical equipment they provided to the Rodriguez for injuries that she allegedly sustained in the motor vehicle accident on May 10, 2018; 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.



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

1/6/2021
DATE

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