

Unitirin Advantage Ins. Co. v Citimedical I, PLLC

2021 NY Slip Op 31685(U)

May 19, 2021

Supreme Court, New York County

Docket Number: 150217/2019

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

-----X

UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

- v -

CITIMEDICAL I, PLLC, COHEN & KRAMER, MD,
PC, REFILL RX PHARMACY, INC, OBB ACUPUNCTURE,
PC, HEEL TO TOE FOOT CENTER, LLC, ISURPLY,
LLC, NOVEL MEDICAL DIAGNOSTICS, PC, LAMAR
CUMMINGS, MAHAINDRA SOOKRAM

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion (Seq. No. 002) by plaintiff, Unitrin Advantage Insurance Company, pursuant to CPLR 3212, for partial summary judgment as against defendants OBB Acupuncture, P.C. and Refill Rx Pharmacy on plaintiff's second cause of action, seeking to disclaim coverage for claims that said medical provider defendants submitted on behalf of claimant-defendant Mahindra Sookram, is granted.

Background

On January 14, 2016, the claimant-defendants Lamar Cummings ("Cummings") and Mahindra Sookram ("Sookram") were allegedly injured in an accident on the Major Deegan Expressway in Bronx, New York while they were in a motor vehicle that plaintiff, Unitrin Advantage Insurance Company, insured. According to the subject police report, the insured vehicle's airbags failed to deploy upon the subject alleged collision, and the claimant-defendants declined medical attention at the scene of the subject alleged accident. However, subsequently, the claimant-defendants asserted that they suffered significant bodily injuries arising out of the subject alleged accident. Plaintiff assigned claim number C003508NY16 to all No-Fault claims arising out of the subject alleged accident. The claimant-defendants allegedly received medical treatment and/or supplies from the medical provider defendants, namely, Citimedical I, PLLC; Cohen & Kramer, M.D., P.C. a/k/a Jeffrey Cohen, M.D. & Mark Kramer, M.D., P.C.; Refill Rx Pharmacy, Inc; OBB Acupuncture, P.C.; Heel to Toe Foot Center, LLC; ISurply LLC; and Novel Medical Diagnostics, P.C. The medical provider defendants, in their respective capacities as the claimant-defendants' assignees under the subject insurance policy, submitted No-Fault claims to plaintiff for reimbursement. (NYSCEF Doc. 1.)

Plaintiff requested an Examination Under Oath (“EUO”) of the claimant-defendants, who were unable to provide details of the subject alleged treatment in their testimony. Plaintiff concluded, essentially, that (1) the claimant-defendants’ testimony contained questions of “the legitimacy and medical necessity” of the treatment that they allegedly received from the medical provider defendants; (2) the subject alleged treatments did not arise from the subject alleged accident; and (3) the subject insurance policy did not cover the subject alleged accident. (NYSCEF Doc. 1.)

On March 14, May 26, and June 27, 2016, claimant-defendant Sookram failed to appear for a scheduled and twice-rescheduled Independent Medical Examination (“IME”) with Dr. Kevin Portnoy, a chiropractor, thereby breaching a condition for No-Fault claims under the subject insurance policy (NYSCEF Documents 1 and 23).

Subsequently, medical provider defendants Citimedical I, PLLC; Heel to Toe Foot Center, LLC; ISurply LLC; Novel Medical Diagnostics, P.C. apparently failed to appear for their EUOs at least twice each, thereby breaching a condition of the subject insurance policy. Thus, plaintiff disclaimed coverage as against said medical provider defendants (NYSCEF Doc. 1, at 8-9).

On December 27, 2018, plaintiff commenced the instant action, seeking a judgment against defendants (1) declaring that plaintiff has no duty to pay No-Fault claims arising out of the subject alleged accident; (2) permanently staying all No-Fault lawsuits and arbitrations that defendants submitted arising out of the subject alleged accident; and (3) awarding costs and disbursements to plaintiff (NYSCEF Doc. 1, at 12-13).

On July 3, 2019, medical provider defendant Cohen & Kramer, M.D., P.C. a/k/a Jeffrey Cohen, M.D. & Mark Kramer, M.D., P.C. answered the instant complaint with various admissions, denials, and a counter-claim (essentially for attorney’s fees) (NYSCEF Doc. 11)

Also on July 3, 2019, medical provider defendant Refill Rx Pharmacy, Inc. answered the instant complaint with various denials, twenty Affirmative Defenses, and a counter-claim (also essentially for attorney’s fees) (NYSCEF Doc. 12).

On July 18, 2019, plaintiff replied to the counter-claims of medical provider defendants Cohen & Kramer, M.D., P.C. a/k/a Jeffrey Cohen, M.D. & Mark Kramer, M.D., P.C. and Refill Rx Pharmacy, Inc., essentially asserting that plaintiff is not obligated to pay attorney’s fees to said medical provider defendants (NYSCEF Documents 14-15).

On August 16, 2019, plaintiff moved, pursuant to CPLR 3215, for a default judgment against medical provider defendants Citimedical I, PLLC; OBB Acupuncture, P.C.; Heel to Toe Foot Center, LLC; ISurply LLC; and Novel Medical Diagnostics, P.C.; and claimant-defendant Sookram (NYSCEF Doc. 16).

By stipulation dated September 12, 2019, plaintiff withdrew its motion (Seq. No. 001) for a default judgment as against medical provider defendant OBB Acupuncture P.C., only, and extended said medical provider defendant’s time to answer the instant complaint until October 12, 2019 (NYSCEF Doc. 31).

On or about October 1, 2019, plaintiff entered into a stipulation of partial settlement with medical provider defendant Cohen & Kramer, M.D., P.C. a/k/a Jeffrey Cohen, M.D. & Mark Kramer, M.D., P.C., only, and thus discontinued the instant action with prejudice as against said medical provider defendant, only (NYSCEF Doc. 36).

On November 26, 2019, this Court entered an amended order on Motion Seq. No. 001, granting plaintiff's motion, pursuant to CPLR 3215, for a default judgment as against medical provider defendants Citimedical I, PLLC; Heel to Toe Foot Center, LLC; ISurply LLC; and Novel Medical Diagnostics, P.C. and claimant-defendant Sookram, (1) declaring that plaintiff has no duty to pay any No-Fault benefits to the aforementioned defendants arising out of any current and/or future proceeding, including arbitrations and lawsuits, to recover No-Fault benefits arising out of the subject alleged accident under claim number C003508NY16, and (2) staying any such arbitration and/or lawsuit. That Order also severed the instant action so that it could still continue as against medical provider defendants OBB Acupuncture, P.C. and Refill RxP Pharmacy, Inc. and claimant-defendant Cummings (NYSCEF Doc. 38).

On December 16, 2019, defendant OBB Acupuncture, P.C. answered the instant complaint with various admissions, denials, and twelve Affirmative Defenses (NYSCEF Doc. 42).

Plaintiff now moves (Seq. No. 002), pursuant to CPLR 3212, for partial summary judgment as against medical provider defendants OBB Acupuncture, P.C. ("OBB") and Refill Rx Pharmacy ("Refill") on plaintiff's second cause of action seeking to disclaim coverage for claims that said defendants submitted on behalf of claimant-defendant Sookram (NYSCEF Doc. 46). Plaintiff notes that while OBB has submitted claims only as an assignee of Sookram, Refill has submitted a claim as an assignee of Cummings (in addition to as an assignee of Sookram); therefore, if this Court grants the instant motion as against Refill, the instant action could still continue as against Refill as to its claim(s) in its capacity as Cummings's assignee under the subject insurance policy (NYSCEF Doc. 47).

In opposition, medical provider defendants OBB and Refill assert, inter alia, the following: (1) plaintiff was untimely in sending its requests to reschedule the subject IME; (2) plaintiff has failed to demonstrate that it mailed its IME scheduling letters timely; (3) plaintiff did not attach the subject denials as exhibits to the instant motion; (4) plaintiff has failed to demonstrate that Sookram failed to appear for her subject IME; and (5) Sookram did indeed attend an IME (see NYSCEF Doc. 58) (NYSCEF Documents 56-57).

In reply, plaintiff asserts, inter alia, the following: (1) the First Department found that Sookram breached a policy condition and, thus, collateral estoppel applies; (2) even if Sookram appeared for the IME that NYSCEF Doc. 58 references, Sookram failed to appear for other appointments, and plaintiff is entitled to schedule a reasonable number of IMEs; and (3) when an insurer asserts a coverage defense (i.e. failure to appear for an EUO or IME), the movant does not need to establish a timely denial of the subject claim (NYSCEF Doc. 59).

Discussion

To prevail on summary judgment, the moving party 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). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept. 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

Plaintiff has e-filed the subject IME-scheduling correspondence, which requested that claimant-defendant Sookram appear for an IME on March 14, May 26, and then June 27, 2016 with “Kevin Portnoy Chiropractic” (NYSCEF Doc. 50). The May 17, 2016 letter (NYSCEF Doc. 58, at 9-12) from Dr. Antoinette Perrie, apparently a chiropractor and licensed acupuncturist, who claims to have conducted an IME of claimant-defendant Sookram, does not satisfy plaintiff’s aforementioned IME requests. Plaintiff has thus submitted evidence that demonstrates the absence of a material issue of fact in this matter, and medical provider defendants OBB and Refill have failed to meet their burden to submit evidentiary proof to establish that an issue of fact does exist.

This Court has considered medical provider defendants OBB and Refill’s other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will grant plaintiff’s motion, pursuant to CPLR 3212, for partial summary judgment against medical provider defendants OBB and Refill.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion (Seq. No. 002) by plaintiff, Unitrin Advantage Insurance Company, pursuant to CPLR 3212, for partial summary judgment against medical provider defendants OBB Acupuncture, P.C. and Refill Rx Pharmacy on plaintiff’s second cause of action, is hereby granted, and, accordingly, the Clerk is hereby directed to enter judgment declaring that plaintiff is not obligated to honor and/or pay claims that medical provider defendants OBB Acupuncture, P.C. and Refill Rx Pharmacy submit and/or will submit in their respective capacities as claimant-defendant Mahindra Sookram’s assignees under the subject insurance policy.


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5/19/2021	
DATE	ARTHUR F. ENGORON, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED
	<input checked="" type="checkbox"/> GRANTED
	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN
	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> REFERENCE