

Country-Wide Ins. Co. v Cruz
2022 NY Slip Op 32440(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 652508/2021
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

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COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

INDEX NO. 652508/2021

MOTION DATE 07/05/2022

MOTION SEQ. NO. 002

- v -

CARLOS CRUZ, EAST WEST ACUPUNCTURE NY, P.C.,
ISHRAT S. KHAN, M.D., P.C., NEW AGE MEDICAL, PC,
VINCENT SCOTT DOWLING MD, 5 BOROUGH
ANESTHESIA, PLLC, DONGSOON PARK, D.C., P.C.,
ATLAS PHARMACY, LLC, LUMINOUS ACUPUNCTURE,
PLLC, CHIROPRACTIC SPINE & SPORT OF QUEENS
P.C., SUMMER PT, P.C., ARTE MEDICAL PRIMARY
CARE, P.C., YOON JI MOON, REACTIVE PHYSICAL
THERAPY, P.C.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion is granted.

Background

Between May 27, 2018, and May 27, 2019, plaintiff Country-Wide Insurance Company ("Country-Wide") provided insurance, policy number PS9395810 18, to defendant Carlos Cruz. NYSCEF Doc. No. 1 ¶¶31-32.

On May 2, 2019, Cruz was allegedly involved in a motor vehicle accident. NYSCEF Doc. No. 1 ¶33.

Afterwards, Cruz allegedly sought medical treatment from 13 medical providers, all named defendants in this case. NYSCEF Doc. No. 1 ¶35.

Accordingly, Cruz received at least seven medical bills between June 13, 2019, and June 26, 2019, which he submitted to plaintiff. NYSCEF Doc. No. 61 ¶9.

In a letter dated June 26, 2019, Country-Wide informed Cruz that it had scheduled an Examination Under Oath ("EUO") for him on July 15, 2019, at 3:00 p.m. NYSCEF Doc. No. 56 at 2. Cruz did not attend. NYSCEF Doc. No. 56 at 7.

In a letter dated July 17, 2019, Country-Wide informed Cruz it had again scheduled an EUO for him on August 2, 2019, at 9:30 a.m. Id. at 10. Again, Cruz did not attend. Id. at 15.

In a letter dated August 19, 2019, Country-Wide informed Cruz and his attorney (who was not included in the first two mailings) that for a third time it had scheduled an EUO, for September 6, 2019, at 11 a.m. NYSCEF Doc. No. 56 at 18. Again, Cruz did not attend. Id. at 23.

Country-Wide then scheduled EUOs for a fourth, fifth, and sixth time, for September 27, 2019, November 20, 2019, and December 16, 2019, and again, each time, Cruz failed to attend. NYSCEF Doc. Nos. 56, 5, 62, and 59. Plaintiff sent the fifth and sixth mailing because it had an outdated address for Cruz's counsel on the third and fourth mailings. NYSCEF Doc. No. 49 ¶21.

On December 17, 2019, plaintiff denied Cruz's claims because of his failure to attend any of the six scheduled EUOs. NYSCEF Doc. No. 49 ¶51.

On April 15, 2021, plaintiff commenced this action against Cruz and thirteen medical providers seeking a declaration stating that it is not obligated to any of the defendants arising out of Cruz's claims. NYSCEF Doc. No. 1.

Cruz and nine of the medical provider defendants failed to answer the complaint, and on July 28, 2021, plaintiff moved for a default judgment against them. NYSCEF Doc. No. 22. In a Decision and Order dated November 3, 2021, this Court granted the motion. NYSCEF Doc. No. 45.

On May 23, 2022, plaintiff moved, pursuant to CPLR 3212, for summary judgment against the remaining defendants: Summer PT, P.C., Atlas Pharmacy, LLC, New Age Medical, P.C., and Vincent Scott Dowling MD ("Remaining Defendants"). NYSCEF Doc. No. 47.

Plaintiff argues that Cruz's failure to attend an EUO on any of the scheduled dates violated the conditions of his policy and therefore allows Country-Wide to deny all claims. Id. ¶25.

In opposition, counsel for two of the Remaining Defendants, New Age Medical, PC and Vincent Scott Dowling MD, asserts, *inter alia*, that: (1) plaintiff's request for EUOs were not timely; and (2) plaintiff did not provide a sufficient basis for seeking the EUOs. NYSCEF Doc. No. 67.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden 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). Furthermore, pursuant to CPLR

3212(b), a motion for summary judgment must be supported by an affidavit “by a person having knowledge of the facts.”

Here, in support of its motion, plaintiff has submitted: an affirmation by its attorney who is “fully familiar with all the facts” of the case; an affidavit from Kyaw Nyein, plaintiff’s no-fault claim supervisor; and an affidavit from Annie Persaud, plaintiff’s EUO clerk, who sent the six EUO notices. NYSCEF Doc. Nos. 49, 61, and 62. These attestations, along with plaintiff’s exhibits, show that plaintiff requested Cruz’s EUOs in a timely manner and that plaintiff sufficiently stated the reasons therefor. Thus, as Cruz has failed to comply with his obligation to attend an EUO despite six chances, plaintiff has made out a prima facie case for summary judgment.

Defendants argue that plaintiff’s requests for EUOs were untimely sent. A request for an independent medical examination is timely when an insurer makes the request within 15 days of receiving a medical provider claim for an injured claimant. See Union Direct Ins. Co. v Beckles, 188 AD3d 620, 621 (1st Dept 2020).

Here, plaintiff received claims for at least seven medical bills that Cruz received between June 13, 2019, and June 26, 2019. NYSCEF Doc. No. 61 ¶9. On June 26, 2019, within the 15-day time limitation, plaintiff requested an EUO of Cruz. Therefore, the EUO requests were timely.

Defendants also argue plaintiff has not shown sufficient rationale for requesting the EUOs. Defendants refer to a recent First Department ruling, in a case to which Country-Wide was a party, affirming the denial of plaintiff’s motion for summary judgment because plaintiff failed to provide a “specific objective justification for requesting the [EUO].” Country-Wide Ins. Co. v Delacruz, 205 AD3d 473, 473 (1st Dept 2022).

Here, as in Delacruz, plaintiff failed to provide a reasonable basis for requesting the EUO in their EUO letters, complaint, and/or moving papers. In its EUO letter, plaintiff only sought to “clarify some of the facts and circumstances surrounding this claim.” NYSCEF Doc. No. 56 at 2.

However, plaintiff’s counsel provided a reasonable basis in reply to defendant’s opposition by affirming that the alleged “medical or lost earnings claim is extensive, but [the] collision [was] a minor impact with minimal property damage to vehicles” and that the “police report indicated no one involved sustained any injury and/or medical treatment at scene was refused.” NYSCEF Doc. No. 74 ¶42. Therefore, this Court finds plaintiff’s basis for requesting the EUO is reasonable (although, this Court notes in passing that neither the instant policy nor the police report were proffered by plaintiff).

This Court further notes that in medical insurance cases in general, and in no-fault cases in particular, insurers have an obvious interest in examining and ascertaining the extent of any medical treatment needed.

The Court has considered defendants’ other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, plaintiff Country-Wide Insurance Company’s motion for summary judgment is granted. The Clerk is hereby directed to enter judgment in favor of plaintiff and against the remaining defendants, Summer PT, P.C., Atlas Pharmacy, LLC, New Age Medical, P.C., and Vincent Scott Dowling MD, declaring that they are not entitled to any “no-fault” benefits arising out of medical care allegedly given to Carlos Cruz for a May 2, 2019, auto accident.



7/22/2022
DATE

ARTHUR ENGORON, 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