

American Tr. Ins. Co. v Maldonado

2014 NY Slip Op 30044(U)

January 7, 2014

Supreme Court, New York County

Docket Number: 101884/12

Judge: Doris Ling-Cohan

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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. Doris Ling-Cohan, Justice **Part 36**

AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

INDEX NO. 101884/12

MOTION SEQ. NO. 002

**EVELYN MALDONADO, ALTERNATIVE PLM
ACUPUNCTURE, P.C., MAIMONIDES MEDICAL
CENTER, MANHATTAN KINGS MEDICAL
SERVICES, MMC EMERGENCY PHYSICIANS,
OMEGA DIAGNOSTIC IMAGING, P.C., and STAND-
UP MRI OF BENSONHURST, P.C.,**

Defendants.

The following papers, numbered 1-3 were considered on the motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	_____
Cross-Motion: [] Yes [X] No _____	

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

This is an action for declaratory judgment arising out of an alleged motor vehicle accident on May 3, 2011. Defendant Evelyn Maldonado (Maldonado) was allegedly injured in such motor vehicle accident involving an automobile insured by plaintiff American Transit Insurance Company (American Transit Ins.), through an insurance policy issued to Gilberto Leon, policy number BYC B00157. As a result of the accident, defendant Maldonado sought no-fault benefits

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

from defendants Alternative PLM Acupuncture, P.C., Maimonides Medical Center, Manhattan Kings Medical Services, MMC Emergency Physicians, Omega Diagnostic Imaging, P.C., and Stand-Up MRI of Bensonhurst, P.C. (Stand-Up MRI) (collectively “Medical Provider Defendants”).

Defendant Maldonado assigned her rights to collect no-fault benefits to the Medical Provider Defendants. On June 20, 2011, NCEI, on behalf of plaintiff American Transit Ins., sent a letter to defendant Maldonado requesting that she attend an orthopedic independent medical examination (IME) on July 6, 2011. As defendant Maldonado failed to appear at such IME, NCEI sent another letter, dated July 6, 2011, to defendant Maldonado requesting that she appear for an orthopedic IME on July 20, 2011. Defendant Maldonado failed to appear at such IME. Subsequently, plaintiff American Transit Ins. denied the claim, retroactive to the date of loss, based upon defendant Maldonado’s failure to attend the scheduled IMEs.

In this action, plaintiff American Transit Ins. seeks a declaration that it owes no duty to pay No-Fault benefits to any of the named defendants on the ground that defendant Maldonado failed to appear for duly scheduled IMEs, in violation of the No-Fault regulations and in violation of a condition precedent to coverage for all No-Fault claims submitted by the Medical Provider Defendants.

By Decision/Order dated May 8, 2013, a default judgment was granted against all defendants except for defendant Stand-Up MRI, the only remaining defendant.

Plaintiff American Transit Ins. now moves for summary judgment against defendant Stand-Up MRI, declaring that such defendant is not entitled to no-fault coverage, as defendant Maldonado failed to attend the IMEs. Defendant Stand-Up MRI opposes plaintiff American

Transit Ins.'s motion.

DISCUSSION

The standards of summary judgment are well settled. Summary judgment should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). “The proponent of 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”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 (1978).

Here, plaintiff American Transit Ins.'s motion for summary judgment against defendant Stand-Up MRI is granted. In support of its motion, plaintiff American Transit Ins. proffers, *inter alia*, the denial of claim form dated August 5, 2011, the two letters sent to defendant Maldonado requesting her appearance at two IMEs, the affidavit of service for such letters, and an affidavit from Dr. Raghava Polavarapu stating that defendant Maldonado failed to attend the two scheduled IMEs. As such, plaintiff American Transit Ins. has shown that it arranged two IMEs

for defendant Maldonado, that defendant Maldonado was notified of such IMEs by mail, and that she failed to attend either IME.

The Appellate Division, First Department, has found that “failure to appear for IMEs requested by the insurer when . . . [it] may reasonably require . . . is a breach of a condition precedent to coverage under the No-Fault policy.” *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 (1st Dep’t 2011)(internal quotations and citations omitted); *see also* 11 NYCRR 65-1.1. As such, “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.” *Id.* Thus, plaintiff American Transit Ins. has established entitlement to summary judgment as a matter of law declaring that defendant Stand-Up MRI is not entitled to no-fault coverage for the motor vehicle accident that occurred on May 3, 2011.

In opposition, defendant Stand-Up MRI proffers an attorney’s affirmation, which is not based upon the requisite personal knowledge and is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985); *Wehringer v Helmsley Spear, Inc.*, 91 AD2d 585, 585 (1st Dep’t 1982). New York courts have consistently held that “a bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing.” *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1st Dept 1981), *aff’d* 54 NY2d 715 (1981). Thus, defendant Stand-Up MRI’s attorney’s conclusory and speculative affirmation,

is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985). Thus, plaintiff American Transit Ins.'s motion for summary judgment is granted.

Accordingly, it is

ORDERED that plaintiff American Transit Insurance Company's motion for summary judgment against defendant Stand-Up MRI of Bensonhurst, P.C. is granted; and it is further

ORDERED, ADJUDGED and DECLARED that the defendant Stand-Up MRI of Bensonhurst, P.C. is not entitled to no-fault coverage, from plaintiff American Transit Insurance Company, for the motor vehicle accident that occurred on May 5, 2011; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon defendant Stand-Up MRI of Bensonhurst, P.C. a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 1/7/14

~~JUSTICE DORIS LING-COHAN~~
DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

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