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Pavlova v Nationwide Ins.
2021 NY Slip Op 50213(U) [70 Misc 3d 144(A)]
Decided on March 12, 2021
Appellate Term, Second Department
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Decided on March 12, 2021

SUPREME COURT, APPELLATE TERM, SECOND DEPARTMENT, 2d, 11th and 13th
JUDICIAL DISTRICTS

PRESENT: : THOMAS P. ALIOTTA, P.J., DAVID ELLIOT, WAVNY TOUSSAINT, JJ
2019-1374 K C

Ksenia Pavlova, D.O., as Assignee of Taylor, Vladimir, Respondent,

against

Nationwide Ins., Appellant.

Hollander Legal Group, P.C. (Allan S. Hollander of counsel), for appellant. The Rybak Firm, PLLC (Oleg Rybak of counsel), for respondent (no brief filed).

Appeal from an order of the Civil Court of the City of New York, Kings County (Robin Kelly Sheares, J.), entered August 9, 2019. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order, insofar as appealed from, is reversed, with \$30 costs, and defendant's motion for summary judgment dismissing the complaint is granted.

In this action by a provider to recover assigned first-party no-fault benefits, defendant appeals from so much of an order of the Civil Court as denied defendant's motion which had sought summary judgment dismissing the complaint on the ground that plaintiff's assignor failed to appear for duly scheduled examinations under oath (EUOs). The Civil Court limited the issues for trial, in effect

pursuant to CPLR 3212 (g), to whether plaintiff's assignor failed to appear for the duly scheduled EUOs. More specifically, the court found, among other things, that "[a]lthough defendant ha[d] established that it mailed EUO scheduling letters to The Rybak [Law] Firm, PLLC and plaintiff's assignor at the address stated on the NF-2, there is an issue of fact as to the assignor's non-appearance for examinations under oath as defendant has not established that [the assignor] was represented by counsel."

To establish its prima facie entitlement to summary judgment dismissing a complaint on the ground that a plaintiff's assignor failed to appear for an EUO, an insurer must demonstrate, as a matter of law, that it twice duly demanded an EUO from the assignor, that the assignor twice failed to appear, and that the insurer issued a timely denial of the claims (*see Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2014]). Contrary to the determination of the Civil Court, the affirmations of defendant's counsel, as well as the transcripts of the EUOs, were sufficient to establish that plaintiff's assignor had failed to appear for the EUOs. It is irrelevant whether plaintiff's assignor was represented by counsel, as defendant was only required to mail the EUO scheduling letters to plaintiff's assignor (*see* 11 NYCRR 65-3.5 [e]; 3.6 [b]). Consequently, as plaintiff failed to raise a triable issue of fact in opposition to defendant's motion or otherwise challenge the implicit CPLR 3212 (g) findings in defendant's favor, defendant is entitled to summary judgment dismissing the complaint.

Accordingly, the order, insofar as appealed from, is reversed and defendant's motion for summary judgment dismissing the complaint is granted.

ALIOTTA, P.J., ELLIOT and TOUSSAINT, JJ., concur.

ENTER:

Paul Kenny

Chief Clerk

Decision Date: March 12, 2021

