34 Mass.L.Rptr. 244
Superior Court of Massachusetts,
Worcester.

AMICA MUTUAL INSURANCE COMPANY
v.
Amanda OLMO

1485CV01042
|
April 11, 2017

**Opinion**

*MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT*

Honorable Shannon Frison, Justice of the Superior Court

***1** The plaintiff, Amica Mutual Insurance Company ("plaintiff"), filed this declaratory judgment action against its insured, Amanda Olmo ("defendant"), seeking a declaration of the parties' rights and obligations under the defendant's Massachusetts Automobile Insurance Policy (the "policy") and the Personal Injury Protection ("PIP") statute, G.L.c. 90, § 34M ("PIP statute"). The plaintiff seeks an order declaring that: (1) the defendant is required to submit to a physical examination with a physician selected by the plaintiff; (2) the defendant's attorney has no absolute right to attend or create an audio/visual record of the examination; (3) the defendant's failure to attend a previously scheduled examination was without proper legal justification; and (4) the defendant's failure to attend the examination amounted to noncooperation, constituting a breach of the policy and the PIP statute, and entitled the plaintiff to deny the defendant's request for PIP coverage. The defendant seeks a declaration that: (1) she is entitled to have counsel present and/or create an audio/visual record of the physical examination; (2) she did not refuse to attend the previously scheduled examination; and (3) she cooperated with the plaintiff's investigation of her PIP claim. [1]

On May 15, 2015, this matter came before the court on the plaintiff's motion for summary judgment and the defendant's cross motion for summary judgment. On June 16, 2015, both motions were denied. On April 4, 2017, this matter again came before the court for a hearing on the parties' renewed motions for summary judgment. The renewed motions were filed because additional discovery had produced evidence to resolve the material facts that the court had previously indicated were in dispute. [2] Both parties agree that there are no material facts in dispute and that only issues of law remain. After hearing and review of the parties' submissions, for the reasons that follow, the plaintiff's motion for summary judgment is *DENIED,* and the defendant's cross motion for summary judgment is *ALLOWED*.

BACKGROUND

***2** The following undisputed takes are taken from the summary judgment record with certain additional facts reserved for later discussion.

The plaintiff is an automobile insurance company, which issued the defendant an automobile insurance policy effective September 23, 2013 through September 23, 2014. On April 28, 2014, the defendant submitted to the plaintiff an application for PIP benefits as a result of injuries she sustained in a motor vehicle accident. Pursuant to the policy and the PIP statute, the plaintiff notified the defendant and her attorney, Ryan Alekman ("Attorney Alekman"), that it had scheduled an Independent Medical Examination ("IME") of the defendant for May 12, 2014, with Dr. Steven Silver in Springfield, Massachusetts. On May 5, 2014, Attorney Alekman sent the plaintiff a letter indicating that he would be sending a representative from his office to audio/video record the IME with Dr. Silver. The plaintiff then contacted Dr. Silver's office, Quality Medical Evaluations, Inc. ("QME"), and spoke with a QME employee, who indicated that Dr. Silver would not allow an attorney to be present or permit an audio/visual recording of the examination. The plaintiff informed Attorney Alekman of QME's policy, and in response, Attorney Alekman indicated that the defendant would not attend the May 12th IME.

The defendant did not appear at the May 12th IME. As a result, the plaintiff rescheduled the examination with Dr. Silver for May 19, 2014. The plaintiff also informed the defendant that her attorney could not attend the examination and that the examination could not be recorded. The defendant did not appear at the May 19th

  

IME. As a result, the plaintiff denied the defendant's request for PIP benefits on the ground that she breached the cooperation clause of the policy.

## DISCUSSION

### I. Standard of Review

Summary judgment shall be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 714 (1991). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Commc'ns Corp.,* 410 Mass. 805, 809 (1991); *Kourouvacilis,* 410 Mass. at 716. Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson,* 404 Mass. at 17. The opposing party cannot rest on its pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. *LaLonde v. Eissner,* 405 Mass. 207, 209 (1989).

When deciding a motion for summary judgment, the court considers pleadings, deposition transcripts, answers to interrogatories, admissions on file, and affidavits. Mass.R.Civ.P. 56(c). The court reviews the evidence in the light most favorable to the nonmoving party but does not weigh evidence, assess credibility, or find facts. *Attorney Gen. v. Bailey*, 386 Mass. 367, 370 (1982). Where, as here, the court is presented with cross motions for summary judgment, the standard of review is identical for both motions. *Epstein v. Board of Appeals of Boston*, 77 Mass.App.Ct. 752, 756 (2010).

### II. Analysis

***3** Pursuant to the defendant's policy, she "must cooperate with [the plaintiff] in the investigation, settlement and defense of any claim ... Failure to cooperate with [the plaintiff] may result in the denial of the claim." The PIP statute also requires the defendant to "submit to physical examinations by physicians selected by the insurer as often as may be reasonably required and ... do all things necessary to enable the insurer to obtain medical reports and other needed information to assist in determining the amounts due." G.L.c. 90, § 34M. Here, the plaintiff argues that the defendant's failure to attend either of the two IMEs is *per se* noncooperation, and thus, a breach of the policy and a violation of the PIP statute. The court disagrees.

It is well known that courts enforce cooperation clauses "with notable rigor," see *Wang v. Liberty Mut. Ins. Co.,* 2000 Mass.App.Div. 313, 314 (2000), and that an insured's failure to cooperate is grounds for an insurer to deny coverage. *MetLife Auto & Home v. Cunningham,* 59 Mass.App.Ct. 583, 590 (2003). The plaintiff, however, bears the burden of proving the insured's noncooperation, and "[t]he failure of an insured to submit to an IME is [merely] *evidence* of noncooperation." *Provenzano v. Plymouth Rock Assur. Corp.,* 2006 Mass.App.Div. 155, 156 (2006). It is not *per se* noncooperation, as alleged by the plaintiff. See *Cotton v. Hanover Ins. Co.,* 2011 Mass.App.Unpub. LEXIS 669 at *1-*2 (Mass.App.Ct. 2011) (Rule 1:28 decision) (declining to decide whether a "willful and unexcused refusal" to submit to an IME amounts to noncooperation). Furthermore, an injured party is not required to "unconditionally submit to examination no matter what the circumstances are and without any preconditions ..." *Wang,* 2000 Mass.App.Div. at 314. Rather, the injured party is protected by a "mantle of reasonableness." *Id.*

In the present case, the defendant, through her attorney, requested that either an attorney be present during the IME or that it be recorded in some way. In support of this request, the defendant cites to *Wang v. Liberty Mut. Ins. Co., supra*, and *Velez v. Liberty Mut. Ins. Co.,* 2001 Mass.App.Div. 56 (2001). Both of these cases involve an injured party's right to record an IME where the injured party's primary language was not English. In *Wang,* the court held that there was no indication that recording the examination would have impeded the doctor or made the examination less effective. 2000 Mass.App.Div. at 314. The court also recognized that recording the examination might be the only record available to rebut or mitigate the physician's report in subsequent court proceedings.

  

*Id.* Similarly, in *Velez,* the court held that recording the examination was the "only objectively valid means to determine the examination's events." 2001 Mass.App.Div. at 58.

Here, nothing in the record indicates that recording the IME would have impeded the examination or made it less effective. Although the plaintiff presumes, without having spoken to Dr. Silver directly, that recording IMEs would open the door to medical malpractice claims, it is significant that the purpose of these evaluations is not for the insured to seek medical treatment but rather for the insurer to obtain an independent verification of the injured party's condition. Notwithstanding, even if the plaintiff's presumption is correct, the defendant's countervailing interest in obtaining an objective record of the examination is strong in light of the adversarial nature of the examination. See *Hepburn v. Barr & Barr,* 2006 Mass.Super. LEXIS 280 at *2 (Mass.Super.Ct. 2006) [21 Mass. L. Rptr. 121] (where psychiatrist was hired by defendant to conduct an independent medical examination of plaintiff, a video recording of examination was reasonable due to the adversarial nature of the examination). Additionally, at the summary judgment hearing, neither party was able to produce an alternative means of producing an objective record of the examination's events. See *Velez,* 2001 Mass.App.Div. at 58 ("[A]udio recording devices should be allowed, at least 'where such a presence is the only objectively valid means to determine the examination's events' ").

***4** In opposition to the defendant's motion, the plaintiff argues that *Wang* and *Velez* should be strictly limited to situations where the insured has a physical or mental disability and/or does not speak English as their primary language. By asserting this argument, the plaintiff urges the court to adopt the "good cause" standard expressed in *Kutner v. Urban,* 2003 Mass.Super. LEXIS 406 (Mass.Super.Ct. 2003) [17 Mass. L. Rptr. 49]. *Kutner* involved a court-ordered examination under Mass.R.Civ.P. 35, in which the court held that an attorney's presence during a Rule 35 physical examination should only be allowed upon a showing of good cause. The court, in *Kutner,* articulated certain factors that should be considered when determining good cause, such as (1) factors suggesting a biased or adversarial examination; (2) allegations of past impropriety on the part of the examining physician; and (3) whether the examinee has any needs or disabilities warranting an attorney's presence. *Id.* at *10-*11. However, here, the parties have not cited to any case applying the "good cause" standard in the context of IMEs, nor is the court aware of any. Notwithstanding, as discussed above, this examination is adversarial in nature because it forms the basis of the insurer's decision to extend or deny coverage to the defendant. Furthermore, the record indicates that a significant amount of Dr. Silver's medical practice is dedicated to providing medical examinations for insurance companies, including the plaintiff, and that in Attorney Alekman's experience working with Dr. Silver, Dr. Silver has routinely opined to insurers that the insured is not injured. Therefore, if the court were to apply the good cause standard, the defendant has made such a showing. The Court also finds that the defendant's request to have an attorney present or to create an audio/visual record of the examination is reasonable. See *Hepburn,* 2000 Mass.Super. LEXIS at *2 ("reasonable protections are due").

The plaintiff alternatively argues that it was justified in denying the defendant's PIP application because the defendant "refused" to attend the IME. However, contrary to the plaintiff's assertion, the record shows that the defendant did not "refuse" to attend; rather she was willing and able to but did not do so at the suggestion of her attorney because the plaintiff single-handedly decided that the defendant had no right to have an attorney present or record the examination. The record is also clear that the defendant's attorney was cooperative and communicative with the plaintiff in an attempt to resolve the issue. See *Cotton,* 2011 Mass.App.Unpub. LEXIS at *2 (where plaintiff missed two scheduled IMEs and plaintiff's attorney subsequently telephoned claims adjuster to reschedule, court held that plaintiff's actions did not amount to a "refusal" to undergo an IME). The plaintiff also concedes that it does not have a policy prohibiting attorneys from being present or precluding an audio/visual recording of the examination and that the plaintiff would not have objected to such a request. The plaintiff also utilizes several vendors, aside from QME, to conduct IMEs; however, the plaintiff made no effort to contact another vendor in an attempt to accommodate the defendant. *Provenzano,* 2006 Mass.App.Div. at 157 ("There is little evidence in the record to suggest that [the insurer] made diligent efforts to communicate with its insured and to secure his cooperation"). Accordingly, the record does not support a finding that the defendant "refused" to attend the IME, and even it did, the

  

plaintiff itself has not "exercised diligence and good faith." *Imperiali v. Pica,* 338 Mass. 494, 498 (1959). Therefore, the plaintiff cannot be relieved from coverage on the ground that the defendant breached the cooperation clause.

Since the defendant did not willfully and inexcusably refuse to undergo the IME, the plaintiff is required to make " 'an affirmative showing of actual prejudice resulting from' the failure;" however, "a showing of prejudice is not, and should not be, easily made." *MetLife Auto & Home v. Cunningham,* 59 Mass.App.Ct. 583, 590-91 (2003), quoting *Darcy v. Hartford Ins. Co.,* 407 Mass. 481, 491 (1990). See *Lorenzo-Martinez v. Safety Ins. Co.,* 58 Mass.App.Ct. 359, 363 (willful, unexcused refusal to submit to an examination under oath discharges insurer's obligation to prove prejudice resulting from the insured's breach of the contract). Where, as here, the plaintiff has not made such an affirmative showing, the defendant is entitled to summary judgment.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the plaintiff's motion for summary judgment is *DENIED,* and the defendants' motion for summary judgment is *ALLOWED.*

It is therefore *ORDERED* that a declaration enter, declaring that the plaintiff's denial of the defendant's application for PIP benefits on the ground that she refused to cooperate regarding the IME was improper.

**All Citations**

Not Reported in N.E.3d, 34 Mass.L.Rptr. 244, 2017 WL 2466110

Footnotes

1 The defendant has asserted two counterclaims in her Answer—a violation of the PIP statute and a violation of G.L.c. 93A. However, after reviewing the defendant's cross motion for summary judgment and supplemental materials, it appears that the defendant has raised arguments in her memoranda relating only to the PIP claim. Therefore, since the 93A claim was not raised in the defendant's motion and was not argued at the hearing, the Court treats the defendant's motion as a cross motion for partial summary judgment on the PIP claim.

2 In the Court's memorandum of decision and order on the parties' initial cross motions for summary judgment, the court held that there were genuine issues of material fact as to whether the defendant breached her duty to cooperate by failing to appear at the physical examination and whether the plaintiff failed to meet the defendant's preconditions to the examination. In denying the motions, the Court also reasoned that a reasonable fact finder could determine that the defendant's argument that recording the examination was the only objectively valid means to determine the examination's events lacked factual support and that the defendant failed to provide direct or compelling evidence that the plaintiff's medical examiner was potentially biased.