

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON  
*Justice*

PART 55

Index Number : 115586/2007

**UNITRIN ADVANTAGE INSURANCE**

VS.

**BAY SHORE PHYSICAL THERAPY**

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 11/24/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

**PAPERS NUMBERED**

1-3

4-3

14

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the amended memorandum decision, order and judgment.*

**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).

Dated: 2/5/10

  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
UNITRIN ADVANTAGE INSURANCE COMPANY,

Plaintiff,

-against-

Index No.  
115586/07

BAYSHORE PHYSICAL THERAPY, PLLC, DR. MARTIN  
BASSIUR, DDS, D/B/A NY CRANIOFACIAL PAIN  
MANAGEMENT, EXCEL RADIOLOGY SERVICES, PC  
HONGTAO ACUPUNCTURE, P.C., JOHN H. KRAFT,  
D.C., P.C., S AND D MEDICAL LLP, MICHAEL  
TRIMBA, M.D., P.C., MARIA MAJANO, AND JUAN GOMEZ,

Defendants.

-----X  
JANE S. SOLOMON, J.S.C.:

Defendants Dr. Martin Bassiur, DDS, d/b/a NY Craniofacial Pain Management (Bassiur) and Excel Radiology Services, PC (Excel) (together, Defendants) move, pursuant to CPLR 3212 (a), for an order dismissing the complaint. Plaintiff Unitrin Advantage Insurance Company (Unitrin) cross-moves for summary judgment declaring that it does not owe coverage for the No-Fault claims of Bassiur and Excel with respect to the No-Fault claims allegedly assigned to them by defendants Maria Majano and Juan Gomez. Those claims arose out of an automobile collision on January 12, 2007.

By order entered on July 24, 2009, this court granted Unitrin a default judgment against defendants Bay Shore Physical Therapy, PLLC, Hongtao Acupuncture, P.C., John H. Kraft, D.C., P.C., Michael Trimba, M.D., Majano and Gomez. Unitrin and defendant S and D Medical LLP have settled this action by stipulation, and the instant cross motion has been withdrawn as to that defendant.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served. Laxed hereon. To obtain entry, motion or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1472).

The following, which is attested to in affidavits submitted by Unitrin, is undisputed. At the time of the collision, Majano and Gomez were passengers in a car being driven by non-party Infausty Fruto and insured by Unitrin under policy no. WY511681. That policy provides No-Fault benefits subject to the conditions that, insofar as is relevant here,

[n]o action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage.

... Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

(d) provide any other pertinent information that may assist the Company in determining the amount due and payable.

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require.

These provisions are mandated to be included in the personal injury endorsements of all No-Fault insurance policies. See 11 NYCRR 65-1.1

Nonparty Alternative Consulting and Examinations (ACE) schedules independent medical examinations (IMEs) for a number of insurance companies, including Unitrin. At Unitrin's request, ACE scheduled IMEs for Majano and Gomez in March, April, and May 2007 to assess the injuries that they allegedly suffered as a result of the January 12, 2007 collision. Specifically, on March 16, 2007, ACE wrote to Majano, with a copy to her attorney, Arturo Quintana, Esq., scheduling an acupuncture IME for March 29, 2007. Majano failed to appear, and neither she, nor Mr. Quintana, sought to

adjourn the IME. On March 27, 2007, ACE wrote to Majano, with a copy to Mr. Quintana, scheduling an orthopedic IME on April 10, 2007, and a chiropractic IME on April 11, 2007. Majano failed to appear at either of those IMEs, and neither she, nor Mr. Quintana, sought to adjourn them. On April 2, 2007, ACE wrote to Majano, with a copy to Mr. Quintana, scheduling an acupuncture IME for April 16, 2007. Majano again failed to appear. Finally, on April 12, 2007, ACE wrote to Majano and Mr. Quintana scheduling an orthopedic IME on April 24, 2007, and a chiropractic IME on April 28, 2007. However, on April 16, 2007, Unitrin received notice from ACE that Majano had missed her first four scheduled IMEs, including two in the same medical specialty, a specialty in which she had been receiving treatment. Unitrin, thereupon, directed ACE to cancel the April 24 and April 28, 2007 IMEs and sent both Majano and Mr. Quintana a general denial notifying them that all future No-Fault claims would be denied because of Majano's failure to appear for her IMEs, and that past claims were being retroactively denied for the same reason. Majano, thereafter, appeared at the cancelled April 28th chiropractic IME, and was examined at that time. The doctor's report, which appears as Exhibit F to the affirmation of Justin Skaferowsky, concludes that there was "no accident related chiropractic disability [at that time, and that] no further chiropractic treatment [was] warranted." Prior to mailing the general denials, Unitrin had paid some claims made by medical providers to Majano, and had denied others on the basis of peer reviews which found treatments to have been medically

unnecessary, or not causally related to the collision.

Gomez, who had also retained Mr. Quintana and was seeing the same medical practitioners as Majano, also failed to appear for the first four of his scheduled IMEs, whereupon Unitrin sent him and Mr. Quintana a general denial similar to that which it had sent to Majano. As with Majano, so, too, with Gomez, a number of peer reviews had found the treatments given to have been medically unnecessary.

On May 3, 2007, one "Mirta" called Unitrin, stated that she was from Mr. Quintana's office, that they had received the cancellation letters for Majano and Gomez and wanted the IMEs to be rescheduled at a venue closer to Mr. Quintana's office. She also stated that she had previously called ACE to make the same request. However, Jim Cannon, the owner and chief managing officer of ACE, states in his deposition that all phone calls to ACE are documented, and that there is no record of any call seeking to adjourn either Majano's, or Gomez's IMEs.

Defendants contend that the scheduling of the IMEs by ACE was unreasonable, but they present no admissible evidence that either Majano, or Gomez, both of whom have defaulted, found the schedules unreasonable. Defendants also argue that Unitrin failed to issue timely denial of claim forms for each of Defendants' claims, and that, in those instances in which it issued a denial of claim form based upon a peer review, normally a factual matter requiring a trial, it failed to preserve the failure to attend IMEs as a basis for denial of the claims. 11 NYCRR 65-3.8 (a) (1) provides that:

No-fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested . . . . In the case of . . . a medical examination, the verification is deemed to have been received by the insurer on the day the examination was performed.

Unitrin has provided undisputed evidence that it sent general denials, within 30 days of having received notice that, first, Majano, and then, Gomez, had failed to appear for their first four scheduled IMEs, and that it had timely complied with the follow-up requirements set forth at 11 NYCRR 65-3.6 (b). In *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.* (35 AD3d 720, 722 [2d Dept 2006]), quoting 11 NYCRR 65-1.1, the Court held that an insurer may "deny a claim retroactively to the date of loss for a claimant's failure to attend IMEs 'when, and as often as, the [insurer] may reasonably require.'" Thus, contrary to Defendants' argument, an insurer may retroactively deny a claim, on the basis of an insured's failure to appear at an IME, although the insurer has earlier either paid the claim, or denied it for a different reason.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment is denied; and it is further

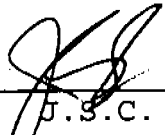
ORDERED that plaintiff's cross motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff Unitrin Advantage Insurance Company does not owe coverage for the No-Fault claims of Dr. Martin Bassiur, DDS, d/b/a NY Craniofacial Pain Management, or

Excel Radiology Services, PC, with respect to the No-Fault claims allegedly assigned to them by defendants Maria Majano and Juan Gomez.

Dated: 2/5/10

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry has not been mailed heron. To obtain entry, counsel for the party whose representative must appear in person at the Judgment Clerk's Desk (Room 1417).