



Mega Supplies Billing

2011 NY Slip Op 52023(U) (2011) | Cited 0 times | New York Supreme Court | October 28, 2011

Mega Supplies Billing, Inc. v State Farm Mut. Auto. Ins. Co.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 28, 2011

PRESENT: PESCE, P.J., WESTON and RIOS, JJ

The judgment, entered pursuant to the March 22, 2010 order granting defendant's motion to dismiss the complaint, dismissed the complaint.

ORDERED that the judgment is affirmed, without costs.

In this action by a provider to recover assigned first-party no-fault benefits, the Civil Court, by order entered March 22, 2010, granted defendant's motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), on the ground that plaintiff's failure to appear for two examinations before trial (EUOs) violated a condition of coverage and bars the action (see Insurance Department Regulations [11 NYCRR] § 65-1.1 [b]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720 [2006]). Plaintiff appeals from the order. A judgment was subsequently entered, from which the appeal is deemed to have been taken (see CPLR 5501 [c]).

Plaintiff's sole contention on appeal is that defendant's motion should have been denied because defendant never proved that the applicable automobile insurance policy contained a provision entitling defendant to EUOs. This argument is without merit because the mandatory personal injury endorsement, effective April 5, 2002, contains a provision providing for EUOs (see Insurance Department Regulations [11 NYCRR] § 65-1.1 [b]) and the underlying motor vehicle accident occurred in 2008. Thus, the applicable automobile insurance policy necessarily would have contained such a provision (see *Dover Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 28 Misc 3d 140[A], 2010 NY Slip Op 51605[U] [App Term, 1st Dept 2010]; *Eagle Chiropractic, P.C. v Chubb Indem. Ins. Co.*, 19 Misc 3d 129[A], 2008 NY Slip Op 50525[U] [App Term, 9th & 10th Jud Dists 2008]). Even if the insurance policy did not contain an EUO provision, the policy would be construed as though it did (see Insurance Law § 5103 [h]; *Dover Acupuncture, P.C.*, 28 Misc 3d 140[A], 2010 NY Slip Op 51605[U]). Consequently, defendant's motion to dismiss the complaint was properly granted (see *Dover*



Mega Supplies Billing

2011 NY Slip Op 52023(U) (2011) | Cited 0 times | New York Supreme Court | October 28, 2011

Acupuncture, P.C., 28 Misc 3d 140[A], 2010 NY Slip Op 51605[U];see also Eagle Chiropractic, P.C., 19 Misc 3d 129[A], 2008 NY SlipOp 50525[U]).

Accordingly, the judgment is affirmed.

Pesce, P.J., Weston and Rios, JJ., concur.

Decision Date: October 28, 2011

