

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

WESTCHESTER MEDICAL CENTER, a/a/o
JAMES GUNSCH, JAMES GUNSCH,

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 22167-09

Plaintiff,

-against-

USAA CASUALTY INSURANCE COMPANY,

Defendant.

DECISION AND ORDER

Pursuant to the order of this Court (Lally, J.) dated November 18, 2010, and the stipulation of counsel dated November 17, 2010, a framed issue hearing was held on March 14, 2011, before this Court. The issues to be determined are:

1. Whether USAA CASUALTY INSURANCE COMPANY (hereinafter USAA) properly denied the bills of WESTCHESTER MEDICAL CENTER a/a/o JAMES GUNSCH (hereinafter WESTCHESTER) based on EUO no show.
2. Whether JAMES GUNSCH's injuries arose out of the use or operation of the insured's motor vehicle.

Copies of the two (2) no-fault claims forms submitted by WESTCHESTER and the denial of claims forms issued by USAA were placed in evidence on consent. The basis for the denials was that:

- a) GUNSCH failed to appear for an EUO; and

- b) the incident was not an "accident" under no-fault law and GUNSCH knowingly concealed or misrepresented material facts in seeking no-fault benefits.

Plaintiff's sole witness was JAMES GUNSCH, who testified that on August 29, 2009, he was driving a Toyota Tacoma pickup truck owned by Richard Harris.

GUNSCH was driving on Route 17K in Newburgh, New York, when he hit a tractor trailer in the rear as it cut him off while exiting the I-84 ramp. There was a passenger with him, Lance Hayes. The tractor-trailer did not stop and GUNSCH tried to follow it but the truck would not operate properly so he pulled over.

GUNSCH described the impact as severe and said he had neck pain, but could not recall much else until the next morning. He awoke in severe neck pain and went to the emergency room of St. Luke's Hospital in Newburgh, New York. He was transferred to WESTCHESTER for emergency spinal fusion surgery.

He testified that on April 9, 2010 he responded to a letter notice for an EUO in Garden City, New York. He answered questions until he requested time to obtain an attorney. He did not attend another EUO and denied ever getting any other or further notices to do so.

GUNSCH was not able to recall the location and extent of damage to the truck except to say it was on the front right side. He was not able to recall who lived at 22 Fleetwood Drive in August, 2009, which was where he stopped the truck, although he said his mother-in-law used to live at 11 Fleetwood Drive and that Lance Hayes also lived next door to her.

GUNSCH denied telling anyone he was not the driver of the truck or that it was just a "tire blowout" and not an accident. He also denied drinking before the incident.

Police Officer Derrick Campbell, Town of Newburgh Police Department, testified that he responded to a radio call of a motor vehicle accident on August 22, 2009. He saw the truck and GUNSCH in front of 22 Fleetwood Drive. Campbell began his investigation by talking to GUNSCH, who told him he was not driving, his friend was. He said it was not an accident, they just lost a tire and went there to get it fixed. GUNSCH also told him he had been drinking. GUNSCH, who was cooperative, was standing with the residents of 22 Fleetwood.

Campbell observed the pickup truck and believed it had some front end damage, a flat right front tire and wheel damage. He viewed a photo of the truck and stated it appeared to be the same truck since the license plate matched the number in his report.

Campbell did not observe GUNSCH to have any injuries, although his speech was slurred, his eyes bloodshot, and he had balance issues. He did not smell the odor of alcohol.

The truck was towed from the scene and Campbell completed his investigation. Campbell did not prepare an accident report since he did not believe there was an accident, just a disabled vehicle. He later learned the owner of the truck filed an accident report.

April Lally, a Litigation Manaer for USAA, testified that after the summons and complaint was received, she investigated the matter to confirm coverage and the accident. She stated the vehicle was insured on the date of the incident, but there

would be no coverage if the driver was intoxicated. Upon reviewing the claims adjuster's file and the police report, she requested an EUO to be conducted.

Her review of the photos of the truck taken at the towing company on August 28, 2009 and the estimate prepared by USAA's agent showed no front end damage to the truck. The only damage was to the tire and wheel.

Lisa Rutigliano, the office manager of USAA's law firm in this action, testified as to the EUO notice letters sent to GUNSCH by regular mail (and on one occasion by FedEx). Six letter notices for an EUO were mailed to GUNSCH between December 28, 2009 and July 30, 2010. The notice dated June 21, 2010 was mailed and sent by FedEx (and delivery of the latter to the address on the notice was confirmed).

GUNSCH was also mailed a letter and copy of the EUO dated April 9, 2010. All the notices and the transcript were sent to GUNSCH's address on Cronk Road, Walkkill, New York, and included the apartment number. GUNSCH testified that is his residence address.

Whether GUNSCH Failed to Appear for EUOs

Since GUNSCH did not testify to any other residence address other than the one listed on EUO notices sent by USAA's counsel, the Court finds that two (2) letters were sent to him prior to the March 16, 2010 letter that he admitted he received and that he appeared on April 9, 2010 for an EUO. However, once he requested an attorney, the examination was suspended.

Three (3) additional letters were sent to him and no appearance was made for a further EUO. GUNSCH's denials that he did not receive any of the five mailings (and 1 Fed Ex delivery to this address) are simply not credible. USAA established the office

procedures and practices to ensure that the letter notices were properly addressed and mailed.

Accordingly, defendant USAA has established that it properly served the EUO notices and that GUNSCH failed to appear for a further EUO.

Whether There Was An Accident Under the No-Fault Law?

No-fault regulations provide for denial of a claim for the following reasons:

1. No coverage on the date of accident.
2. Circumstances of the accident not covered.
3. Statutory exclusions pursuant to Insurance Law §5103(b) 11 NYCRR 65-3.8(e)(2).

Thus, an insurer can disclaim if the circumstances of the incident did not arise out of the use or operation of an insured's motor vehicle.

While plaintiff, as the proponent of a no-fault claim, has the burden of persuasion that coverage exists, that burden is met by its prima facie case of the facts and amount of the loss and nonpayment by defendant. Given this, there is a presumption of coverage. *V.S. Medical Services, P.C. v. Allstate Ins. Co.*, 11 Misc.3d 334 (Civ. Ct. Kings Co. 2006); *Universal Open MRI v. State Farm Mutual*, 12 Misc.3d 1151(A) (Civ. Ct. Kings Co. 2006).

Then, the burden of production shifts to defendant. *Central Gen. Hosp. v. Chubb Group*, 90 NY2d 195; *Mount Sinai Hosp. v. Triboro Coach*, 263 AD2d 11, 18. However, plaintiff maintains the burden of persuasion, even if defendant designated its denial as an affirmative defense. *Beece v. Guardian Life Ins. Co.*, 110 AD2d 865; *Sinacord v. State of New York*, 176 Misc.2d 1.

Based upon the foregoing evidence offered by both sides, the defendant put forth sufficient evidence to rebut the presumption of coverage. Given GUNSCH's testimony that he rear-ended the tractor-trailer and that the photograph of the truck shows no front end damage, the Court does not believe the incident occurred as a result of a motor vehicle accident as described by GUNSCH. Further, his testimony as to the facts was generally not credible, even accepting that he had limited memory of the events after the impact. Therefore, plaintiff has failed to establish that the injuries arose out of the use or operation of the insured's motor vehicle.

Based on the evidence produced at the hearing, the Court answers the framed issues as follows:

1. USAA properly denied the bills of WESTCHESTER based on the EUO no show.
2. GUNSCH's injuries did not arise out of the use or operation of the insured's motor vehicle.

The foregoing constitutes the Decision and Order of the Court.

Dated: March 30, 2011


STEVEN M. JAEGER, A.J.S.C.