IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE, FLORIDA

D & K REHAB CENTER, INC.
a/a/o Eusebia Lopez,

CASE NO: 15-014474 CC 05 (04)

Plaintiff,

vs.

INFINITY AUTO INSURANCE COMPANY

Defendant.
_____/

AMENDED ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

This cause came before the court on March 28, 2018, on Defendant's Motion for Final Summary Judgment. The Court entered an order on May 1, 2018, granting Defendant's motion. The Court vacates that order and substitutes this amended order granting Defendant's motion for final summary judgment. This Court, having reviewed the Motion, the entire Court file and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record including but not limited to the transcript of the summary judgment hearing and all filings and cases referenced therein, and having been sufficiently advised of the premises, the Court finds as follows:

RELEVANT FACTS AND ANALYSIS

D & K Rehab Center, Inc. (hereinafter "Plaintiff") as assignee of Eusebia Lopez (hereinafter "Assignor" or "insured") filed a lawsuit against Infinity Auto Insurance Company (hereinafter "Defendant") for breach of a contract of personal injury protection benefits. The Assignor was involved in a motor vehicle accident on November 16, 2014, and sought treatment from the Plaintiff provider. Pursuant to the terms of the Personal Injury Protection Insurance Policy (the "policy"), the Defendant carrier scheduled two Examinations Under Oath (hereinafter "EUO") of the Assignor for January 12, 2015, and January 29, 2015. It is undisputed that the Assignor did not appear at either

EUO. The Court finds that, based on the evidence presented and affidavits filed, there is no genuine issue of material fact as to whether the Assignor received proper notice for both EUOs.

The Defendant asserts the Plaintiff is not entitled to benefits because the Assignor failed to satisfy a condition precedent when she did not appear at the properly-noticed EUOs. The Assignor is not entitled to benefits because she failed to comply with a condition precedent to recovery under the PIP statute, therefore the Plaintiff – standing in the shoes of the Assignor – is also barred from recovering any benefits from the Defendant.

Plaintiff argues Defendant's policy language incorporates language which permits the Assignor to miss EUOs for a valid reason, and filed an Affidavit in Opposition to the Defendant's Final Motion for Summary Judgment citing the Assignor could not attend the EUOs due to her work schedule. Relying on *Custer v. United Auto Inc. Co.*, 62 So. 3d 1086, 1100 (Fla. 2010), the Plaintiff argues that the insured must unreasonably refuse to attend an EUO in order to allow the insurer to deny PIP coverage. However, the reliance on this case is misguided since it addressed medical examinations, not EUOs. Additionally, the statute which this case is traveling under has since been amended.

Florida Statute § 627.736 controls and went into effect on January 1, 2014, subsequent to *Custer*. The relevant sub-section which addresses EUOs is (6)(g). Specifically, it states:

> (g) An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, *must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath.* The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. *Compliance with this paragraph is a condition precedent to receiving benefits.* An insurer that, as a general business practice as determined by the office, requests an examination under oath of an insured or an omnibus insured without a reasonable basis is subject to s. 626.9541

(emphasis added). Notably absent from language in the statute is any mention that the PIP insurer is only permitted to deny benefits if the insured unreasonably refuses to attend an EUO. Courts must "begin with the 'actual language used in the statute.'" *Raymond James, Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013). There is no question that the statute requires compliance with an insurer's request for an EUO. As declared in *Savin Medical Group, LLC a/a/o Teresita Machado vs. State Farm Mutual Automobile Insurance Company,* 23 Fla. L. Weekly Supp. 762b (Miami-Dade Cty. Ct. December 4, 2015) (Hon. Cannava), this section of the statute, "does not include any mitigating factors for the Court's consideration."

The next question is, does the insurance policy provide any contractual rights or safeguards not found in the statute? As explained below, it does not. The language of the policy (found in the Florida Amendatory Endorsement Personal Injury Protection Coverage) regarding EUOs provides:

> Examination Under Oath
>
> As a condition precedent to receiving personal injury protection benefits under the policy, any **insured** making a claim for personal injury protection benefits must submit as often as **we** require to examinations under oath outside the presence of anyone other than that person's attorney and, if a minor, the legal guardian of the minor may also be present. The scope of questioning during the examination is limited to relevant information or information that could reasonably be expected to lead to relevant information. [Emphasis in original].

The Court finds unambiguously that the insurance policy tracks the statutory requirements for EUOs and adds no additional requirements or protections.

Plaintiff argues that the policy in question contains a Florida Amendatory Endorsement 10951AE802 Personal Injury Protection Coverage Conditions section that establishes a reasonableness standard sufficient to bring this question to a finder of fact and past summary judgment:

> An insured making a claim for personal injury protection benefits must submit as often as we reasonably request and at our expense to **mental and physical examinations by doctors that we select**. We will pay for these examinations. If requested, we will provide a copy of the medical report to the person examined. If the insured fails to appear at an examination, we will not be liable for subsequent 'personal injury protection benefits. **An insureds refusal to submit to or failure to appear at two examinations raises a rebuttable presumption that the insureds refusal or failure was unreasonable**.

(Emphasis added). Importantly, that section explicitly references only mental and physical examinations by a medical professional. Such examinations are separate and apart from EUOs. Specifically, the contract language explains that EUOs are verbal examinations where the insured is questioned about potentially relevant information, and the medical examinations are mental or physical examinations performed by a medical professional. Therefore, the Plaintiff's argument that the reasonableness language applies to EUOs is rebutted by the plain language of the policy. The rebuttable presumption regarding unreasonableness applies only to medical examinations under that specific section. There is no corresponding reasonableness analysis regarding the EUO. Accordingly, the Court need not examine the issue of whether an insured's failure to attend a medical examination raises a question of reasonableness sufficient to create an issue of fact for a jury.

In this case, we have the failure (twice) to attend a properly-scheduled EUO. Under the statute, there is no reasonableness analysis to be performed as to why the insured missed the exam. The contract adds no additional protection for the insured in the context of an EUO. Simply put, there is no question that the insured missed her EUOs and there is no question that such attendance was a condition precedent to filing suit under both the operative statute and the contract. The Court finds that the language of the policy, adopted from Fla. Stat. 627.736 (2014), requires compliance with an insurer's request for an EUO as a condition precedent to receiving PIP benefits. The Defendant scheduled and noticed two EUOs, which the Assignor failed to attend. There is no provision in Fla.

Stat. 627.736(6)(g) or Defendant's policy which provides for any reasonable excuse for a failure to attend an EUO. Failure to attend the properly scheduled and noticed EUOs constituted a failure to satisfy a condition precedent. Therefore, the Plaintiff, who was assigned the rights and benefits of the Assignor, is not entitled to any PIP benefits from the Defendant. *Fla. East Coast Railway Co. vs. Eno,* 128 So. 622 (Fla. 1930).

Accordingly, the Defendant's Motion for Summary Judgment is hereby **GRANTED** and the Plaintiff's motion for rehearing and/or reconsideration is **DENIED**. Final Judgment is hereby entered in favor of the Defendant, INFINITY AUTO INSURANCE COMPANY, as the prevailing party in this action, and the Court reserves jurisdiction to consider a timely motion to tax costs and attorney's fees. Plaintiff, D & K REHAB CENTER, INC. a/a/o Eusebia Lopez, shall take nothing by this action and Defendant shall go hence without day.

DONE AND ORDERED in Chambers in Miami-Dade County, Florida this 10th day of August, 2018.

Honorable Alexander S. Bokor
County Court Judge

Copies furnished to:
Carla Martinez, Esq.
Cristina Suarez-Arias, Esq.

SIGNED AND DATED
AUG 10, 2018
JUDGE ALEXANDER S. BOKOR