Mercury Cas. Co. v Encare, Inc.
2011 NY Slip Op 32166(U)
July 13, 2011
Sup Ct, NY County
Docket Number: 102610/2011
Judge: Saliann Scarpulla
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SCANNED ON 7/18/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 102610/2011
MERCURY CASUALTY CO.
vs
ENCARE INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

:o/for

No(s).
No(s).

Replying Affidavits

No(s).

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

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision. This constitutes the decision and order of the Court.

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/14/11

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-- X

MERCURY CASUALTY COMPANY,

Plaintiff,

-against-

ENCARE, INC. A/A/O/ ROBERT MANLEY,

Defendant.

-- X

Index No.: 102610/2011
Submission Date: 6/8/2011

DECISION AND ORDER

For Plaintiff:
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For Defendants:
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Papers considered in review of motion to dismiss and cross motion for summary judgment:

Notice of Motion..............................1
Aff in Supp of Motion to Dismiss 2
Notice of Cross Motion.....................3
Aff in Reply 4
Aff in Opposition to Cross Motion.........5

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, defendant Encare, Inc. ("Encare") moves to dismiss plaintiff Mercury Casualty Company's ("Mercury") complaint and Mercury cross moves for partial summary judgment.

This action arose out of a December 27, 2007 motor vehicle accident, in which Encare's assignor Robert Manley ("Manley") was injured. Mercury, an automobile insurance liability carrier, issued non-party Nelson Rodriquez an insurance policy, which included a no-fault endorsement providing coverage to all eligible injured persons in the amount of $50,000. As a no-fault injured person, Manley was entitled to receive no-fault benefits for "all necessary expenses." Encare subsequently provided Manley with

medical treatment for his injuries and submitted a bill to Mercury for its skilled nursing services and home health care services in an amount totaling $ 23,760.00. To date, Mercury has paid $10,504.00.

After Mercury's failure to pay all charged amounts, Encare submitted the matter to the American Arbitration Association ("AAA") for adjudication. At a hearing, Mercury asserted that the amount paid to Encare was "the usual and customary fee for a home health aide." On November 3, 2010, Arbitrator Lucille S. DiGirolomo ruled in favor of Encare and ordered Mercury to pay an additional $9,306.00 for services rendered by Encare to Manley, noting that Mercury's denials of the amounts billed were not on prescribed forms, missing the dates the billing was received by the insurance carrier, and untimely. Further, the arbitrator noted that even if the denials were proper and timely, Mercury did not substantiate its claim that the reimbursement was made in accordance with the usual and customary fee for the specific services rendered. On November 19, 2010, via letter, Mercury filed a demand for Master Arbitral review. On February 1, 2010, the Master Arbitrator upheld the lower arbitrator's ruling.

Thereafter, Mercury commenced this action seeking a judgment declaring that it did not owe Encare any additional monies for services rendered by Encare to its assignor Robert Manley, except for interst due on late payments and attorneys fees. In its complaint, Mercury asserted that it paid the "reasonable geographic and customary value of the services . . ." in accordance with the Workers' Compensation fee schedule.

Encare now moves to dismiss the complaint, arguing that Mercury failed to state a cause of action under CPLR §3211(a)(7) because Mercury's fee schedule defense is

precluded as a matter of law. Mercury cross-moves for partial summary judgment, arguing that it paid the usual and customary amount for services rendered in full satisfaction of its obligations and that it was not precluded from asserting a fee schedule defense.

Discussion

Mercury alleges that Encare's charges were excessive and inconsistent with the "usual and customary" fees provided in the Workers' Compensation fee schedule. A no-fault claim must not exceed "the legally permissible fee." Insurance Law §5108(c); *see Goldberg v. Corcoran*, 153 A.D.2d 113 (2nd Dept. 1989); *see also Jamil M. Abraham M.D. P.C. v. Country Wide Ins. Co.*, 3 Misc.3d 130A (N.Y. App. Term, Sup. Ct. 2004).

To successfully invoke a fee schedule defense for non-payment of charges, however, an insurer's denial of a claim must be timely. *See P.L.P Acupuncture, P.C. v. Travelers Indem. Co.,* 19 Misc.3d 126A (N.Y. App. Term, 1st Dept. 2008). An insurer must either pay or deny a claim for no-fault vehicle insurance benefits within thirty days from the date an applicant provides proof of a claim. *See Fair Price Medical Supply Corp. v. Travelers Indem. Co.*, 10 N.Y.3d 556 (2008); *Mount Sinai Hosp. v. Chubb Group of Ins. Companies*, 43 A.D.3d 889 (2nd Dept. 2007). An insurer that fails timely to deny is precluded from offering a defense against payment of that claim. *Hosp. for Joint Diseases v. Travelers Prop. Cas. Inc. Co.*, 9 N.Y.3d 312 (2007).

A fee schedule defense does not fit into the narrow lack of coverage defense exception to the preclusion rule. *See A.B. Med. Servs. PLLC v. Prudential Prop. & Cas. Ins. Co.*, 11 Misc.3d 137A (N.Y. App. Term, 2nd Dept. 2006); *Struhl v. Progressive Cas.*

Ins. Co., 7 Misc.3d 138A-(N.Y. App. Term, 2nd Dept. 2005). A fee schedule defense, therefore, is only preserved if an insurer has complied with the thirty-day rule and issued a timely denial. Here, the record shows that Mercury failed to issue a timely denial.

Mercury does not deny that it failed timely to deny Encare's claims. Instead, Mercury argues that its fee schedule defense should not be precluded because there is no First Department ruling on this specific defense. Mercury, however, has failed to demonstrate any reason for this Court to deviate from the current Appellate Term case law in New York, which provides that a fee schedule defense is precluded if an insurer's denial is untimely. As Mercury's fee schedule defense is precluded, Encare's motion to dismiss the complaint is granted.

As Mercury's fee schedule defense is precluded due to a failure to comply with the thirty-day denial rule, Mercury has not asserted a valid cause of action and therefore Encare's motion to dismiss is granted.

In accordance with the foregoing, it is

ORDERED that the defendant Encare, Inc. a/a/o Robert Manley's motion to dismiss the complaint is granted and the complaint is dismissed; and it is further ORDERED that plaintiff Mercury Casualty Company's cross motion for partial summary judgment is denied; and it is further ORDERED the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED

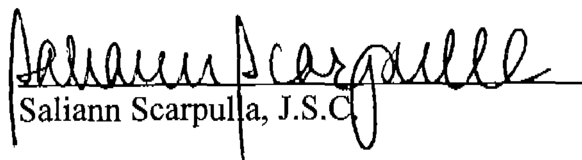
JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York

July 13, 2011

ENTER



Saliann Scarpulla, J.S.C.