

New York Hosp. Med. v Allstate Ins. Co.

2012 NY Slip Op 30418(U)

February 7, 2012

Supreme Court, Nassau County

Docket Number: 9981/11

Judge: Anthony L. Parga

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**SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY**

**PRESENT: HON. ANTHONY L. PARGA
JUSTICE**

-----X **PART 6**

THE NEW YORK HOSPITAL MEDICAL,
CENTER OF QUEENS, a/a/o LUIS ROBLES;
THE NYACK HOSPITAL, a/a/o SANDRA SZPICEK;
NYU-HOSPITAL FOR JOINT DISEASES, a/a/o
RICHARD PLOCK,

INDEX NO. 9981/11
XXX
MOTION DATE: 12/15/11
SEQUENCE NO. 001, 002

Plaintiff(s),

-against-

ALLSTATE INSURANCE COMPANY,

Defendant(s).

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Notice of Cross-Motion, Affs & Exs.....	<u>2</u>
Affirmation in Reply.....	<u>3</u>
Reply Affirmation & Exs.....	<u>4</u>

Plaintiff's motion for summary judgment on its first cause of action, pursuant to CPLR §3212, is granted, and defendant's cross-motion for summary judgment on the first cause of action, pursuant to CPLR §3212, is denied.

The plaintiff health care providers and assignee of no-fault benefits commenced this action against the defendant, the insurer of the three assignors, to recover first party No Fault benefits. The actions were commenced by plaintiff, The New York Hospital Medical Center of Queens, as assignee of Luis Robles, The Nyack Hospital, as assignee of Sandra Szpicek, and NYU-Hospital for Joint Diseases, as assignee of Richard Plock, in three separate causes of action arising from three separate motor vehicle accidents.

Plaintiffs moved for summary judgment on all three causes of action. Within its Reply Affirmation, counsel for plaintiff has withdrawn its second and third causes of action commenced by The Nyack Hospital, as assignee of Sandra Szpicek, and NYU-Hospital for Joint

Diseases, as assignee of Richard Plock. Defendant has cross-moved for summary judgment on plaintiff's first cause of action, brought by The New York Hospital Medical Center of Queens, a/a/o Luis Robles, on the grounds that plaintiff's assignor, Luis Robles, failed to appear for an Examination Under Oath.

With respect to plaintiff's first cause of action involving the claim on behalf of Luis Robles, plaintiff contends that on May 24, 2011, plaintiff billed the defendant with a Form NF-5 for payment of a hospital bill in the sum of \$18,574.19. A form UB-04 and DRG Master Output Report were attached to the bill. The bill was mailed certified mail, return receipt requested, and was received by the defendant on May 26, 2011. In support of its motion, plaintiff submits a copy of the certified mail and return receipts and an affidavit by Peter Kattis, who is employed by Hospital Receivable Systems, Inc. as a Billing Supervisor and Account Representative for the New York Hospital Medical Center of Queens. Mr. Kattis attests that on May 24, 2011, he mailed the hospital facility form (NF-5 Form), for payment of the sum of \$18,574.19, to the defendant by certified mail. He further attests that the postal service returned the delivery receipt for same, which was signed for by a representative of the defendant on May 26, 2011. Plaintiff contends that the defendant failed to pay or issue a timely Denial of Claim form. Said bill remains unpaid. Accordingly, plaintiff contends that it is entitled to summary judgment on its first cause of action.

The plaintiff has made a prima facie showing of entitlement to summary judgment by submitting evidentiary proof that the prescribed statutory billing forms were mailed and received, and that payment of no-fault benefits is overdue. (Insurance Law 5106(a); 11 NYCRR 65.15(g)(3); *Mary Immaculate Hosp. v. Allstae Ins. Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

Defendant opposes plaintiff's motion and cross-moves for summary judgment on plaintiff's first cause of action on the ground that the defendant timely and properly denied

plaintiff's claim because plaintiff's assignor breached the policy conditions established pursuant to 11 NYCRR §65-1.1(d) by failing to appear for an examination under oath ("EUO") which was timely demanded by defendant. Defendant submits proof that within thirty days of receipt of plaintiff's bill, defendant sought the EUO of insured Mario Robles and plaintiff's assignor, Luis Robles, by sending a letter, dated June 16, 2011, stating same, by certified mail, return receipt requested. The letter noticed the EUO for June 27, 2011. The Court notes that the affirmation of Edward Lannan, Esq., submitted by the defendant, states only that he "sent a letter [requesting an EUO of the claimant] dated June 15, 2011" without attesting to the date that the letter was actually mailed. The Court further notes that the certified mail receipt submitted by defendant for said letter appears to be dated June 21, 2011. Plaintiff's assignor, Luis Robles, failed to appear at the first noticed EUO date on Monday, June 27, 2011 and thereafter failed to appear for noticed EUOs on four additional occasions. After the fifth scheduled EUO had passed, on August 24, 2011, and counsel for Robles never rescheduled same, defendant mailed an NF-10 Denial of Claim form to both plaintiff and its assignor, Robles, on September 1, 2011. Same was mailed within thirty days after Robles' fifth failure to appear for the EUO and stated that plaintiff's claim was denied on the ground that Robles failed to appear for an EUO.

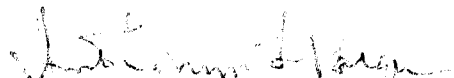
Defendant contends that because Robles failed to appear for duly noticed EUO, there was a failure to comply with the terms of the no-fault policy, which is a condition precedent to insurer liability, and therefore Allstate properly denied plaintiff's claim and is entitled to summary judgment.

The defendant has failed to establish a prima facie showing of entitlement to summary judgment, as the defendant has not submitted any proof that it sent a request for the EUO as additional verification within 15 days of the receipt of the NF-5 form on May 26, 2011. The 30 day time period to pay or deny a claim is extended when the defendant requests additional verification within 15 business days of receipt of the claim, and once the defendant makes a timely request for verification, the time to pay or deny the claim is tolled until the plaintiff provides the verification information to the defendant. (*See, New York Presbyterian Hosp. v. American Transit Ins. Co.*, 287 A.D.2d 699, 733 N.Y.S.2d 80 (2d Dept. 2001); *Ocean Diagnostic Imaging, P.C. v. Nationwide Mutual Ins. Co.*, 11 Misc.3d 135(A), 816 N.Y.S.2d 698 (N.Y. App.

Term. 2006)). In order to toll the 30-day period in which to pay or deny the claim, a request for EUOs as additional verification to establish the proof of claim, must be done within 15 business days of receipt of the claim. (*S&M Supply, Inc. v. State Farm Mutual Insurance Company*, 4 Misc.3d 130(A), 791 N.Y.S.2d 873 (N.Y. App. Term 2004); *See*, 11 NYCRR §65-3.5(b); *Arco Medical New York, P.C. v. Lancer Ins. Co.*, 34 Misc.3d 134(A), 2011 N.Y. Slip Op. 52382(U)(N.Y. App. Term 2011); *Prime Psychological Services, PC v. Elrac, Inc.*, 25 Misc.3d 1244(A), 906 N.Y.S.2d 782 (N.Y. City Civ. Ct. 2009); *Psych. & Massage Therapy Assoc. v. Progressive Casualty Ins. Co.*, 5 Misc.3d 723, 789 N.Y.S.2d 661 (N.Y. City Civ. Ct. 2004); *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 31 A.D.3d 512, 818 N.Y.S.2d 583 (2d Dept. 2006)). Allstate was required to demonstrate that its initial and follow-up requests for verification were timely and that the assignor failed to appear for the EUOs. (*Infinity Health Products v. Progressive Ins. Co.*, 28 Misc.3d 133(A), 2010 WL 2990124 (N.Y. Sup. App. Term. 2010)). As the defendant's submissions indicate that the letter noticing the initial EUO was not mailed until June 21, 2011, it was not requested in time to toll the thirty day time period to deny or pay the claim. The Court further notes that defendant failed to submit copies of the certified mail and return receipts for the letters dated June 27, 2011 and August 12, 2010 (the last EUO notice for the EUO scheduled on August 24, 2011), and the affirmation of Edward Lannan, Esq. is insufficient to establish the dates upon which said notice letters were actually mailed. As such, Allstate's Denial of Claim, dated September 1, 2011, was late. Accordingly, defendant's cross-motion for summary judgment is denied

As defendant has also failed to raise any triable issues of fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment, plaintiff's motion for summary judgment is granted. Submit judgment in the amount of \$18,574.19, plus statutory interest and attorneys fees pursuant to 11 NYCRR §65-4.6(e), on notice.

Dated: February 7, 2012


 Anthony L. Parga, J.S.C.

ENTERED
FEB 10 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Cc: Law Offices of Joseph Henig, P.C.
Attn: Joseph Henig, Esq.
1598 Bellmore Avenue
P.O. Box 1144
Bellmore, NY 11710

McDonnell & Adels, PLLC
Attn: Linda A. Mule, Esq.
401 Franklin Avenue, 2nd Floor
Garden City, NY 11530