

**Surgicare Surgical Assoc. of Fair Lawn v State Farm
Fire & Cas. Co.**

2017 NY Slip Op 32202(U)

October 18, 2017

Civil Court of the City of New York, Bronx County

Docket Number: CV-712560/2014

Judge: Sabrina B. Kraus

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
 COUNTY OF BRONX: PART 15

 SURGICARE SURGICAL ASSOCIATES OF
 FAIR LAWN A/A/O RONALD THEUS,

X

Plaintiff,

-against-

DECISION & ORDER

Index No.: CV-712560/2014

HON. SABRINA B. KRAUS

STATE FARM FIRE AND CASUALTY CO.,

Defendant

X

PROCEDURAL HISTORY

Plaintiff commenced this action to recover assigned first-party no fault benefits, pursuant to a summons and complaint filed September 5, 2014.

Defendant appeared, by counsel, and filed an answer with discovery demands on October 7, 2014.

Notice of Trial was filed on December 19, 2014.

On April 16, 2015, Defendant moved for summary judgment. The motion was granted pursuant to an order dated October 27, 2016, to the extent of finding that Plaintiff has timely mailed its bills, Defendant had timely mailed its denials, amending the amount in dispute to be \$14,099.94 and finding that the only remaining issue for trial was the defense of medical necessity.

Trial was initially scheduled for June 2, 2015, and was adjourned, by the parties, over four dates to October 17, 2017.

On October 16, 2017, the court held a bench trial and reserved decision.

The parties stipulated to the elements of each *prima facie* case, the admission of a package of documents (court exhibit 1), and to the expertise of the Doctor who testified for Defendant at trial.

***FACTS BASED ON A REVIEW OF THE DOCUMENTS
STIPULATED INTO EVIDENCE***

On March 8, 2013, Ronald Theus (Assignor) has a car accident causing injury to his left knee. Ten days after the accident, on March 18, 2013, he was treated at Nyack Hospital Emergency Room, where x-rays were taken of his left knee and spine. He was diagnosed with neck pain and a knee contusion, released the same day and advised to follow up at a clinic in a few days for further evaluation.

Assignor then received treatment from a Chiropractor, Dr. Capello. Assignor received physical therapy and anti-inflammatory medication.

On August 17, 2013, several diagnostic tests were performed on Assignor including x-rays of the cervical spine, lumbar spine, and left foot; and MRIs of the cervical spine, lumbar spine and left knee.

Assignor was then referred to Mayhill Medical Group due to continued complaints of discomfort in his left knee. Assignor reported having no problems with the left knee prior to the accident. Assignor was examined by Dr. Robert Greenbaum on October 29, 2013. Dr. Greenbaum found that Assignor's left knee was swollen with a small effusion palpable, and a limited range of motion.

Dr. Greenbaum recommended that Assignor undergo diagnostic and surgical arthroscopy to address the meniscal pathology, and ,if warranted once the surgery commenced, a ligament

reconstruction. Dr. Greenbaum's recommendation was based on the fact that Assignor continued to suffer from chronic pain seven and a half months after the accident, the MRI evidence of meniscal pathology and Assignor's failure to improve with conservative treatment.

The surgery took place on January 6, 2014 and the ligament was reconstructed.

TESTIMONY OF DR. DOROTHY SCARPINTO

At trial, Defendant presented the testimony of Dr. Dorothy Scarpinato, an orthopedist. Dr. Scarpinato had done a Peer Review regarding the recommendation for surgery, which is dated February 12, 2014. Dr. Scarpinato never examined Assignor, but based her Peer Review on a review of Assignor's medical records.

Dr. Scarpinato felt that surgery was not warranted based on Assignor's medical records. Dr. Scarpinato stated that the progress reports for Assignor's Physical Therapy consistently described his progress as good, and she relied heavily on this fact. The reports she based this on however, are not fact filled narratives about the Assignor's progress, but rather a series of multiple choice options circled and signed off on by a therapist. Each date has the same options circled from the first date of therapy, through the last. The five options available to circle on the report under progress were very good, good, fair or poor.

Dr. Scarpinato did not address in her report or testimony the progress reports from Assignor's acupuncture treatment, which she also reviewed, and were also submitted into evidence. These reports cover a period from March through July 2013 and show that Assignor continued to seek relief from the pain, and while the Acupuncture treatments were often noted as helping, as of July 2013, Assignor continued to suffer from pain and at times perceived no relief in pain even with the treatments.

Dr. Sacrpinto did not appear to believe that the physical therapy was as aggressive as it could have been, noting in her peer review “(i)t is important to stress that these physical therapy treatments did not include any form of active rehabilitation which is the standard of care in the rehabilitation of a knee injury. In this case, passive modalities were provided to the claimant ...(Peer Review)”.

Dr. Scarpinto also did not believe the information, provided by the Assignor and accepted by his doctors, that Assignor had no prior problems with his knee. She testified at trial that she did not believe the accident caused Assignor’s knee injury. This is also reflected in her Peer Review where she stated “(e)ssentially, the findings notes on this MRI strongly suggest long standing degenerative processes that do not appear to be directly related to the motor vehicle accident in question.”

Dr. Scarpinto then concluded that surgery was not appropriate for a degenerative knee condition and relied upon an article from a medical journal, also submitted in evidence, which specifies the limitations of surgery for a degenerative condition. The article does however state “.. (p)atients with realistic expectations of surgical outcome who specifically understand that the goal of the surgery is to diminish pain and improve function and not to cure their arthritis “ would be appropriate candidates for surgery.

DISCUSSION

The issue before the court is whether the surgery was medically necessary under the No Fault Laws.

Under No Fault Law claimants are entitled to recover for basic economic loss which Insurance Law § 5102(a)(1) defines as :

(1) All necessary expenses incurred for: (I) medical, hospital (including services rendered in compliance with article forty-one of the public health law, whether or not such services are rendered directly by a hospital), surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical and occupational therapy and rehabilitation; (iii) any non-medical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of this state; and (iv) any other professional health services; all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury. For the purpose of determining basic economic loss, the expenses incurred under this paragraph shall be in accordance with the limitations of section five thousand one hundred eight of this article.

Some courts have defined a necessary medical expense to be for “... treatment or services that are reasonable in light of the patient’s injury, subjective and objective evidence of the patient’s complaints of pain, and the goals of evaluating and treating the patient (*Complete Medical Care Services of NY, PC v State Farm Mutual Automobile Insurance Company* 21 Misc.3d 436, 440 (2008) citing *Fifth Avenue Pain Control Center v Allstate Insurance Company* 196 Misc.2d 801, 807).”

The purpose of the No Fault law is to “... deliver better protection for the insured and to pay off claims quickly (NY Legis Ann. 1973 p.298).” The intent is to permit the liberal recovery of money spent in the treatment of accident related injuries, and to encourage the prompt payment of claims without prolonged delay (*Vidra v Shoman* 59 AD2d 714, 716; *Dermatossian v NYCTA* 67 NY2d 219, 225).

Initially, there is a presumption of medical necessity in favor of the insured (*Foster Diagnostic Imaging, PC v General Assur Co.* 10 Misc3d 428). Thus, once Plaintiff establishes a *prima facie* case, the burden is on Defendant to establish by a preponderance of credible evidence that the services were not medically necessary (*Nir v Allstate Insurance Co.* 7 Misc.3d 544,546). The defense must be supported by sufficient factual basis, and medical rationale for denying the claim (*Healing Hands Chiropractic, PC v Nationwide Assur. Co.* 5 Misc3d 975).

If Defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, then the burden would shift to Plaintiff to present its own evidence of medical necessity [*Tremont Medical Diagnostic, PC v Geico Insurance Co.* 13 Misc3d 131(A)].

Ultimately, the determination is a question of fact to be determined by the court at trial based upon the testimony of expert witnesses and the court's determination regarding the credibility of said testimony (*A-Quality Medical Supply v Geico General Ins. Co.* 39 Misc3d 24).

***DEFENDANT HAS FAILED TO MEET ITS BURDEN
IN ESTABLISHING MEDICAL NECESSITY***

The court finds that Dr. Scarpinto's opinion that the surgery was not medically necessary should not be credited or given great weight.

Defendant must establish a factual basis and a medical rationale to support its claim of lack of medical necessity (*Nir v Allstate Insurance Company* 7 Misc3d 544).

The factual basis of Dr. Scarpinto's opinion was improper. Dr. Scarpinto's opinion was based on her belief that Assignor's knee injury was not caused by this accident and that Assignor lied when he reported no prior problems with his left knee to his treating physicians. The court finds there is an insufficient basis for such a factual premise in the documentation upon which Dr. Scarpinto's opinion was based.

To sustain a defense of lack of medical necessity, Defendant must also show that the services were inconsistent with generally accepted medical/professional practices, an expert opinion alone is insufficient to carry the burden [(*A.R. Med. Art, P.C. v State Farm Mut. Auto. Ins. Co.* 11 Misc3d 1057(A))].

Assuming *arguendo*, Dr. Scarpinto was justified in basing her opinion on the assumption that Assignor was lying about previous problems with his left knee, and that the accident was not

the cause of his injury, Dr. Scarpinto failed to establish through her testimony that surgery was inconsistent with generally accepted medical practices. While her testimony did establish that there are limitations as to when surgery is appropriate, the authority she relied upon specifically provides that it may be appropriate for patients with realistic expectations as to the surgery being intended to reduce pain rather than cure the degenerative condition. It is precisely due to the ongoing chronic pain that Assignor was referred for the surgery.

As the trier of fact, the court is free to assess and reject Dr. Scarpinto's opinion even where the testimony is uncontradicted [*West Tremont Medical Diagnostic, PC v Geico Insurance Co.* 13 Misc.3d 131(A); *Vasquez v Jacobowitz* 284 AD2d 326; *Mechanick v Conradi* 139 Ad2d 857 (*there is no duty to rebut expert testimony and trier of fact may reject even uncontradicted expert testimony*)]. For all of the reasons stated above, the court does reject Dr. Scarpinto's opinion that the surgery was not medically necessary.

Based on the foregoing, the court finds that Defendant failed to establish a lack of medical necessity for the surgery by a preponderance of credible evidence and that Plaintiff is entitled to a judgment in the amount of \$14,099.94 plus interest, attorneys' fees, costs and disbursements.

This constitutes the decision and order of this court.

Dated: October 18, 2017
Bronx, New York

Hon. Sabrina B. Kraus
JCC

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