IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALONZO ROBERTS, Plaintiff, v. NORTHERN INSURANCE COMPANY OF NEW YORK, a foreign corporation, EMPIRE FIRE AND MARINE INSURANCE COMPANY, a foreign corporation, and LINCOLN GENERAL INSURANCE GROUP, a/k/a LINCOLN GENERAL INSURANCE COMPANY, a foreign corporation, Defendants.	)	C.A. No. 08C-10-094 MMJ

Submitted: April 16, 2009
Decided: May 6, 2009

On Defendants', Northern Insurance Company of New York and Empire Fire and Marine Insurance Company, Motion to Dismiss.
DENIED.

MEMORANDUM OPINION

Vincent A. Bifferato, Jr., Esquire, Bifferato Gentilotti LLC, Wilmington, DE, Attorney for Plaintiff

Vicki L. Shoemaker, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, DE, Attorney for Defendants, Northern Insurance Company of New York and Empire Fire and Marine Insurance Co.

Christian G. Heesters, Esquire, Mintzer, Sarowitz, Zeris, Ledva & Meyers, Wilmington, DE, Attorney for Defendant, Lincoln General Insurance Group

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

On October 9, 2006, Alonzo Roberts suffered injuries from an automobile accident. At the time of the accident, plaintiff was working as a delivery agent for P & S Deliveries ("P&S"). Plaintiff was a passenger in the delivery vehicle when it swerved off the road and hit a tree. The accident was not reported to the police.

Plaintiff attempted to recover from P&S's workers' compensation carrier. On June 5, 2007, the Industrial Accident Board ("IAB") held a hearing. P&S failed to attend. The IAB entered an award in favor of plaintiff. It later was determined that P&S did not have worker's compensation insurance. P&S is no longer in business.

Plaintiff hired an investigator to perform a skip trace to identify any automotive insurance held by P&S at the time of the accident. On July 2, 2007, plaintiff received the investigator's skip trace report. The report listed six vehicles and three different insurance companies, Northern Insurance Company of New York ("Northern"), Empire Fire and Marine Insurance Company ("Empire"), and Lincoln General Insurance Group ("Lincoln").

Plaintiff states that he is unable to recall the specific vehicle involved in the accident. As a result, Plaintiff asserts that he is unable to ascertain which of the three insurance companies is responsible for covering the

damage incurred from the accident. Plaintiff further explains that he is currently awaiting information from an individual who claims he can obtain vehicle specific information, which could resolve the issue.

On October 8, 2008, plaintiff filed suit against all three insurance companies. Plaintiff claimed that defendants failed to pay plaintiff's Personal Injury Protection ("PIP") benefits for his medical bills and lost wages in violation of 21 *Del. C.* § 2118.

On December 17, 2008, Northern and Empire filed a motion to compel plaintiff to file a more definite statement. On December 29, 2008, plaintiff provided defendants' counsel with evidence of expenses. By order dated January 8, 2009, the Court ordered plaintiff to file an amended complaint and include information regarding insurance claim denials. On February 6, 2009, plaintiff filed an amended complaint. The amended complaint did not mention any insurance claim denials.

On March 19, 2009, Northern and Empire filed the present Motion to Dismiss the complaint. The following day, Lincoln joined in the motion. Defendants assert three grounds for dismissing the complaint: (1) plaintiff failed to comply with the Court's January 8th order in violation of Rule 41; (2) plaintiff failed to file for and be denied PIP benefits prior to filing suit, and as such, the complaint fails to state a claim upon which relief can be

granted; and (3) plaintiff failed to properly submit his expenses as required under 21 *Del. C.* § 2118.

On April 16, 2009, plaintiff submitted a response to defendants' motion. Plaintiff asserts that the complaint states a claim upon which relief can be granted. Further, plaintiff asserts that he complied with the relevant code provisions and the Court's January 8th order. Plaintiff requests that defendants' motion be denied.

On April 23, 2009, the Court heard oral argument on all three of the claims presented by defendants.

When reviewing a motion to dismiss, the Court must determine whether plaintiff has a viable cause of action.[1] Plaintiff's complaint may not be dismissed "unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[2] When applying this standard, the Court will accept as true all well-pleaded allegations.[3] If plaintiff may recover, the Court must deny the motion to dismiss.[4]

ANALYSIS

[1] *Proctor v. Taylor*, 2006 WL 1520085, at *1 (Del. Super.).
[2] *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).
[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[4] *Id.*

Claim 1: Failure to Comply with a Court Order

Defendants assert that plaintiff failed to comply with the Court's January 8th order. The order required that plaintiff include additional information regarding insurance claim denials within the amended complaint. When plaintiff filed the amended complaint, he did not include any information on insurance claim denials. Defendants assert that plaintiff's failure to comply with the Court's order is a violation of Rule 41 and warrants dismissal of the complaint.

Plaintiff counters that he complied with the Court's order. Plaintiff states that he did not include information regarding insurance claim denials because none existed. Because he complied with the Court's order, he did not violate Rule 41.

Rule 41 provides that "the Court may order an action dismissed … for failure to comply with any rule, statute, or order of the Court…."[5] The Court finds that plaintiff complied with the Court's order. There were no insurance denials to be included in the Amended Complaint. While it would have been a better practice for plaintiff to have stated that no denials existed, omission of that fact was not a violation of the Court's order. Therefore, the Court denies the motion to dismiss under Rule 41.

Claim 2: Failure to File for and be Denied PIP Benefits

[5] Super. Ct. Civ. R. 41(e).

Defendants assert that plaintiff failed to file a PIP claim and be denied benefits prior to filing his suit; and as such, does not have a justiciable claim. Defendants assert that without a denial of benefits there is no breach of contract for failure to provide benefits. Further, defendants contend that filing a lawsuit is not the same as submitting a claim to the PIP carrier. During oral argument, defendants stated that if plaintiff were to file a PIP claim now, the claim would be denied as untimely.

Plaintiff asserts that the amended complaint, in and of itself, constitutes a claim for benefits. Plaintiff argues that defendants mistakenly distinguish between a claim and a lawsuit. Plaintiff contends that the term "claim" is essentially defined as the assertion of a right to payment or to an equitable remedy. Plaintiff states that "the operative facts give rise to a right enforceable by a court and is clearly an assertion of a right to payment." Plaintiff concludes that the filing of the suit constituted the making of a claim.

Defendants' position is accurate – at the time plaintiff filed suit, plaintiff lacked a justiciable claim. In *Harper v. State Farm Mut. Auto. Ins. Co.,*[6] the Delaware Supreme Court held that "the insured does not have a justiciable controversy for PIP benefits until a request for PIP payments has

[6] 703 A.2d 136 (Del. 1997).

been denied by the PIP insurer."[7] Here, plaintiff did not file a PIP claim prior to filing suit.

However, PIP counsel conceded during oral argument that if a claim were filed, they plan to deny the claim as untimely. Therefore, as of April 23, 2009, defendants have asserted the functional equivalent of a denial. As a practical matter, if the Court were to dismiss the case today, plaintiff simply could re-file. Therefore, in the interest of judicial economy, the Court will not dismiss the case on the basis that PIP benefits had not been denied prior to filing suit.

Claim 3: Failure to Properly Submit Expenses Under PIP

Defendants assert that plaintiff failed to timely and properly submit his expenses as required by 21 *Del. C.* § 2118. Defendants contend that plaintiff's submission of expenses occurred outside of the two-year requirement. Additionally, defendants argue that plaintiff is not entitled to the 90-day extension to submit expenses that previously were impractical to submit. Defendants explain that it was practical and possible for plaintiff to submit the expenses prior to the two-year deadline. Further, defendants assert that plaintiff's submission of expenses to defendants' attorney was

[7] *Id.* at 140.

insufficient to be considered a submission to the insurer, under the statute.

Plaintiff counters that he fully complied with the requirements of 21 *Del. C.* § 2118. Plaintiff states that the complaint and the expenses were filed and submitted prior to the conclusion of the 27-month requirement. Plaintiff asserts that the term practical equates to reasonableness. Plaintiff contends that it was reasonable for him to wait to submit expenses until defendants obtained counsel. Additionally, Plaintiff argues that submitting the expenses to defendants' attorney was proper. Plaintiff asserts that the defendants' attorney operates as an agent; and service on the agent constitutes service on the principal.

Delaware public policy favors full compensation to all victims of automobile accidents.[8] 21 *Del. C.* § 2118 should be constructed liberally in order to achieve that purpose.[9] In relevant part, the statute provides:

> Expenses … shall be submitted to the insurer as promptly as practical, in no event more than 2 years after they are received by the insured. … Expenses which are incurred within the 2 years but which have been impractical to present to an insurer within the 2 years shall be paid if presented within 90 days after the end of the 2-year period.[10]

[8] *State Farm Mut. Auto.Ins. Co. v. Smith*, 2000 WL 1211153, at *2 (Del. Super.) (citing *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915, 918 (Del. Super. 1997)).
[9] *Id.*
[10] 21 *Del. C.* § 2118(a)(2)(i).

Here, plaintiff's accident occurred on October 9, 2006. On October 8, 2008, plaintiff filed suit. Plaintiff submitted his expenses to defendants' attorney on December 29, 2008.

When a plaintiff files a suit in a PIP claim, the defendant is placed on notice of expenses.[11] While this is certainly not the best or most appropriate mechanism for notice, it is timely.[12] Therefore, the Court finds that plaintiff provided defendants with timely notice of his expenses when he filed suit just prior to the two-year deadline.

[11] *Salvatore v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 1952904, at *1 (Del. Super.) (holding that plaintiff's filing of the complaint was sufficient notice of medical expenses, which had not been provided to the insurer until well after 27 months from the accident).
[12] *Id.*

Plaintiff's submission of bills and expenses directly to defendants' attorney is acceptable under 21 *Del. C.* § 2118. Generally, information received by an attorney, within the scope of counsel's employment, is imputed to the client.[13] Therefore, when the attorney receives something on behalf of the client, it is as if the client personally received it.

At the time the expenses were given to the attorney, the attorney had entered an appearance in this action. Therefore, the Court finds that plaintiff properly submitted his expenses to defendants.

CONCLUSION

The Court holds that plaintiff has a viable cause of action. Plaintiff has complied with all Court orders. Additionally, plaintiff has timely and properly filed his claim and submitted his expenses. As of the time of the hearing, plaintiff's claim was denied by defendants. **THEREFORE**, Defendants' Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

[13] *Ocean Drilling & Exploration Co. v. Pauley Pan Am. Petroleum Co.*, 1965 WL 90028, at *2 (Del. Super.).