

**NYU-Hosp. for Joint Diseases v Unitrin Direct Prop.
& Cas. Co.**

2012 NY Slip Op 30421(U)

February 8, 2012

Supreme Court, Nassau County

Docket Number: 12441/11

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**

NYU-HOSPITAL FOR JOINT DISEASES, a/a/o
RONALD KEURIAN;
WESTCHESTER MEDICAL CENTER, a/a/o
IMELDA PORTUGAL;
WHITE PLAINS HOSPITAL CENTER, a/a/o
JOHN F. BRETT,

INDEX NO. 12441/11
MOTION DATE: 12/22/11
SEQUENCE NO. 001, 002

Plaintiff(s),
-against-

UNITRIN DIRECT PROPERTY & CASUALTY
COMPANY,

Defendant(s).

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

Plaintiff's motion for summary judgment on its second and third causes of action (only), pursuant to CPLR §3212, is granted, and defendant's cross-motion for summary judgment, 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, NYU-Hospital for Joint Diseases, as assignee of Ronald Keurian, Westchester Medical Center, as assignee of Imelda Portugal, and White Plains Hospital Center, as assignee of John Brett, in three separate causes of action arising from three separate motor vehicle accidents.

Plaintiffs moved for summary judgment on all three causes of action, and the defendant cross-moves for summary judgment.

With respect to plaintiff's first cause of action involving the claim on behalf of Ronald Keurian, plaintiff contends that on July 7, 2011, plaintiff billed the defendant with a Form NF-5 for payment of a hospital bill in the sum of \$10,467.80. 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 July 11, 2011. In support of its motion, plaintiff submits a copy of the certified mail and return receipts and an affidavit by Steven Attias, who is employed by Hospital Receivable Systems, Inc. as a Biller and Account Representative for the NYU-Hospital for Joint Diseases. Mr. Attias attests that on July 7, 2011, he mailed the hospital facility form (NF-5 Form), for payment of the sum of \$10,467.80, 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 July 11, 2011. Plaintiff contends that the defendant failed to pay or issue a timely Denial of Claim form. Accordingly, plaintiff contends that it is entitled to summary judgment on its first cause of action.

With respect to plaintiff's second cause of action involving the claim on behalf of Imelda Portugal, plaintiff contends that on July 5, 2011, plaintiff billed the defendant with a Form NF-5 for payment of a hospital bill in the sum of \$12,922.45. 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 July 7, 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 Westchester Medial Center. Mr. Kattis attests that on July 5, 2011, he mailed the hospital facility form (NF-5 Form), for payment of the sum of \$12,922.45, 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, and that the "Track and Confirm" from the USPS confirmed delivery on July 7, 2011. Plaintiff contends that the defendant failed to pay or issue a timely Denial of Claim form. Accordingly, plaintiff contends that it is entitled to summary judgment on its second cause of action.

With respect to plaintiff's third cause of action involving the claim on behalf of John F. Brett, plaintiff contends that on June 17, 2011, plaintiff billed the defendant with a Form NF-5

for payment of a hospital bill in the sum of \$4,195.60. A form UB-04 was attached to the bill. The bill was mailed certified mail, return receipt requested, and was received by the defendant on June 21, 2011. In support of its motion, plaintiff submits a copy of the certified mail and return receipts and an affidavit by Steven Attias, who is employed by Hospital Receivable Systems, Inc. as a Biller and Account Representative for White Plains Hospital Center. Mr. Attias attests that on June 17, 2011, he mailed the hospital facility form (NF-5 Form), for payment of the sum of \$4,195.60, 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 June 21, 2011. Plaintiff contends that the defendant failed to pay or issue a timely Denial of Claim form. Accordingly, plaintiff contends that it is entitled to summary judgment on its third 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)). An insurer is required to either pay or deny a claim for medical services rendered under No-Fault within 30 days from receipt of proof of the claim (e.g., the bill), which proof shall include verification requested by the insurer pursuant to 11 NYCRR 65-3.5. (See, 11 NYCRR §65-3.8(a); Insurance Law §5106(a)). 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 a severance of the causes of action brought by each of the three plaintiffs and for summary judgment.

To begin, with respect to the severance of the causes of action, joinder of the claims herein is proper under CPLR 1002(a) since the claims arise out of a uniform contract of insurance and involve the interpretation of the same no-fault provisions of the Insurance Law. (*Hempstead Gen. Hosp. v. Liberty Mut. Ins. Co.*, 134 A.D.2d 569, 521 N.Y.S.2d 469 (2d Dept.

1987)). Accordingly, said request is denied.

Next, defendant contends that plaintiff's motion should be denied because it is premature as there has been no discovery. Defendant contends that the plaintiffs are in possession of information necessary for the defendant to properly defend this action. The defendant argues that it is in the process of obtaining information to prove its defense of improper party, that there was no policy in effect, and that the defendant never received the bills in dispute. The Court notes, however, that the information which defendant contends it is seeking, is information which would be in the possession of the defendant, not of the plaintiff.

Defendant further contends that plaintiff served the wrong party defendant in its claim for reimbursement of no fault benefits. Plaintiff submitted the bills to Unitrin Direct Property & Casualty Company, but defendant contends that a review of the claim numbers shows that this is an improper party. Defendant argues that the proper insurance company for Ronald Keurian is Kemper Independence Insurance Company. Defendant contends that the remaining claimants may be insured by the defendant or by Unitrin Direct Insurance. Therefore, defendant contends that the named defendant does not have a policy in effect for said assignors and is not responsible for the bills. Additionally, defendant contends that it never received the bills at issue, which were sent to a post office box.

Defendant further argues that the plaintiff did not submit proper proof of mailing by its affidavits and that its proof is also insufficient to show who the proper insurers of the claimants are. In support of its contentions, defendant submits an affidavit of Karen Copp, a no-fault claims representative employed by Merastar Insurance Company. She attests that Merastar Insurance Company ("Merastar") is her employer and she works for its business segment called Kemper Preferred. Ms. Copp attests that the claims handlers of Merastar adjust claims for several subsidiary underwriting companies through Kemper Preferred, including Unitrin Advantage Insurance Company ("Unitrin") and "the proper insurer" Kemper Independence Insurance Company ("Kemper"). Ms. Copp attests that Kemper Independence Insurance Co. is the insurer which issued the policy of insurance to claimant Ronald Keurian.

Ms. Copp further attests that her search revealed that the subject bills for claimants Imelda Portugal and John F. Brett were never received by the defendant, therefore payment was

neither denied nor issued. The Court notes, however, that Ms. Copp does not attest that the address to which the bills were sent is not the proper address for the defendant.

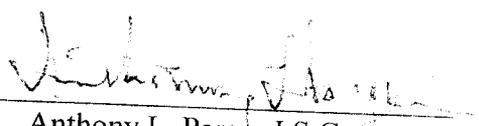
With respect to plaintiff's second and third causes of action, defendant has failed to set forth any evidence in admissible form sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment. Ms. Copp's affidavit, in which she states only that the "defendant did not receive the subject bills or claim," is insufficient to create a question of fact where the plaintiff has established proof of mailing to the defendant's proper address and receipt by the defendant. Defendant fails to submit any affidavit from Unitrin Direct Property & Casualty Company, either by an underwriter or claims representative, attesting that defendant did not insurer assignors Portugal and Brett. It is well settled that a party opposing a motion for summary judgment must lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact. (*Morgan v. New York Telephone*, 220 A.D.2d 728, 633 N.Y.S.2d 319 (2d Dept. 1995)). The defendant has also failed to demonstrate that the information needed to oppose the within motion is solely within the plaintiff's possession. It is well settled that the "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion. (*Woodard v. Thomas*, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2d Dept. 2010); *Simpson v. New York City Transit Authority*, 44 A.D.3d 930, 844 N.Y.S.2d 108 (2d Dept. 2007); *Lightfoot v. City of New York*, 279 A.D.2d 457, 719 N.Y.S.2d 99 (2d Dept. 2001); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006)). Accordingly, plaintiff's motion for summary judgment on its second and third causes of action is granted. Plaintiff shall submit judgment on notice for the amounts demanded in the second and third causes of action in its complaint, plus statutory interest and attorneys fees pursuant to 11 NYCRR §65-4.6(e).

With respect to plaintiff's motion for summary judgment upon its first cause of action involving the claim on behalf of Ronald Keurian, the affidavit of Ms. Copp is sufficient to create a question of fact to warrant the denial of plaintiff's motion, but is insufficient to establish a prima facie showing of entitlement to summary judgment on behalf of the defendant. Ms. Copp attests affirmatively that Ronald Keurian was covered by a policy of insurance issued by Kemper and not by the defendant. The Court notes, however, that the policy of insurance submitted by

the defendant is not in admissible form. As such, plaintiff's motion for summary judgment on its first cause of action is denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

Plaintiff is directed to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court, and upon counsel for the defendant, within twenty (20) days of the date of this Order. The parties shall appear for a Preliminary Conference on **March 28, 2012 at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings related to the first cause of action in this matter.

Dated: February 8, 2012



Anthony L. Parga, J.S.C.

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