Gotham Massage Therapy, P.C. v Allstate Ins. Co.
2017 NY Slip Op 32140(U)
October 13, 2017
Civil Court of the City of New York, Bronx County
Docket Number: CV - 716836/14
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 40

_____X

GOTHAM MASSAGE THERAPY, PC
A/A/O Olimpia Cepeda

Plaintiff

-against-

ALLSTATE INSURANCE COMPANY,

Defendant

_____X

DECISION & ORDER

Index No.: CV - 716836/14

HON. SABRINA B. KRAUS

BACKGROUND

Plaintiff commenced this action to recover assigned first-party no fault benefits, pursuant to Insurance Law Section 5102, and its implementing regulations, 11 NYCRR 65, by filing a summons and complaint on December 17, 2014.

Defendant appeared by counsel and filed an answer on January 21, 2015, asserting ten affirmative defenses .

On August 10, 2015, Plaintiff made a motion for relief pursuant to CPLR §3126, based on Defendant's failure to respond to interrogatories. The motion was settled pursuant to a stipulation on March 25, 2016.

Plaintiff filed a Notice of Trial on July 22, 2016.

Trial was initially scheduled for September 28, 2016, and then adjourned to August 8, 2017. The trial has since been further adjourned by the parties to February 20, 2018.

THE PENDING MOTION

On September 7, 2016, Defendant moved for summary judgment on the grounds that the services provided were not reimbursable under the fee schedule as per the 8 units rule.

On October 11, 2017, the court heard brief oral argument and reserved decision.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART

The proponent of a motion for summary judgment bears the burden of tendering sufficient evidence to demonstrate the absence of a material issue of fact requiring a trial (*Alvarez v Prospect Hospital* 68 NY2d 320). Once movant makes the required showing, the burden shifts to the opposing party to come forward with evidence establishing a triable issue of fact (*Zuckerman v City of New York* 49 NY2d 557).

The court finds based on the record submitted that there are no material issues of fact requiring a trial.

Plaintiff seeks to recover $1835.72 for medical services rendered to Olimpia Cepeda (Assignor) for injuries as a result of an automobile accident on December 23, 2010. There are nine bills at issue, covering services rendered between January 4, 2011 and April 13, 2011.[11]

Defendant asserts timely denied all of the bills. All of the denials were based on Ground Rule # 11 of the New York Worker's Compensation Fee Schedule, which provides "(w)hen multiple physical medicine procedures and/or modalities are performed on the same day,

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[1] At oral argument, counsel for Defendant conceded that Plaintiff is entitled to be paid for the bills for January 2, 2011, and March 17, 2011, as Defendant presents no proof of payment made to any other provider that would count against the eight unit maximum. These bills total $547.08.

reimbursement is limited to 8.0 units or the amount billed, whichever is less." This language is followed by a list of specific codes subject to the Rule.

DEFENDANT'S MAILING AFFIDAVIT IS SUFFICIENT TO ESTABLISH TIMELY DENIAL

The court finds that the affidavit in support of the motion does specifically address Defendant's standard office practice to ensure that items are properly addressed and mailed. The affidavit sufficiently demonstrated that Defendant timely mailed the denial of claim forms based upon its standard office practice and procedures designed to ensure that items are properly addressed or mailed (*Delta Diagnostic Radiology PC v Chubb* 17 Misc.3d 16).

THE DOCUMENTS ANNEXED TO THE MOVING PAPERS ARE IN ADMISSIBLE FOR PURSUANT TO CPLR § 4518(a)

Additionally, the court finds that the documents annexed to Defendant's moving papers are in admissible form.

As held by the Court of Appeals:

> Certain affidavits and documents submitted in support of a motion for summary judgment may be deemed admissible where those documents meet the requirements of the business records exception to the rule against hearsay under CPLR 4518 (see e.g. JPMorgan Chase Bank, N.A. v. Clancy, 117 A.D.3d 472, 472, 985 N.Y.S.2d 507 [1st Dept.2014]; Education Plus, Inc. v. Glasser, 112 A.D.3d 1125, 1125–1126, 976 N.Y.S.2d 706 [3d Dept.2013]; Melendez v. 176 Hopkins Assoc., LP, 28 A.D.3d 723, 723, 813 N.Y.S.2d 775 [2d Dept.2006]). CPLR 4518(a) provides:
>
> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter."

[*Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 508 (2015)].

THE DISPUTED CHARGES ARE PRECLUDED BASED ON THE APPLICABLE FEE SCHEDULE AND RULE REGARDING CONCURRENT SERVICES

The remaining dispute between the parties centers Defendant's claim, that Plaintiff, who provided massage therapy, is precluded from recovering because Defendant because paid out for those same dates, the requisite amounts to other providers, from whom the Assignor received physical therapy and chiropractic treatment.

Plaintiff's allegation is that Chiropractic Care and Physical Therapy are separate and distinct from Massage Therapy, and because they are separate modalities not subject to the rule on concurrent care. Plaintiff argues such an interpretation is supported by the fact that there is a separate fee schedule for Physical Medicine and for Chiropractic Care. Both fees schedules contain the identically worded rule [2], but the list of applicable codes under each, while overlapping is not identical.

Plaintiff billed under CPT Codes 97124 and 97140 for each date of service. Other providers billed for Codes 97010, 97035 and 97110 for the same dates of service. All of these codes are specifically listed under Ground Rule 11.

Based on the foregoing, the court agrees with Defendant, that based on concurrent care, Plaintiff is precluded from recovery for said services.

[2] It appears as ground Rule #3 in the Chiropractic Fee Schedule.

CONCLUSION

Based on the foregoing, the motion is granted to the extent of dismissing all claims except, in the amount of $547.08, as conceded by Defendant at oral argument. As to said amount, Plaintiff is entitled to summary judgment pursuant to CPLR § 3212(b).

The trial date of February 20, 2018 is hereby vacated.

Parties to settle an order.

Dated: October 13, 2017
Bronx, New York

Hon. Sabrina B. Kraus
JCC

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