

**Westchester Med. Ctr. v American Tr. Ins. Co.**

2008 NY Slip Op 30354(U)

January 21, 2008

Supreme Court, Nassau County

Docket Number: 3941-07/

Judge: James P. McCormack

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SHORT FORM ORDER

SUPREME COURT- STATE OF NEW YORK  
Present: HON. JAMES P. McCORMACK, Acting Justice of the Supreme Court

TRIAL/IAS, PART 51  
NASSAU COUNTY

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WESTCHESTER MEDICAL CENTER,  
a/a/o DAPHNE MCPHERSON; THE NEW YORK  
HOSPITAL MEDICAL CENTER OF QUEENS,  
a/a/o ARNOLD TERLIEN; SOUND SHORE  
MEDICAL CENTER, a/a/o RAYMOND  
LABRUSCIANO,

**Plaintiffs,**

**-against-**

**Index No.: 013941/07  
Motion Seq. No.: 001  
Submission: 10/31/07**

AMERICAN TRANSIT INSURANCE COMPANY,

**Defendant.**

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The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X  
Answering Papers.....X  
Reply.....X

Motion pursuant to CPLR § 3212 by plaintiffs, Westchester Medical Center (hereinafter Westchester) , The New York Hospital Medical Center of Queens (hereinafter New York Hospital); Sound Shore Medical Center (hereinafter Sound Shore) et.al., for summary judgment.

The instant action involves three no-fault insurance claims against defendant American Transit Insurance Company (hereinafter American Transit), by Westchester, New York Hospital, and Sound Shore for services rendered to Daphne McPherson, Arnold Terlien, and Raymond Labrusciano, patients involved in three unrelated automobile accidents. The claims herein stem from hospital bills that were allegedly never paid by defendant insurer. Plaintiff filed the instant motion seeking summary judgment pursuant to Insurance Law Section 5106(a).

Section 5106 (a) of the New York State Insurance Law provides that payment of a no-fault claim by an insurer is considered overdue if it is not paid or denied within 30 days after the claimant provides the insurer with proof of fact and amount of loss related to the claim. Interest is accrued at a rate of 2% for every month the claim remains unpaid (*see Hempstead Gen. Hosp. v Ins. Co. of N. Am.*, 208 AD2d 501; *see also Smithtown Gen. Hosp. v State Forum Mutual Auto Ins. Co.*, 207 AD2d 338.) In addition, the claimant is entitled to reasonable attorney's fees "for services necessarily performed in connection with securing payment of an overdue claim" subject to certain limitations outlined in 11 NYCRR 65.17; N.Y. Ins Law 5106 (a). Specifically, "once a court action has been commenced, 11 NYCRR 65.17(b)(6)(v) grants an attorney's fee on no-fault insurance claims of 20% of the amount of first-party benefits awarded plus interest with a maximum payment of \$850 per claim." (*Hosp. for Joint Diseases v Nationwide Mutual Ins.*, 284 AD2d 374.)

In order to succeed on a motion for summary judgment, the plaintiff must demonstrate through competent evidence that there is no issue of material fact upon which reasonable people could disagree. (*Baly v Chrysler Credit Corp.*, 94 AD2d 781.) Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. (*Andre v Pomeroy*,

[\* 3.]  
35 NY2d 361.) The goal of summary judgment is to issue find, rather than to issue determine. (*Hantz v Fleischman*, 155 AD2d 415.) If there is any reasonable question raised as to any alleged fact of a claim “based on personal knowledge and documentary evidence”, then a motion for summary judgment must fail and the case must proceed to trial in order to resolve the issue. (*Baly*, 94 AD2d 781, *citing Behar v Ordover*, 92 AD2d 557.)

#### McPherson Action

The plaintiff, Westchester is the assignee for health service rendered to Ms. McPherson between January 15, 2007 and January 22, 2007. That treatment was necessary after an automobile accident which occurred on January 14, 2007. According to the plaintiff, the defendant was billed on February 16, 2007 with a Hospital Facility Form (Form N-F 5) and UB-92, for payment of a hospital bill in the sum of \$6,993.96. That bill, according to the plaintiff, was sent certified mail return receipt requested and was received by the defendant on February 20, 2007. Plaintiff allege the defendant failed to either pay the hospital bill or to issue a timely Denial of Claim Form within 30 days. Moreover, plaintiff Westchester claims that when they did finally get a Denial of Claim Form it was untimely, as it was dated April 5, 2007. In addition, the plaintiff claims the reason given on the Denial of Claim form “Claimant is eligible for workers’ comp...” is an invalid reason for denial.

In *Presbyterian Hosp. v Maryland Cas. Co.*, 90 NY2d 274, the Court of Appeals stated, “[A]n insurer may be precluded from interposing a statutory exclusion defense for failure to deny a claim within 30 days as required by Insurance Law section 5106(a) and 11 NYCRR 65.15 (g)(3).” The bill, although denied, was denied untimely and according to plaintiff remains

[\* 4 ]

unpaid as of today. Accordingly, the defendant did not deny the claim in a timely fashion as required under Insurance Law 5106(a), and as such, the court must grant summary judgment to the plaintiff and order defendant to pay the outstanding hospital bill in the amount of \$6,993.96 with statutory interest and attorney's fees. Counsel for plaintiff is directed to submit judgment on notice.

#### Terlien Action

On February 5, 2007, Arnold Terlien was in a auto accident for which he received treatment at The New York Hospital from February 5, 2007 to February 9, 2007. Terlien assigned his claim for no-fault medical benefits to the New York Hospital.

The New York Hospital subsequently billed defendant, American Transit on May 9, 2007 for the treatment in the sum of \$4,670.17. Plaintiff billed with a Form N-F5 (Hospital Facility Form) and a UB-92 form by certified mail, return receipt requested. According to the plaintiff, the bills were received on May 10, 2007. Defendant does not deny receipt of this bill but rather claims the claim was immediately denied on May 11, 2007 on the grounds that proper notice of claim in writing was not received within 30 days of the date of the accident. Summary judgment must be denied where there are factual issues in dispute. If a genuine issue of fact exists, summary judgment must be denied (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395) Summary Judgment is a drastic remedy and should be denied if there is any significant doubt as to the existence of a triable issue or if there is even arguably such an issue. When a disputed question of fact arising out of a No-Fault denial arises, the court should deny summary judgment. (*see Hospital for Joint Diseases v Nationwide Mutual Ins. Co.*, 284 AD2d 374).

Accordingly, the court finds there is a sufficient factual issue that prevents this court from granting summary judgment. Therefore, the Terlien matter will be placed on the court's calendar for a conference on March 18, 2008.

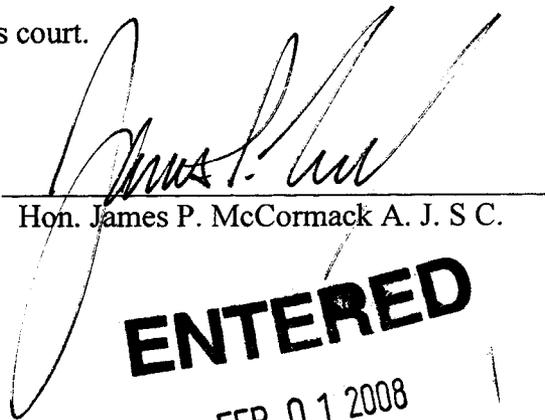
Labrusciano Action

Plaintiff, Sound Shore, is the assignee for health services rendered to Raymond Labrusciano during the period from January 13, 2007 through January 19, 2007. The injuries were the result of an automobile accident on January 13, 2007.

According to the plaintiff, the defendant American Transit, was billed on February 5, 2007 with Hospital Facility Form (N-F 5) and a UB-92, for payment of a hospital bill in the sum of \$17,967.83. The plaintiff states the bill was mailed certified mail, return receipt requested and was received by defendant on February 7, 2007. Defendant agrees that they received the bill on February 7, 2007 and states that the defendant requested verification including (1) complete medical records; (2) a signed assignment of benefit for and (3) a completed and signed N-F 5. Thereafter, when no response had been received regarding the Labrusciano claim, the defendant sent a second request for the same information on March 14, 2007. According to the defendant on June 4, 2007 plaintiff finally responded to the two prior letters and provided the verification that had been requested. Thereafter, on June 29, 2007, defendant made a timely denial of the plaintiff's claim. This was clearly within 30 days of the receipt of the verification that had been repeatedly requested. Plaintiff failed to address any of these communications in their motion presently before the court, but rather moves this court to grant summary judgment due to an untimely denial. Accordingly, summary judgment is denied as to the Labrusciano claim as it

appears the claim was denied in a timely fashion. This matter will also be placed on the court's calendar for a conference on March 18, 2008.

This constitutes the decision and order of this court.



Hon. James P. McCormack A. J. S C.

Dated: January 21, 2008

**ENTERED**  
FEB 01 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE