

**Brentwood Pain & Rehabilitation Servs., P.C. v
Progressive Ins. Co.**

2009 NY Slip Op 31881(U)

August 19, 2009

Supreme Court, New York County

Docket Number: 109805/04

Judge: Edward H. Lehner

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ANNEXED ON 9/21/2009
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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BRENTWOOD PAIN & REHABILITATION SERVICES, P.C.,
and HEMPSTEAD PAIN AND MEDICAL SERVICES, P.C.,

Plaintiffs,

Index No.
109805/04

-against-

PROGRESSIVE INSURANCE COMPANY, THE PROGRESSIVE CORPORATION, PROGRESSIVE AMERICAN INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE CLASSIC INSURANCE COMPANY, PROGRESSIVE HALCYON INSURANCE COMPANY, PROGRESSIVE HOME INSURANCE COMPANY, PROGRESSIVE MAX INSURANCE COMPANY, PROGRESSIVE NORTHEASTERN INSURANCE COMPANY, PROGRESSIVE NORTHERN INSURANCE COMPANY, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, PROGRESSIVE PREFERRED INSURANCE COMPANY, PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY, PROGRESSIVE SPECIALTY INSURANCE COMPANY, and John Does 1-10, being the various subsidiaries of Progressive Insurance Company that write automobile insurance in New York,

Defendants.

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PROGRESSIVE INSURANCE COMPANY, THE PROGRESSIVE CORPORATION, PROGRESSIVE AMERICAN INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE CLASSIC INSURANCE COMPANY, PROGRESSIVE HALCYON INSURANCE COMPANY, PROGRESSIVE HOME INSURANCE COMPANY, PROGRESSIVE MAX INSURANCE COMPANY, PROGRESSIVE NORTHEASTERN INSURANCE COMPANY, PROGRESSIVE NORTHERN INSURANCE COMPANY, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, PROGRESSIVE PREFERRED INSURANCE COMPANY, PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY, PROGRESSIVE SPECIALTY INSURANCE COMPANY,

Third-Party Plaintiffs,

Index No.
591076/04

- against -

**RICHARD LEE, D.C., ANNE BRUTUS, M.D., ANDREW GEYER,
GEORGE BRAFF, M.D., SOUTH BRONX PAIN & MEDICAL
SERVICES, P.C., MICHAEL DANTE MANAGEMENT, INC.,
ARLO MANAGEMENT, INC. AND HEALTH PLUS
MARKETING SERVICES, INC.,**

Third-Party Defendants.

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EDWARD H. LEHNER, J.:

Plaintiffs Brentwood Pain & Rehabilitation Services, P.C. (Brentwood), and Hempstead Pain and Medical Services, P.C. (Hempstead) move, pursuant to CPLR 3212, for an order granting partial summary judgment determining that, as a matter of law, prior to April 5, 2002 no-fault insurance carriers had no right to demand Examinations Under Oath (EUOs) of medical providers (see, tr. p. 21).

Defendants/third party plaintiffs the Progressive Insurance Companies (Progressive) cross-move, pursuant to CPLR 3212, for an order granting partial summary judgment against the plaintiffs and third-party defendant Dr. Anne Brutus (Dr. Brutus) dismissing the complaint, and for an order resolving issues and facts relating to Progressive's counterclaims and third-party claims.

Brentwood and Hempstead are New York State licensed medical providers that treat individuals who are injured in New York automobile accidents and are covered by no-fault insurance. They claim that they have been solely owned since 1996 by Dr. Brutus, who is the 100% shareholder.¹ Progressive is comprised of insurance companies licensed to conduct business and write insurance in the State of New York. The plaintiffs commenced this action to recover

¹Plaintiffs assert that Dr. Brutus is now retired and has voluntarily surrendered her license to practice medicine.

approximately \$7 million in no-fault claims² for services they allegedly provided to their assignors for injuries sustained in automobile accidents. Plaintiffs explain that, as is common in the no-fault automobile insurance industry, the injured parties assign to medical providers their rights to insurance proceeds for the procedures, tests and treatments which are administered by the medical providers. Plaintiffs claim that since 1996 they have treated Progressive claimants and have timely submitted bills for services, and that Progressive has refused to pay almost all of the submitted claims from 1996 to April 4, 2002.

It is undisputed that following receipt of the claims from Brentwood or Hempstead, Progressive made various verification requests of the plaintiffs. Included in the requests were, inter alia, demands for EUOs of Dr. Brutus for each claim submitted, the names and license numbers of the medical providers providing each service, and handwritten and signed notes by the providers.

Plaintiffs claim that they complied with essentially all of the requests. While they concede that they did not respond to Progressive's requests for EUOs, they argue that Progressive had no legal right to request EUOs of plaintiffs as a form of verification prior to April 5, 2002, when revised Regulation 68 went into effect (see 11 NYCRR 65-1.1 and 11 NYCRR 65-3.5 [e]). Plaintiffs point out that prior to April 5, 2002 Progressive never offered to reimburse plaintiffs for lost time, income or expenses related to the EUO requests, and that after April 5, 2002 Progressive never again

²Progressive claims that the disputed amount is actually between \$500,000 and \$600,000. It contends that plaintiffs have included in this action claims that were previously denied in arbitration, and are seeking to be paid twice for the same claims. The amount demanded by plaintiffs is calculated based on the addition of interest at the statutory rate of 2% per month (Insurance Law § 5106 [a], compounded monthly.

requested an EUO of the plaintiffs, yet paid almost all of the claims submitted to it by plaintiffs without objection.³

Progressive argues, inter alia, that it was entitled to demand EUOs of medical providers prior to the effective date of revised Regulation 68 pursuant to case law and arbitration rulings, which rulings should be given collateral estoppel effect. It also points to a statement published by the Insurance Department in the State Register, dated May 9, 2001, at 23, item 16, which opined that the provision providing for an examination under oath in revised Regulation 68 “clarifies existing authority to require such examination.” Progressive urges that, even if plaintiffs were to prevail on this issue, they would not be entitled to recover on the claims because they failed to comply with Progressive’s other requests. Progressive claims that plaintiffs, in many instances, failed to submit the identity of the doctor providing each service, and failed to provide signed reports and notes with the treating doctor’s signature and license number.

Finally, they argue that plaintiffs did not have a right to receive no-fault benefits because they were engaged in illegal fee splitting, and were illegally and improperly controlled and/or owned by third-party defendant Richard Lee (Lee), D.C., a licensed chiropractor, and the head of their management company. Progressive also claims that plaintiffs, together with third-party defendant South Bronx Pain & Medical Services, P.C. (South Bronx), are fraudulent entities, and that plaintiffs engaged in an extensive pattern of fraud, including billing for unnecessary testing, and for lay person services and chiropractic services as medical services to inflate their billing.

³Plaintiffs claim that, after April 5, 2002, Progressive paid over \$155,000 to plaintiffs to date, out of a billed amount of approximately \$196,000.

On April 5, 2002, "revised Regulation, No. 68" went into effect (11 NYCRR 65-1.1).⁴ It repealed and replaced 11 NYCRR part 65 implementing the No-Fault Automobile Insurance Law (Insurance Law art 51) and provides, inter alia, that insurance carriers have a right to demand EUOs of medical providers, as the insured person's assignee, "as may reasonably be required" (11 NYCRR 65-1.1 [d]). It also requires the insurance carrier to reimburse the applicant for any loss of earnings and reasonable transportation expenses incurred in complying with the request for an EUO (11 NYCRR 65-3.5 [e]).

Pursuant to Insurance Law Section 5106 (a) and 11 NYCRR 65-3.5, an insurer has 30 days from receipt of the medical provider's verification of claim to pay or validly deny the claim for no-fault automobile insurance benefits. An insurer's timely and proper request for additional information from the health provider to verify its claim to recover payment for medical services rendered to a patient, and the health provider's failure to provide the properly requested verification, extends the statutory 30-day period for paying or denying a claim for no-fault medical payments until such time as the requested verification is received (*New York & Presbyterian Hosp. v Allstate Ins. Co.*, 30 AD3d 492 [2d Dept 2006]).

However, if the insurer is not entitled to the requested verification, the 30-day time period is not tolled, and the insurer is precluded from asserting most defenses after the 30-day time period, including "fraudulent claims" (*East Acupuncture, P.C. v Electric Ins. Co.*, 16 Misc 3d 128[A], 2007 NY Slip Op 51281[U] [App Term, 2nd & 11th Jud Dists 2007]). Notwithstanding the foregoing, insurance carriers can assert various limited defenses including, e.g., a "fraudulent corporate

⁴ All of plaintiffs' claims at issue herein accrued prior to the date of the promulgation of Insurance Regulation No. 68.

formation” defense to payment of a claim (*see State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313 [2005]), or a defense that the assignor’s injuries did not arise from a covered incident (*Matter of Metro Med. Diagnostics v Eagle Ins. Co.*, 293 AD2d 751, 752 [2nd Dept 2002]).

Plaintiffs cite to innumerable Appellate Term cases which support their position that insurance companies were not entitled to demand EUOs of medical providers prior to April 5, 2002 when revised Regulation 68 went into effect. This regulation, for the first time, provided in the Mandatory Personal Injury Protection Endorsement that an eligible injured person shall submit to EUOs “as may reasonably be required” (11 NYCRR 65-1.1 [d]). This long line of cases determined that the provision contained in revised Regulation 68, which requires claimants to submit to EUOs, could not be applied retroactively, and that the insurance regulations in effect prior to April 5, 2002 did not authorize EUOs (*see Webster Diagnostic Medicine, P.C. v State Farm Ins. Co.*, 15 Misc 3d 97 [App Term, 2nd Dept 2007] [“(T)he insured had no obligation to appear for an examination under oath because ‘at the applicable time, the insurance regulations contained no authorization for examinations under oath’” (citation omitted)]; *Oleg Barshay, D.C., P.C. v State Farm Ins. Co.*, 14 Misc 3d 74 [App Term, 2d Dept 2006] [“an absence of an EUO provision in the former verification scheme ‘may (not) be remedied by reference to policy provisions requiring that an insured cooperate with the insurer’s investigation of a claim . . .’ ” (citation omitted)]; *Ocean Diagnostic Imaging P.C. v State Farm Mut. Auto. Ins. Co.*, 9 Misc 3d 73 [App Term, 2d Dept 2005] [“(U)nder the applicable prior regulations (11 NYCRR 65.12 [e]), defendant had no right to request an EUO”]; *King’s Med. Supply v Kemper Auto & Home Ins. Co.*, 3 Misc 3d 131[A], 2004 NY Slip Op 50401[U] [App Term, 2d & 11th Jud Dists 2004] [EUOs were not available as a form of verification by the Insurance Regulations in effect prior to April 5, 2002; nor may an insurer base its right to an EUO on the

policy provisions providing for “cooperation”]; *King’s Medical Supply Inc. v Progressive Ins.*, 3 Misc 3d 126[A], 2004 NY Slip Op 50311[U] (App Term, 2d & 11th Jud Dists 2004)].

In *Bronx Medical Services, P.C. v Lumbermans Mutual Casualty Co.*, (2003 WL 21402045, [App Term, 1st Dept 2003]), the court determined that the insurer had no right to request EUOs as a form of verification prior to April 5, 2002, and that this “conclusion [was] supported by relevant case law ..., and consistent with the Insurance Department’s own interpretation of revised Regulation 68 as articulated in the agency’s ‘Circular Letter No. 9 of 2002,’ an interpretation entitled to great deference” [citations omitted].⁵ Said Circular Letter states that an insurer’s request for EUOs depends on the policy endorsement in effect, and the insurer’s compliance with conditions applicable to EUOs (*see Star Med Servs P.C. v Eagle Ins. Co.*, 6 Misc 3d 56 [App Term, 2d Dept 2004] [The insurance policy must contain the new no-fault endorsement authorizing EUOs, otherwise the request for an EUO is invalid]; *S & M Supply Inc. v State Farm Mutual Auto. Ins. Co.*, 4 Misc 3d 130[A], 2004 NY Slip Op 50693[U] (App Term, 9th and 10th Jud Dists 2004) [“the insurer must include the revised prescribed endorsement with new or renewal policies issued on or after April 5, 2002, and the claim rules are to be governed by the policy endorsement in effect [*see* Circular Letter No. 9 [2002]]”).

In support of its argument that an insurer had a right to demand an EUO prior to April 5, 2002, Progressive cites to four Appellate Division cases, *i.e.*, *Park v Long Island Ins. Co.* (13 AD3d

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Circular Letter No. 9, dated April 9, 2002, by the Insurance Department, states that the new regulation “provides for revised endorsements with new notice provisions, [and that] these new provisions will not be applicable to claims until new policies containing the revised endorsements are issued or renewed.”

506 [2nd Dept 2004]; *Lee v American Transit Ins. Co.* (304 AD2d 713 [2d Dept 2003]); *Galante v State Farm Ins. Co.* (249 AD2d 506 [2d Dept 1998]); and *Raymond v Allstate Ins. Co.* (94 AD2d 301 [1st Dept 1983]). Although the aforementioned cases found that an insurer had a legal basis to examine an insured under oath under certain facts, none of the cases addressed an insurer's entitlement to demand an EUO of a medical provider prior to April 5, 2002.

Progressive next argues that its right to an EUO has been decided in arbitration and should be given collateral effect. The requirements for the application of collateral estoppel are that: (1) the issue with respect to which preclusion is sought must be identical with the issue decided in the prior proceedings; (2) the issue was necessarily decided in that prior proceeding, and (3) the litigants who will be precluded in the instant proceeding had a full and fair opportunity to litigate the issue in the prior proceeding (*see Allied Chemical v Niagara Mohawk Power Corp.*, 72 NY2d 271 [1988]).

It is well settled that the doctrines of res judicata and collateral estoppel apply to arbitration awards with the same force and effect as they apply to judgments of courts, and "may serve as the basis for the defense of collateral estoppel in a subsequent action" (*Acevedo v Holton*, 239 AD2d 194, 195 [1st Dept 1997]; *American Ins. Co. v Messinger*, 43 NY2d 184, 191 [1977]). It is equally well settled that the "burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [a] prior action or proceeding" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 501 [1984]).

In January 2001, six awards were rendered against plaintiffs denying their claims by Arbitrator Walter Higgins. Four of the six cases involved requests for EUOs. The six awards were issued on the same day, and used identical language except for the different names of the injured.

Arbitrator Higgins found, inter alia, that plaintiffs' verification requests were reasonable except for one exception,⁶ that plaintiffs had failed to comply with various verification requests, and that there was evidence of excess billing.

The remaining two awards were rendered by Arbitrator Maria Schuchmann and Arbitrator Lester Sacks. The award rendered by Arbitrator Schuchmann, dated May 11, 2000, dealt with Progressive's numerous requests for verification, and whether they were reasonable. Schuchmann determined that Progressive's verification requests, which included EUOs, were reasonable and should have been complied with, and denied the claims as premature pending completion of the verification process. In an award dated January 7, 2001, Arbitrator Sacks denied plaintiffs' claim, finding questions as to the relationship between the plaintiffs and the propriety of the claim. He concluded that plaintiffs failed to comply with various verification requests.

A review of the issues litigated in the prior arbitration proceedings fails to demonstrate that the issue of whether Progressive was legally entitled to EUOs of plaintiffs as part of its verification requests under the administrative regulation then in effect was raised by the parties or actually or necessarily determined by the arbitrators. Thus, there is no basis to apply collateral estoppel against plaintiffs.

While the court is not bound by the above decisions of the Appellate Term, this court believes them to have been correctly decided. Accordingly, plaintiffs' motion for partial summary judgment is granted to the extent that this court declares that, under the applicable prior regulations (11 NYCRR 65.12 [e]), Progressive had no right to demand EUOs of plaintiffs prior to April 5, 2002.

⁶The one exception was the repeated requests for preauthorization for physical therapy in excess of 12 treatments.

Progressive argues that it is entitled to partial summary judgment on the claims that the plaintiffs elected to arbitrate, including claims that were denied in arbitration, and claims that were listed twice. Plaintiffs concede that these claims should be dismissed. Further, plaintiffs are precluded from including claims from the same accident that they elected to arbitrate, and claims that plaintiffs elected to arbitrate and then withdrew (*see Roggio v Nationwide Mutual Insurance Co.*, 66 NY2d 260 [1985]). Accordingly, that branch of Progressive's cross motion which seeks partial summary judgment dismissing plaintiffs' duplicate claims, the claims previously denied in arbitration, and the claims that plaintiffs elected to arbitrate and then withdrew, is granted.

Progressive further moves to dismiss the claims that it argues are barred by the statute of limitations, i.e., claims that were submitted prior to June 2, 1998. Progressive attaches a list of claims that the plaintiffs presented and stipulated to, which sets forth the date of the bills, and the date that the claims were submitted to Progressive. A cause of action against an insurer for payment of no-fault first-party benefits for services provided to the insured is subject "to the six-year statute of limitations in CPLR 213 (2), not the three-year statute in CPLR 214 (2)" (*Matter of Travelers Indem. Co. of Conn. v Glenwood Med., P.C.*, 48 AD3d 319 [1st Dept 2008]). Hence, Progressive's cross-motion which seeks to dismiss any claims with a date prior to June 2, 1998, is granted.

Progressive seeks summary judgment on those claims wherein plaintiffs have failed to respond to Progressive's verification requests. The mandatory policy endorsement in effect at the time of the plaintiffs' claims provided in the "Conditions" section that "no action shall lie against the Company unless as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." It further provided that an applicant must provide "any other pertinent information requested by the Company." (11 NYCRR 65-12 [e]; *see also* current Regulation 11 NYCRR 65-1.1

[d]). The claim was not payable until such time as the applicant provided “verification of all of the relevant information requested . . .” (see 11 NYCRR 65.12 [g] [I] and current Regulation 11 NYCRR 65-3.8 [a] [1]).

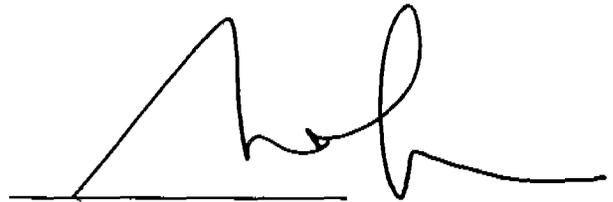
The courts have consistently held that substantial compliance by the insured with the insurer’s requests sufficiently satisfies the cooperation clause of an insurance policy (*Baerga v Transtate Insurance Co.*, 213 AD2d 217 [1st Dept 1995]). This court finds that issues of fact exist regarding whether plaintiffs reasonably and substantially complied with Progressive’s proper verification requests. Thus, Progressive’s motion for partial summary judgment on plaintiffs’ claims, based upon their failure to comply with a necessary condition, is denied.

Progressive’s motion to dismiss plaintiff’s unjust enrichment claim is granted without opposition. This claim is properly dismissed since a valid agreement exists which governs the subject matter at issue in the instant case (see e.g. *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1987]; *Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dept 2004]).

Finally, Progressive argues that plaintiffs were involved in a myriad of wrongdoing, including violating Public Health Law (PHL) § 238 and 238-a, and thus are not eligible for reimbursement by insurance carriers (see e.g. *State Farm Mutual Automobile Ins. Co. v Mallela*, 4 NY3d 313, *supra*). Such questions will be considered in determining the subsequent motion which was argued on April 20, 2009 (see, tr. pp. 5, 114).

Settle Order.

DATE: August 19, 2009



J.S.C.