

<b>Westchester Med. Ctr. v Government Empls. Ins. Co.</b>
2010 NY Slip Op 32295(U)
August 17, 2010
Supreme Court, Nassau County
Docket Number: 019549/09
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

**TRIAL/IAS PART 20**

\_\_\_\_\_  
WESTCHESTER MEDICAL CENTER, a/a/o  
RADHIKA SINGH, NICHOLAS DIMARGO;  
NEW YORK UNIVERSITY HOSPITAL TISCH  
INSTITUTE, a/a/o SHERRI FRASCA,

Index No.: 019549/09  
Motion Sequence...01  
Motion Date...06/14/10

Plaintiffs,

-against-

GOVERNMENT EMPLOYEES INSURANCE  
COMPANY,

Defendant.

\_\_\_\_\_  
Papers Submitted:  
Notice of Motion and Affirmation.....X  
Affirmation in Opposition.....X  
Reply Affirmation.....X  
Reaffirmation.....X  
Supplemental Affirmation.....X

Upon the foregoing papers, the Plaintiffs' motion for an order pursuant to CPLR § 3212, granting them summary judgment, is determined as hereinafter provided.

This is an action to recover no-fault benefits on three (3) separate hospital no-fault billings. The first cause of action was settled and withdrawn by the Plaintiff.

At issue regarding the second cause of action is the non-payment of no-fault

benefits by the Defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY (“GEICO”) for services rendered to their insured, NICHOLAS DIMARGO (hereinafter “DIMARGO”) during the period July 27, 2009 through July 28, 2009, arising out of an automobile accident on July 27, 2009. The Plaintiff, WESTCHESTER MEDICAL CENTER, is the assignee for the health services rendered to the insured, DIMARGO.

On August 12, 2009, the Plaintiff billed the Defendant, GEICO utilizing a Hospital Facility Form (Form NF-5) and a UB-04, seeking payment of a hospital bill in the sum of \$1,392.38. The billing was sent via certified mail, return receipt requested, and was received by the Defendant on August 13, 2009.

The Plaintiff alleges that the Defendant failed to pay the hospital bill and on September 14, 2009 issued a defective Denial of Claim which read: NO FAULT BENEFITS ARE EXCLUDED TO ANY PERSON WHO INTENTIONALLY CAUSES HIS OR HER OWN INJURY. The Plaintiff claims that DIMARGO was a covered person who did not cause his own injury, and is entitled to no-fault benefits.

In opposition, the Defendant, GEICO, claims that they sent a request to the Plaintiff for additional verification on August 19, 2009 requesting a copy of the insured’s emergency room/hospital records. The Defendant acknowledges receipt of the requested records on August 24, 2009. The Defendant indicates they sent the bill and the records to Support Claim Services, Inc. for an “independent peer review”. The “independent peer review” was performed by Dr. Alain De La Chapelle, a board certified psychiatrist, who

concluded that the accident appeared to be of an intentional nature, either as a suicidal or parasuicidal attempt. Based on Dr. De La Chapelle's peer review, the Defendant alleges that a denial of claim was mailed to the Plaintiff on September 14, 2009. The Defendant alleges that a timely and proper denial of claim was mailed.

The Plaintiff does not deny the timeliness of Denial of Claim. Rather, the Plaintiff attacks the sufficiency of the reason for the denial.

At issue regarding the third cause of action is the non-payment of no-fault benefits by the Defendant, GEICO for services rendered to their insured, SHERRI FRASCA (hereinafter "FRASCA") during the period July 21, 2009 through July 24, 2009, arising out of an automobile accident on July 27, 2005. The Plaintiff, NEW YORK UNIVERSITY HOSPITAL TISCH INSTITUTE, is the assignee for the health services rendered to the insured, FRASCA.

On August 6, 2009, the Plaintiff billed the Defendant, GEICO utilizing a Hospital Facility Form (Form NF-5) and a UB-04, seeking payment of a hospital bill in the sum of \$14,550.23. The billing was sent via certified mail, return receipt requested, and was received by the Defendant on August 7, 2009.

The Plaintiff alleges that the Defendant failed to pay the hospital bill or issue a Denial of Claim.

In opposition, the Defendant, GEICO, claims that they sent a request to the Plaintiff for additional verification on August 17, 2009 requesting a narrative report of the

patient's initial consultation from the prescribing/referring physician, Dr. Ranga Krishna; a letter specifically explaining how the treatment is related to the accident; office notes for follow up treatment and any testing results from Dr. Ranga Krishna. The Defendant acknowledges receipt of the requested records on August 27, 2009. The Defendant indicates they sent the bill and the information received from the Plaintiff to Support Claim Services, Inc. for an "independent peer review". The "independent peer review" was performed by Dr. Ish Kumar, a board certified neurosurgeon, who concluded that the surgery was not medically necessary and causally related to the accident of November 16, 2005. Based on Dr. Kumar's peer review, the Defendant alleges that a denial of claim was timely and properly mailed to the Plaintiff on September 15, 2009.

The Plaintiff, in its attorney's Reply Affirmation, does not deny the timeliness of the Denial of Claim. Rather, the Plaintiff's counsel contends that since the report submitted by Dr. Kumar is not affirmed, it may not be considered by the Court.

Over the objection of the Plaintiff's counsel, the Court permitted the Defendant to submit an Affirmation by Dr. Kumar, attesting to the contents of his report under the penalties of perjury. The Plaintiff was permitted to submit a Supplemental Affirmation to address the sufficiency of Dr. Kumar's report thereby obviating any danger of prejudice to the Plaintiff from the Court's receipt of Dr. Kumar's Reaffirmation. The Plaintiff contends that Dr. Kumar's report is defective as it fails to rebut the Plaintiff's prima facie case with competent medical proof. Specifically, the Plaintiff's counsel argues that since Dr. Kumar's

report was not sworn to or affirmed it is unsupported and is insufficient to defeat the Plaintiff's motion.

As such, the Plaintiff does not deny the timeliness of Denial of Claim regarding the third cause of action. The Plaintiff attacks the sufficiency of the reason for the denial.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957]; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Bhatti v. Roche*, 140 A.D.2d 660 [2d Dept. 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v. Farrell Lines*, 64 N.Y.2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980], *supra*).

A motion for summary judgment is the procedural equivalent of a trial, and when entertaining such an application, the Court is not to determine matters of credibility, but rather is to confine its inquiry to determining whether material issues of fact exist (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 [1974]; *Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957], *supra*).

The Plaintiff has failed to establish a *prima facie* showing that it is entitled to judgment as a matter of law on its complaint to recover no-fault medical payments by submitting evidence that the Defendant failed to deny the claims within the requisite 30-day period. The issues of fact raised by the Defendant as to the coverage afforded to the assignors requires a determination by the trier of fact.

Accordingly, the Plaintiff's motion seeking summary judgment is **DENIED**.

The Plaintiff's second cause of action and the third cause of action were brought on behalf of unrelated assignees and unrelated assignors. The assignors were involved in separate, unrelated motor vehicle accidents and treated at separate, unrelated medical facilities. The only common element between the causes of action is the same insurance carrier and the insurer's failure to pay the no-fault benefits. See, *Mount Sinai v. MVAIC*, 291 A.D.2d 536 (2d Dept. 2002)

Accordingly, the Court finds severance of the two causes of action is appropriate.

In addition, pursuant to CPLR § 325(d), the severed causes of action are

removed from the Supreme Court and transferred to the Nassau County District Court to be heard and determined as if initially lodged therein.

Accordingly, it is hereby

**ORDERED**, that the Plaintiffs' counsel shall serve a copy of this Order upon the Nassau County Clerk, the clerk of the District Court and upon adverse counsel. The Nassau County Clerk, upon receipt of a copy of this Order and the payment of the requisite fee, if any, shall transfer the file maintained under index number 019519/10 to the Clerk of the Nassau County District Court; and it is further

**ORDERED**, that the Clerk of the Nassau County District Court, upon receipt of a copy of this Order and the transferred file is to assign, without additional cost, an index number to the cause of action asserted on behalf of WESTCHESTER MEDICAL CENTER and the pleadings previously served shall be deemed served as to that action; and it is further

**ORDERED**, that the Clerk of the Nassau County District Court, upon receipt of a copy of this Order and the transferred file is to assign, without additional cost, an index number to the cause of action asserted on behalf of NEW YORK UNIVERSITY HOSPITAL TISCH INSTITUTE and the pleadings previously served shall be deemed served as to that action.

This constitutes the decision and order of this court.

DATED: Mineola, New York  
August 17, 2010

  
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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
AUG 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE