Burke Physical Therapy, P.C. v MVAIC
2024 NY Slip Op 31558(U)
April 19, 2024
Civil Court of the City of New York, Kings County
Docket Number: Index No. CV-713053-20
Judge: L. Austin D'Souza
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 41

Index # CV-713053-20
Seq. #1, 2

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BURKE PHYSICAL THERAPY, P.C., AAO
REYNA BASURTO-GALINDO,
Plaintiff,

- *against* -

MVAIC,
Defendant,
---X

DECISION AND ORDER

Papers Reviewed:
Motion, Cross-Motion & Supporting Papers: 2
Opposition: 2
Reply: 1

Appearances:
Plaintiff: The Rybak Firm, PLLC by Richard Rozhik, Esq.
Defendant: Marshall & Marshall by David Gray, Esq.

In this case for no-fault insurance benefits, Defendant moves for summary judgment and dismissal. Plaintiff opposes and cross-moves for summary judgment. Defendant opposes the cross-motion. Plaintiff sues for three unpaid claims arising from medical treatment provided on November 13, 2018, November 19, 2018, and January 28, 2019. Defendant asserts the defense of non-receipt for the bill for date of service November 13, 2018. For the other two bills Defendant asserts the defenses of fee schedule and lack of medical necessity. After oral arguments held on June 30, 2023, the motions are decided as follows:

Bill for Date of Service November 13, 2018

For the bill dated November 13, 2018, Defendant asserts the defense of non-receipt for the bill.

In the defense of non-receipt there is a burden shifting sequence. A plaintiff's prima facie case is made out "by submitting evidence that the prescribed statutory billing forms had been mailed and received, and that the defendant had failed to either pay or deny the claim within the requisite 30-day period" (*Westchester Medical Center v Lincoln General Ins. Co.*, 60 AD3d 1045 [2d Dept 2009]). Demonstration of mailing creates "a presumption arises that those notices have been received by the insurers" (*Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498 [2015]; *see also Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2001] ["proof of proper mailing gives rise to a presumption that the item was received by the addressee"]). "However, that presumption is rebuttable" (*Wave Med. Servs. v Hertz Vehs., LLC*, 76 Misc 3d 131[A] [App Term 2d Dept 2022]). "Evidence that an insurer did not receive the claim forms is a rebuttal of plaintiff's prima facie case even at trial and, if accepted by the court, a complete defense to the action" (*id.*). "[O]n a motion for summary judgment, proof of

nonreceipt calls into question whether the claim forms were ever mailed in the first instance" (*id.*). That is, a sworn affidavit of mailing and a sworn affidavit of denial of receipt may create a question of fact for trial.

Here, Plaintiff submits the affidavit of John Nasrinpay, the owner of Plaintiff (*see* Aff in support of Plaintiff's cross-motion, exhibit 4). Nasrinpay avers that "in the regular course of business, person [sic] acting under my person direction, supervision and control mailed . . . a true copy of this assignment to the defendant with the first bill directly through the U.S.P.S. official post office location by hanging [sic] the items needed to be mailed directly to a U.S.P.S. employee" (*id.*). Defendant submits the affidavit of Joseph Howell, a claim representative for Defendant (*see* Defendant's motion for summary judgment, affidavit in support). Howell avers that "[u]pon an exhaustive and thorough review of MVAIC's records, including claim number 597151 as assigned to Reyna Basurto-Galinda, MVAIC did not receive a bill(s) and/or claim in the amount of $475.00 for the date of service 11/13/2018, from Burke Physical Therapy, PC, as alleged by plaintiff" (*id.*). Contrary to Plaintiff's opposition, the Court finds that the Howell affidavit is reliable and based on a personal review of the records and facts attested to.

Based on the competing affidavits, the presumption of receipt is rebutted and a material question of fact exist of whether the claim is overdue. This issue shall be resolved at trial.

Bills for Dates of Service November 19, 2018 and January 28, 2019

For the two bills for dates of service November 19, 2018 and January 28, 2019, Defendant asserts the defenses of medical necessity and fee schedule and requests dismissal or reduction of the claims. Plaintiff opposes that request and cross-moves for judgment for those two bills arguing that the denials were untimely. The timeliness of the denials will be analyzed before the merit of the defenses.

Defendant's Denials Were Timely

Plaintiff's cross-motion for judgment based on late denials is denied. The requirements for notices and requests from the insurer are as follows: Upon receipt of a claim, a carrier shall forward verification forms to a claimant within 10 days of receipt of the claim (*see* 11 NYCRR at 65-3.5[a]). If no response is received within 30 days from the verification request, an insurer must send a second verification request letter within ten days thereafter (*id.* at 65-3.6). "If there is no response to the second, or follow-up, request for verification, the time in which the insurer must decide whether to pay or deny the claim is indefinitely tolled" (*Mount Sinai Hosp. v New York Cent. Mut. Fire Ins. Co.*, 120 AD3d 561 [2d Dept 2014]). Upon receipt of completed forms, the carrier shall request any additional verification within 15 days of receipt of said forms (11 NYCRR 65-3.5[b]). An applicant shall submit requested verification within 120 days of receipt of the request (*id.* at 3.5[o]). Finally, a carrier

must pay or deny a claim within 30 days of receipt of proof of the claim, including verification request responses (*id.* at 65-3.8).

November 19, 2018 Bill

For the bill for date of service November 19, 2018, Defendant received the claim on January 7, 2019. Defendant sent verification request letters on January 25, 2019 and March 4, 2019. Defendant received residency information from the Plaintiff on June 17, 2019 and sent further verification requests on June 28, 2019. Defendant received the final verification response on July 17, 2019 and issued the denial on August 1, 2019.

The initial verification requests were late by 8 days because the verification request was sent 18 days after receiving the claim. However, this does not render the request invalid, but merely shortens the time that the insurer has to pay or deny the claim after the verification is received (*see Nyack Hospital v General Motors Acceptance Corp.*, 27 AD3d 96 [2d Dept 2005]). "[A]n insurer that requests additional verification after the 10– or 15–business–day periods but before the 30–day claim denial window has expired is entitled to verification. In these instances, the 30–day time frame to pay or deny the claim is correspondingly reduced" (*Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 318 [2007] citing *Nyack Hospital*, 27 AD3d 96; 11 NYCRR 65-3.8[j]). In this instance, the deadline for denying the claim was reduced from 30 to 22 days because of the late initial verification request. The denial was issued 14 days after the final verification information was received by the insurer. Therefore, the denial for the bill dated November 19, 2018 was timely.

January 28, 2019 Bill

For the bill for date of service January 28, 2019, Defendant received the claim on March 1, 2019. Defendant sent verification request letters on March 11, 2019 and April 16, 2019. Defendant received residency information from the Plaintiff on June 17, 2019 and sent further verification requests on June 28, 2019. Defendant received the final verification response on July 17, 2019 and issued the denial on August 1, 2019.

For the bill dated January 28, 2019, the initial verification request was ten days after the receipt of the claim. Upon receiving no response to the initial request letter after 30 days, Defendant sent the follow up request letter within less than ten days thereafter. Each follow-up request was sent less than 15 days after receiving any verification. Finally, the denial was less than 30 days after the final verification information was received. Therefore, for the bill dated January 28, 2019, all requests and the denial were timely.

Accordingly, Plaintiff's cross-motion based on untimely denials as to the November 19 and January 28 bills is denied.

Defendant's motion for summary judgment

Medical Necessity Defense

To support its medical necessity defense, Defendant submitted the peer review of Dr. Michael D. Leibowitz (*see* Defendant's motion for summary judgment, Leibowitz affirmation and exhibit G). Dr. Liebowitz averred that the computerized range of motion and computerized muscle testing were not necessary and that manual testing was sufficient.

In opposition Plaintiff submitted the affidavit of John A. Nasrinpay (*see* Plaintiff's cross-motion for summary judgment, exhibit 6). Nasrinpay averred that the testing was all medically necessary. Nasrinpay averred that the extent of the injuries would not have been discovered without the computerized testing. Nasrinpay also averred that the works cited by Leibowitz applied only to emergency medicine.

Where an affidavit from the provider physician states that they disagree with the peer review, this creates an issue of fact as to medical necessity (*see Park Slope Med. & Surgical Supply, Inc. v New York Cent. Mut. Fire Ins. Co.*, 22 Misc 3d 141[A] [App Term 2d Dept 2009]). Therefore, a trial is warranted to resolve the medical necessity defense.

Fee Schedule Defense

To support its fee schedule defense Defendant submitted the affidavit of Claim Representative Joseph Howell (*see* Defendant's motion for summary judgment, affidavit in support). Howell averred that Plaintiff used codes 95831 (muscle testing, manual, for extremity or trunk) and 95851 (range of motion testing) too many times (*see* Howell affidavit at ¶¶ 22-25). Regarding code 95831, Howell referred to the Current Procedural Terminology (CPT) which states that the code should not be used for each muscle tested (*id.*). Howell suggests that code 95833 (total evaluation) would have been appropriate, rather than using 95831 five times. For code 95851, Howell also referred to the CPT and concludes that 95851 should be used a maximum of seven times per visit, not nine as was billed.

In opposition Plaintiff submitted the affidavit of John A. Nasrinpay (Plaintiff's cross-motion for summary judgment, exhibit 7). Nasrinpay averred that the fees were coded correctly in accordance with the fee schedule and CPT (Nasrinpay aff at ¶ 9). Nasrinpay averred that the codes can be separately billed and that Howell's analysis depends on narrow reading of the CPT.

Where a defendant makes a showing that the amounts charged are in excess of the fee schedule, the burden shifts to the plaintiff to show that the charges involved a different interpretation of the schedules (*see Cornell Med., P.C. v Mercury Casualty Co.*, 24 Misc 3d 58 [App Term 2d Dept 2009]). Here, the Plaintiff has shown a different interpretation, which creates a question of fact. Therefore, a trial is needed to resolve the fee schedule defense.

Accordingly, it is hereby

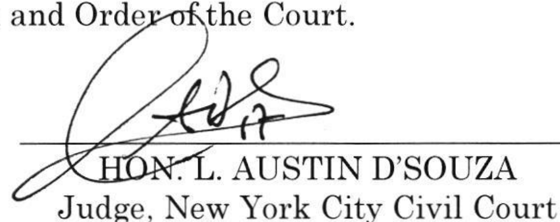
ORDERED that Defendant's motion is denied in as much as it seeks dismissal or reduction of the claims; it is further

ORDERED that Plaintiff's cross-motion is denied in as much as it seeks judgment; and it is further.

ORDERED that the following issues shall be resolved at trial: whether Defendant received the November 13, 2018 bill, and the defenses of medical necessity and fee schedule for the bills dated November 19, 2018 and January 28, 2019.

This constitutes the Decision and Order of the Court.

Dated: April 19, 2024
Brooklyn, NY



HON. L. AUSTIN D'SOUZA
Judge, New York City Civil Court

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