

Burke Physical Therapy, P.C. v National Gen. Ins. Co.
2026 NY Slip Op 30876(U)
March 13, 2026
Civil Court of the City of New York, Kings County
Docket Number: Index No. CV-743417-19KI
Judge: Sandra E. Roper
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

X

BURKE PHYSICAL THERAPY, P.C.,
a/a/o OCASIO, HECTOR

Plaintiff,

against-

NATIONAL GENERAL INSURANCE COMPANY

Defendant.

Index No. CV-743417-19/KI

Motion Cal. # 42/43

Motion Seq. # 1&2

DECISION AND ORDER

Recitation as required by CPLR § 2219(a) of the papers considered in review of this Motion:

Papers:

D’s Notice of Motion and Affidavits Annexed...1-2

P’s cross-motion for SJ and Exhibits.....3-4

D’s Opposition.....5

Upon the papers submitted, and after due deliberation, the Court finds and determines as follows:

This action seeks assigned first-party no-fault benefits arising from eight causes of action. The record reflects that the first four causes of action concern bills received on February 7, 2019 (Causes of Action 1 through 3) and March 4, 2019 (Cause of Action 4). The first IME scheduling letter reflected in the record is dated March 22, 2019 and scheduled an IME for April 12, 2019. The remaining causes of action are numbered 5 through 8.

Applicable Law

Insurance Law § 5106(a) and 11 NYCRR 65-3.8(a)(1) require an insurer to pay or deny a no-fault claim within 30 calendar days after receipt of proof of claim. Additional verification must be requested within 15 business days of receipt of the prescribed verification forms and, where the additional verification sought is a medical examination, the insurer must schedule that examination to be held within 30 calendar days of receipt of the prescribed verification forms. See 11 NYCRR 65-3.5(b), (d).

Determination as to Causes of Action 1 through 4

As to the first four causes of action, Defendant may not rely upon an IME no-show defense. The initial IME in the motion record was not scheduled to be held within 30 calendar days after defendant's receipt of those bills, as required by 11 NYCRR 65-3.5(d). Under controlling and persuasive no-fault authority, an original request for additional verification made outside the applicable regulatory time frame is a nullity as to the affected claim and cannot support dismissal. See Burke Physical Therapy, P.C. v State Farm Mut. Auto. Ins. Co., 83 Misc. 3d 41, 44-45 (App. Term 2d Dep't. 2024); Irina Acupuncture, P.C. v Nationwide Affinity Ins. Co., 57 Misc. 3d 146(A), (App. Term 2d Dep't, 2017); Thomas J. Tesi, M.S., D.C., P.C. v Hereford Ins. Co., 58 Misc. 3d 159(A) (App. Term 2d Dep't, 2018); American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 A.D.3d 841, 842 (1st Dep't 2015).

The NF-10 denials as to the first four causes of action were also untimely. A no-fault claim that is not timely paid or denied becomes overdue, and the insurer is generally precluded from asserting defenses to payment other than true lack-of-coverage defenses. *See* Insurance Law § 5106(a); Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co., 90 N.Y.2d 274, 278, 282-83 (1997); Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 317-18 (2007); Westchester Med. Ctr. v Lincoln Gen. Ins. Co., 60 A.D.3d 1045, 1045 (2d Dep't 2009). Accordingly, as to Causes of Action 1 through 4, defendant's IME no-show defense is unavailable and all non-fee-schedule defenses are precluded.

That does not end the inquiry, however, because the services here were rendered in 2019. Under 11 NYCRR 65-3.8(g)(1)(ii), proof of the fact and amount of loss is not deemed supplied, and no payment is due under any circumstances, for medical service fees that exceed the charges permissible under Insurance Law § 5108 and the fee schedule. For post-April 1, 2013 services, the fee schedule defense is not subject to preclusion. *See* JFL Medical Care, P.C. v Wesco Ins. Co., 77 Misc. 3d 139(A) (App. Term 2d Dep't 2022); Z. M. S. & Y Acupuncture, P.C. v GEICO Gen. Ins. Co., 58 Misc. 3d 143(A) (App. Term 2d Dep't 2017). Consequently, the matter shall proceed to trial solely on defendant's fee schedule defense as to Causes of Action 1 through 4.

Claim-by-Claim Detail for Causes of Action 1 through 4

For ease of reference: DOS = date of service; R = date defendant received bill; D = denial date. The initial IME letter reflected in the record is dated 3/22/19 and scheduled the IME for 4/12/19.

Cause	DOS	R	D	Disposition
1	1/14/19	2/7/19	7/11/19	IME late under 11 NYCRR 65-3.5(d); denial late; trial limited to fee schedule.
2	1/18/19	2/7/19	3/12/19	IME late under 11 NYCRR 65-3.5(d); denial late; trial limited to fee schedule.
3	1/18/19	2/7/19	3/12/19	IME late under 11 NYCRR 65-3.5(d); denial late; trial limited to fee schedule.
4	2/7/19	3/4/19	7/19/19	IME late under 11 NYCRR 65-3.5(d); denial late; trial limited to fee schedule.

Determination as to Causes of Action 5 through 8

As to the remaining causes of action, namely Causes of Action 5 through 8, defendant established its IME no-show defense. An assignor's appearance for a duly scheduled IME is a condition precedent to coverage under the mandatory personal injury protection endorsement. *See* 11 NYCRR 65-1.1(d); Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co., 35 A.D.3d 720, 721-22 (2d Dep't 2006); Performance Plus Med., P.C. v Utica Mut. Ins. Co., 47 Misc. 3d 129(A), (App. Term 2d Dep't, 2015). Accordingly, Causes of Action 5, 6, 7, and 8 are dismissed.

ORDERED;

that, as to the First, Second, Third, and Fourth Causes of Action, Defendant's IME no-show defense is rejected as untimely, the denials are untimely, and the matter shall proceed to trial solely on defendant's fee schedule defense; and further

that the Fifth, Sixth, Seventh, and Eighth Causes of Action are dismissed on the grounds that defendant established its IME no-show defense; and further

that the Clerk shall mark the matter for trial limited to defendant's fee schedule defense as to the First through Fourth Causes of Action only. RR

This constitutes the Decision and Order of the Court.

“The undersigned attorneys certify that upon due diligence none of their firm’s papers as pertains to case law associated with this case or this motion, and upon information and belief, none of the associated papers that were drafted post January 1, 2022 used generative artificial intelligence programs.”

P’s Counsel- The Rybak Firm, PLLC- Richard Rozhik, Esq.
D’s Counsel- Freidberg Peck and Kang- Daniel Fuentes, Esq.



March 13, 2026
DATE

HON. SANDRA E. ROPER

CHECK ONE:

MOTION SEQ. #1

MOTION SEQ #2:

CHECK IF APPROPRIATE:

NOTES

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>		<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	STAY CASE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

NOTES