SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

CHANNEL CHIROPRACTIC P.C., CKC CHIROPRACTIC P.C. and EAST-WAY CHIROPRACTIC, P.C., Individually and on behalf of all others similarly situated,

Plaintiffs,

- v -

COUNTRY-WIDE INSURANCE COMPANY,

Defendants.

Index No.: 115071/04

Motion Date: 04/18/05

Motion Seq. No.: 01

Motion Cal. No.: 28

The following papers, numbered 1 to 6 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits - Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5, 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

Plaintiffs bring this proposed class-action seeking a [illegible] that defendant's practice of denying first-party no-fault insurance benefit payments to medical providers in reliance upon peer reviews of medical necessity conducted by registered nurses is impermissible. Defendant moves to dismiss the complaint for failure to state a cause of action and on the grounds of prior actions pending. Plaintiff cross-moves for summary judgment, to add a plaintiff and amend the complaint to add a cause of action for a declaratory judgment. For the reasons that follow, the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

court shall grant the motion to dismiss the complaint and deny the cross-motion in its entirety.

The gravamen of plaintiffs' complaint is that the defendant's use of nurses in making peer review medical necessity determinations leading to the denial of the payment of no-fault insurance benefits is impermissible. Plaintiffs argue that defendant has breached the terms of its policies by denying claims for necessary medical services provided by the plaintiffs. Plaintiffs further argue that this case is ripe for class certification because there are hundreds of medical offices that have pending unpaid claims which have been denied by defendant based upon peer reviews performed by nurses.

Defendant argues for dismissal asserting in part that the complaint fails to state a cause of action under Article 51 of the Insurance Law and its implementing regulations at 11 NYCRR 65.15, et seq. Defendant asserts that to the extent the plaintiffs seek to challenge the denial of no-fault claims they submitted to the defendant, the plaintiffs fail to allege essential allegations of pleading a no-fault reimbursement cause of action. Defendant argues that plaintiffs fail to identify the claims which were submitted and not paid, fail to allege that more than 30 days have elapsed since the submission of the claims (Insurance Law §5106), and fail to allege that specifically identified bills were wrongfully denied based upon review by a

nurse. Defendant further argues that plaintiffs have not alleged any causal connection between the denial of the claims and the damages sought. This court agrees and shall dismiss the complaint.

The complaint in this action alleges breach of contract without setting forth any provision of the insurance contract that was allegedly breached by the defendant nor does the complaint set forth what statute or regulation, if any, the defendant has violated and thereby caused injury to the plaintiffs. The complaint further fails to set forth the prerequisites for recovery on a claim-by-claim basis. It has been held that "a provider's proof of a properly-completed claim makes out a prima facie case upon its motion for summary judgment thereby shifting the burden to the insurer who, if not precluded, may rebut the inference by proof in admissible form establishing that the health benefits were not medically necessary." Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc3d 128(A) *2, 2003 NY Slip Op 51701 (U), 784 NYS2d 918, (App Term, 2d & 11th Jud Dists 2003). Plaintiffs do not identify the bills that were not paid or that defendant untimely and wrongfully denied on the grounds of lack of medical necessity. The failure of the plaintiffs to allege with specificity the claims which were denied deprives the defendant from crafting and asserting defenses in its answer to the complaint as the defendant cannot

secure evidence to support its denials on the grounds of lack of medical necessity when the claims which it is alleged to have wrongfully denied are not identified.

The plaintiffs' main assertion appears to be that the defendant as a matter of law will be unable to establish its defense of lack of medical necessity as to any of the denied claims because any defense would be based upon peer reviews conducted by nurses. Such an argument as set forth in the complaint fails to state a cause of action because it does not assert that nurse peer reviews constitute a violation of either a statute, an administrative rule or an insurance contract provision which would as a matter of law preclude defendant from raising the defense of lack of medical necessity. Contrast Amaze Medical Supply Inc. v Eagle Ins. Co., supra, 2 Misc3d 128(A) *3, 2003 NY Slip Op 51701 (U), 784 NYS2d 918, (App Term, 2d & 11th Jud Dists 2003) (summary judgment granted upon proof of filing of claim where insurer precluded from raising the defense of medical necessity due to untimeliness); Central General Hosp. v Chubb Group of Ins. Companies, 90 NY2d 195, 199 (1997) ("failure to comply with the Insurance Law time restriction might properly preclude the insurer from a belated rejection of the billing claim on that basis"). The courts have not held as plaintiffs attempt to argue here that the validity of a medical necessity determination turns on the issue of the status of the defendant's

employee who performed the review. Instead, the legal standard imposed is that "the defense that the claim was not medically necessary must be supported by sufficient factual evidence or proof and cannot simply be conclusory." Inwood Hill Medical P.C. v Allstate Ins. Co., 3 Misc3d 1110(A) *10, 787 NYS2d 678 (Civ Ct, NY County, 2004) (citations omitted). Therefore, it has been held that

> Insurance Regulation 11 NYCRR 65-3.8(b)(4) provides: "If the specific reason for a denial of a no-fault claim, or any element thereof, is a medical examination or peer review report requested by the insurer, the insurer shall release a copy of that report to the applicant for benefits, the applicant's attorney, or the applicant's treating physician, upon the written request of any of these parties."
> This regulation implicitly permits an insurer to deny a no-fault claim on the basis either of a peer review report or a medical examination. Inasmuch as defendant denied coverage based on a detailed peer review report, there are issues of fact as to whether the services rendered were medically necessary.

Choicenet Chiropractic P.C. v. Travelers Property Casualty Corp., NYLJ, March 7, 2003, at 20, col 3 (App Term, 2d & 11th Jud Dists 2003). Therefore, unlike the case where an insurer is statutorily precluded from raising a defense of medical necessity because of an untimely disclaimer, in this action concerning an insurer's medical necessity determination the issue is one of admissibility which is not properly the subject of a declaratory judgment action. The issue of admissibility is properly raised in the trial of the individual claim at issue. See Bower &

Gardner v Evans, 60 NY2d 781, 782 (1983) ("any objections the plaintiffs may have to the application of the regulation in a particular case may be considered in the normal course in the context of that litigation").

Plaintiff argues that the decision of the Appellate Term in Jamil M. Abraham M.D. P.C. v Country-Wide Ins. Co., 3 Misc3d 130 (A), 2004 NY Slip Op 50388(U),***1 787 NYS2d 678 (App Term, 2d & 11th Jud Dists 2004) provides a sufficient basis in law for the maintenance of this action. To the contrary, this court finds that Abraham in fact demonstrates why dismissal of the complaint is appropriate. In Abraham, the Court held that the nurse peer reviews submitted by Country-Wide in that case did not constitute competent evidence sufficient to defeat the plaintiff-provider's motion for summary judgment. Id. at *2. The Court also noted that the general rule is that for purposes of medical diagnosis and treatment a nurse is a mere lay informant. Id. at *1. However, the Court noted that in spite of the general rule it was empowered to consider whether "based on their 'formal training or long observation and actual experience' the reviewers were qualified to state an expert opinion on the relevant issues." Id. Therefore, contrary to plaintiffs' argument here, the Court in Abraham found that the admissibility of nurse peer reviews should be tested under standard principles of evidentiary admissibility in each case and in applying those principles the

Court found that affidavits submitted by the reviewers were insufficient because they did not include details as to the training, observations and experience of th reviewers sufficient to establish the admissibility of their opinions. The plaintiffs here are incorrect in stating that the Court found that nurse peer reviews were per se inadmissible.

The court shall therefore grant the defendant's motion and dismiss the complaint and deny plaintiffs' cross-motions in their entirety as the proposed amendments to the complaint do not remedy the deficiencies in plaintiffs' pleading.

Accordingly, it is

ORDERED and ADJUDGED that defendant's motion to dismiss the complaint is GRANTED, the complaint is DISMISSED and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' cross-motion is DENIED.

This is the decision and order of the court.

Dated: September 26, 2005 ENTER:

DEBRA A. JAMES J.S.C.
J.S.C.