

**New York Univ. Med. Ctr. v Choudhury**

2007 NY Slip Op 32360(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0108275/2006

Judge: Judith J. Gische

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

PRESENT: **HON. JUDITH J. GISCHE**

PART 10

Justice

Index Number : 108275/2006

NYU MEDICAL CENTER

vs

CHOUDURY, NILIMA

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUL 31 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: **JUL 27 2007**

  
**HON. JUDITH J. GISCHE** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X

New York University Medical Center,

Plaintiff

-against-

Nilima Choudhury,

Defendant

-----X

Nilima Choudhury,

3<sup>rd</sup> Party Plaintiff

-against-

Horizon Health Care Services, Inc.

3<sup>rd</sup> Party Defendant

-----X

**DECISION/ORDER**

Index No.: 108275/06

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C

TP Index No.:

590954/06

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

<b>Papers</b>	<b>Numbered</b>
3PA n/m (§3211) w/CV-A affid & exh A (sep backs), exhs	1,2,3
Affid of Service of 3PA's motion	2
3PP opp w/BMD affirm, exhs	3
3PA reply w/DLP affirm	4

*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.*

This is an action by plaintiff-hospital ("NYU") to collect payment for surgery performed by a doctor at its hospital on defendant Nilima Choudhury s/h/a Nilma

Choudhury. Dr<sup>1</sup>. Choudhury has answered and commenced a third party action against her health insurance company ("Horizon") for breach of contract on the basis that it is responsible for the debt plaintiff seeks to collect from her. Within the time provided under the CPLR, Dr. Choudhury served an amended answer and amended third party complaint that Horizon now moves to dismiss. Dr. Choudhury opposes the motion. NYU has taken no position on the relief sought.

Although Horizon has not stated the specific provision within CPLR § 3211 that it is moving under, it appears to be CPLR 3211 (a) (1) and/or (a) (7) since its argument is that the plaintiff's insurance policy (documentary evidence) sets forth requirements that it claims Dr. Choudhury failed to comply with, therefore failing to state a cause of action.

On a motion to dismiss for failure to state a cause of action [CPLR § 3211 (a) (7)], the court is not required to decide whether plaintiff has pled claims on which will eventually succeed. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). Therefore, if the plaintiff asserts facts which, when accepted as true, support the causes of action it has asserted, this will defeat the motion to dismiss the complaint before issue has been joined. Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976); Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1<sup>st</sup> dept. 1997]). Where, the motion to dismiss is premised upon the existence of documentary evidence, such

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<sup>1</sup>Plaintiff is herself a medical doctor.

evidence must definitively and unequivocally dispose of plaintiff's claim. CPLR 3211 (a)(1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> dept. 1995).

The facts alleged in the complaint by plaintiff are as follows:

Plaintiff had a cochlear implant by Dr. Noel Cohen at plaintiff's hospital in New York on December 23, 2003. When she had the surgery, it had not been approved by Horizon, her health care insurance provider.

Plaintiff alleges that she obtained from her primary health care provider (PCP) a referral to a specialist in New Jersey and she went to that doctor. The doctor declined to do the surgery because it involved a cochlear implant (October 23, 2003). Plaintiff returned to her PCP. He contacted Horizon on her behalf in writing (November 3, 2003) requesting that Dr. Cohen be permitted to do the surgery because of his familiarity with the patient and her history with auditory problems, including neuromas. The PCP stated in his letter that because there was no cochlear implant center in New Jersey, permission should be granted. Not hearing back from Horizon, the PCP provided plaintiff with a written referral to Dr. Cohen. She then scheduled the surgery for December 23, 2003.

On December 20<sup>th</sup> Dr. Choudhury wrote a follow up letter to Horizon requesting a decision from the company because they had not provided her any response. Horizon wrote back to her on December 23<sup>rd</sup> - the same day she had the surgery at plaintiff's hospital - denying the request for prior authorization. The denial letter stated that Dr. Choudhury had a pre-existing condition, "sensorineural hearing loss, unspecified," and

therefore the claim was being denied because under her policy, "no benefits are available for the requested service . . . during the first 12 months of your coverage." It is undisputed that plaintiff had selected this policy in September 2003.

Horizon contends the third party action is without merit because: 1) Dr. Choudhury's surgery was by an out of network doctor, 2) plaintiff's hospital is not a network hospital, 3) Dr. Choudhury did not obtain provide a prior written referral from her PCP, and 4) she had a pre-existing condition that is not covered under the terms of her limited health insurance plan. Horizon contends further that Dr. Choudhury selected their least expensive policy in September 2003, with the least available benefits. Therefore, Horizon's claim is that Dr. Choudhury seeks to expand the benefits she is entitled to, thereby re-writing the terms of the policy. Horizon contends that it also denied the claim because Dr. Choudhury failed to comply with the express provisions of the policy because she did not provide a PCP referral for Dr. Cohen. Finally, Horizon argues that the policy must be construed according to New Jersey law, per its express terms and any estoppel claim raised by Dr. Choudhury is without merit as well.

In opposition, Dr. Choudhury states that the need for the cochlear implant arose from an acute condition that was not pre-existing. She provides the affidavits of her PCP, Dr. Cohen (who did the implant) and Dr. Loeffler who also treated her before the implant. All state that her condition was acute and not pre-existing. They also state that her hearing loss would have been profound without immediate action.

### **Discussion**

Dr. Choudhury has set forth facts that state a cause of action against Horizon. Moreover, the policy itself is not documentary evidence that unequivocally disposes of her claims. Not only has Dr. Choudhury presented facts that she went to the in-plan provider who refused to do the surgery, she then presented Horizon with an alternative for it to consider. Plaintiff's facts show a delay by Horizon, and that it ultimately denied her request for approval of a non-network provider because her condition was pre-existing. She alleges facts that the condition for which she required the implant was not pre-existing but an acute one. The court does not reach the further issue of whether the policy is construed according to New Jersey law or not because there appears to be no dispute. In any event, even under New Jersey law as Horizon represents it to be, the 3<sup>rd</sup> party complaint survives this pre-answer motion to dismiss.

Horizon's motion to dismiss the 3<sup>rd</sup> party complaint is denied. Horizon's time to answer is hereby extended to ten days after service of a copy of this order with notice of entry.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
July 27, 2007

**FILED**  
JUL 31 2007  
COUNTY NEW YORK  
So Ordered CLERK'S OFFICE  
Hon. Judith J. Gische