

Westchester Med. Ctr. v Auto One Ins. Co.

2007 NY Slip Op 33595(U)

November 1, 2007

Supreme Court, Nassau County

Docket Number: 4828-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
**WESTCHESTER MEDICAL CENTER, a/a/o
JENNIFER SUCKRA, MAGDALIA VOSS,**

TRIAL TERM PART: 50

Plaintiff,

INDEX NO.:004828/07

-against-

**MOTION DATE:8-17-07
SUBMIT DATE: 10-29-07
SEQ. NUMBER - 001**

AUTO ONE INSURANCE COMPANY,

Defendant.

-----X

The following papers have been read on this motion:

- Notice of Motion, dated 7-25-07.....1**
- Affirmation in Opposition, undated2**
- Reply Affirmation, dated 10-22-07.....3**

The motion by the plaintiff Westchester Medical Center pursuant to CPLR 3212 for summary judgment is granted as to the Second Cause of Action (Voss) in the amount of \$29,026.78 plus statutorily authorized interest, attorneys fees, costs and disbursements. Judgement to be submitted. The claim on the First Cause of Action (Suckra) has been settled.

This is an action for payment of no-fault benefits by a provider of medical services, as assignee of the covered person's claim therefor. It is undisputed that assignor Voss was a patient at plaintiff's facility from November 24 through December 12, 2006, for which the bill was \$29,026.78. Voss was also treated at plaintiff's facility for the period December 10, 2006 through December 21, 2006, for which the bill was \$115,188.06 of which \$19,919.37 was paid by defendant. Plaintiff billed for the earlier services first and then the second period of services. However, defendant paid the second bill before paying the first bill and declined the first bill on the grounds of exhaustion of benefits. Defendant does not contend that benefits were exhausted when the first bill, the one in dispute here, was received and does not offer any explanation for why the bills were paid out of order.

By way of affidavit of an account representative for the plaintiff, and associated documentation, the plaintiff has demonstrated that a billing in the amount demanded for this admission was mailed to the defendant on January 5, 2007 and received January 10, 2007. Plaintiff also presents a partial denial of claim form dated April 3, 2007, which is claimed to be untimely and, in addition, defective in that it is incomplete. It is noted that the copies submitted by plaintiff and defendant fail to contain a referenced "attached sheet".

The foregoing constitutes proof sufficient to make out a *prima facie* showing that the plaintiff is entitled to judgment as a matter of law for the balance stated, with statutory interest and attorneys' fees, as it establishes that the defendant failed either to pay the hospital bill or to issue a timely denial within 30 days of receipt of the claim. Insurance Law § 5106(a); 11 NYCRR 65-3.8(a)(1); *see, Hempstead Gen. Hosp. v Insurance Co. of N. Am.*, 208 AD2d 501

(2d Dept. 1994). The burden thus shifts to defendant to demonstrate that issues of fact exist with regard to plaintiff's right to the relief sought in its complaint. *See generally, Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The defendant has failed to meet its burden.

Defendant's submission alleges in conclusory form that the policy limits have been exhausted but defendant's representative fails to state what the limits are and that they were exhausted at the time that the bill in this action was received. Although defendant's attorney states that the policy limits aggregate \$80,000 (of which \$50,000 is basic economic loss) counsel does not state the source of this knowledge and does not offer any competent documentary evidence in support. An attorney's affirmation that is not based upon personal knowledge, is of no probative value or evidentiary significance. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 (2d Dept. 2006).

Defendant is correct in stating that an insurer is not required to pay a claim where policy limits have been exhausted however, to defeat a motion for summary judgment, the insurer must demonstrate that issues of fact exist as to whether the policy limits have been exceeded. *Mount Sinai Hospital v. Zurich American Insurance Company*, 15 AD3d 550 (2d Dept. 2005). Such evidence must also demonstrate that the payments which led to the depletion of policy benefits were in compliance with 11 NYCRR §65-3.15, "Computation of basic economic loss." *New York and Presbyterian Hospital v. Allstate Insurance Company*, 12 AD3d 579 (2d Dept. 2004); *cf. New York and Presbyterian Hospital v. Allstate Insurance Company*, 28 AD3d 528 (2d Dept. 2006) and *Hospital For Joint Diseases v. State Farm Mutual Automobile Insurance Company*, 8 AD3d 533 (2d Dept. 2004).

Defendant does not claim that at the time the subject bill was tendered, policy limits had been exhausted and they could not have been because defendant paid a portion of the second bill after the first bill had been received. Defendant argues that there has been no prejudice because plaintiff has in any event received all that it could have received. However defendant does not explain or offer compliance with 11 NYCRR§65-3.15 which provides “when claims aggregate to more than \$50,000, payments for basic economic loss shall be made.... in the order in which each service was rendered or each expense was incurred.” The Court is not authorized to gloss over these regulatory requirements or to make the assumption that there are no adverse consequences as a result of not adhering to the regulation.

Hence, defendant was required to show more than the mere exhaustion of benefits in order to take refuge in the regulatory safe harbor. *See Nyack Hospital v. General Motors Acceptance Corp.*, 8 NY3d 298 (2007). In sum, when, as here, competing bills are outstanding and policy limits have been or will be exhausted, the insurer must defer to the regulatory default mechanism in order to determine priority and defendant has failed to do so or to explain such failure.

Based on the foregoing, defendant has failed to establish a question of fact so as to deny summary judgment.


Defendant has alternatively argued that if required to pay the bill here in question, it should receive a credit for the portion paid on the later bill. This issue has not been addressed on the merits since it is not the subject of any cross motion, has not been pleaded as a defense

and as noted above, no explanation has been offered from which the Court could make a reasoned determination of the contention.

This shall constitute the Decision and Order of this Court.

DATED: November 1, 2007

ENTER


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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