Westchester Med. Ctr. v Allstate Ins. Co.

2007 NY Slip Op 33739(U)

November 13, 2007

Supreme Court, Nassau County

Docket Number: 0927-07/

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

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Present: HON. WILLIAM R. LaMARCA
Justice

WESTCHESTER MEDICAL CENTER, a/a/o DYANA BERGMANN; THE MOUNT VERNON HOSPITAL, a/a/o JACK WHITAKER; LAWRENCE HOSPITAL CENTER, a/a/o EUGENE SULLIVAN,

Plaintiffs,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

Motion Sequence # 001, # 2
Submitted August 2, 2007

INDEX NO: 927/07

The following papers were read on these motions:

Notice of Motion.....1
Notice of Cross-Motion.....2
Memorandum of Law in Support of Cross-Motion.....3
Reply and in Opposition to Cross-Motion.....4
Reply Memorandum of Law in Support of Cross-Motion.....5

Initially, the Court notes that the first cause of action with respect to plaintiff, WESTCHESTER MEDICAL CENTER a/a/o DYANA BERGMANN v. ALLSTATE INSURANCE COMPANY (hereinafter referred to as "ALLSTATE"), has been withdrawn, and the second cause of action with respect to plaintiff, THE MOUNT VERNON HOSPITAL a/a/o JACK WHITAKER v. ALLSTATE has been settled. The instant motion

concerns the third cause of action, LAWRENCE HOSPITAL CENTER a/a/o EUGENE SULLIVAN (hereinafter referred to as"LAWRENCE") v. ALLSTATE, in which plaintiff seeks an order, pursuant to CPLR §3212, granting summary judgment against defendant, in the sum of $3,044.54, plus statutory no-fault interest from June 30, 2006, attorney fees pursuant to 11 NYCRR 65-4.6(e), together with the costs and disbursements of this action. Defendant, ALLSTATE, opposes the motion and cross-moves for summary judgment dismissing the complaint of LAWRENCE on the ground that the injuries sought to be reimbursed did not arise out of the use or operation of a motor vehicle. The motion and cross-motion are determined as follows:

Plaintiff, LAWRENCE is the assignee for health services rendered to EUGENE SULLIVAN during the period from May 29, 2005 through June 1, 2005, allegedly arising out of an automobile accident that occurred on May 29, 2005. Plaintiff claims that it billed ALLSTATE with a Hospital Facility Form (Form N-F5) and a UB-92 on May 25, 2006, in the sum of $3044.54, which was received by ALLSTATE and signed for on May 30, 2006. It is plaintiff's position that ALLSTATE has either failed to pay the hospital bill or to issue a Denial of Claim Form and that it is entitled to summary judgment.

In opposition to the motion and in support of its cross-motion, counsel for ALLSTATE asserts that is entitled to summary judgment because the injuries allegedly sustained by plaintiff's assignor were unrelated to the underlying motor vehicle accident and, thus, did not arise from an insured incident. It is ALLSTATE's position that the assignor is not eligible to recover no-fault benefits. Counsel points out that diagnosis codes on the submitted bill reflect that Mr. Sullivan was admitted to the hospital due to loss of consciousness resulting form insufficient blood flow to the brain, cardiac dysrythmias

and rheumatoid arthritis, and that the portion of the bill where the source of the injuries and the procedures is to be recorded has been left blank. Counsel urges that the diagnosis and procedure codes and the meaning thereof are admissible under the common-law public document exception to the hearsay rule and, at a minimum, triable questions of fact have been raised that preclude granting summary judgment to LAWRENCE. Moreover, counsel for ALLSTATE asserts that, since the alleged injuries did not arise from an insured accident, ALLSTATE was not obligated to deny the claim within the prescribed 30-day period. In its Memorandum of Law, ALLSTATE contends that the defense of non-coverage is never waived through failure to assert same in a disclaimer, citing *Central General Hospital v Chubb Group of Insurance Companies*, 90 NY2d 199, 659 NYS2d 248, 681 NE2d 415, (C.A. 1997), *Schiff Associates Inc. v Flack*, 51 NY2d 692, 435 NYS2d 972, 417 NE2d 84 (C.A. 1980), *St. Luke's Roosevelt Hospital v Allstate* Insurance Company, 303 AD2d 743, 757 NYS2d 457 (2nd Dept. 2003). Counsel argues that said cases are grounded in the fundamental principal of insurance law that insurance cannot be created where none exists. *Cf.*, *Metro Medical Diagnostics, PC v Eagle Insurance Company*, 293 AD2d 751, 741 NYS2d 284 (2nd Dept. 2002); *State Farm Mutual Automobile Insurance Company v Laguerre,* 305 AD2d 490,759 NYS2d 531 (2nd Dept. 2003).

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488,

594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

After a careful reading of the submissions herein, it is the judgment of the Court that neither party has demonstrated that it is entitled to judgment, as a matter of law. ALLSTATE has raised issues of fact as to whether the injuries arose from the operation or use of the insured motor vehicle. The Court finds that the evidence presented raises issues of fact that require a trial and that an order granting summary judgment to either party is not warranted. Accordingly, it is hereby

ORDERED, that LAWRENCE's motion for summary judgment is denied; and it is further

ORDERED, that ALLSTATE's cross-motion for summary judgment is denied; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on December 18, 2007, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 13, 2007

WILLIAM R. LaMARCA, J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE

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