

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

2007 NY Slip Op 34134(U)

December 11, 2007

Supreme Court, Nassau County

Docket Number: 9889-06/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack**  
**Acting Justice of the Supreme Court**

\_\_\_\_\_x

WESTCHESTER MEDICAL CENTER, a/a/o  
MERCEDES DIAZ; NEW YORK UNIVERSITY  
HOSPITAL RUSK INSTITUTE, a/a/o MAYVA  
OCASIO; ST. VINCENT'S HOSPITAL OF  
RICHMOND, a/a/o JOSEPH BRIGGS,

Index No. 019899/06

Plaintiff(s),

Motion Seq. No.: 001 +002  
Motion Submitted: 10/1/07

-against-

AUTO ONE INSURANCE COMPANY,

Defendant(s).

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion for Summary Judgment/Supporting Exhibits.....X
- Notice of Cross Motion to Dismiss/Supporting Exhibits.....X
- Reply Affirmation.....X

Motion pursuant to CPLR §3212 by plaintiff New York University Hospital Rusk Institute, et. al., for summary judgment. Defendant Auto One Insurance cross moves for summary judgment dismissing the second and third causes of action in the complaint. The motions are decided as hereinafter provided.

**New York University Hospital Rusk Institute A/a/o Mayva Ocasio Action**

Mayva Ocasio was treated at New York University Hospital Rusk Institute from July 14, 2006 through July 16, 2006 for injuries arising out of a automobile accident that

occurred on July 14, 2006. New York University Hospital is the no-fault benefits assignee for health services rendered to Mayva Ocasio. Plaintiff hospital billed defendant Auto One on August 14, 2006 for \$15,183.81 by first class and certified mail which was received by the defendant on August 16, 2006. On September 8, 2006 a request for further verification was mailed by the defendant to the plaintiff hospital requesting complete hospital records. The records were received by defendant on October 3, 2006 and a check was forwarded in the amount of \$3,860.94 to plaintiff on October 6, 2006. Defendant claims that plaintiff is only entitled to \$3,880.94, not the \$5,183.11 billed, claiming that plaintiff billed under the DRG Code for the Hospital for Joint Diseases, not New York University Hospital. The amount payable under the DRG Code for New York University Hospital is \$3,860.94. In its reply papers, plaintiff claims that the defendant's failure to issue a denial of claim form precludes it from raising a defense that the DRG rate was incorrect and, in any event, the defendant is wrong as they computed payment using DRG Code for the New York University Hospital Tish Institute (\$3,860.94) and not the News York Hospital University Hospital Rusk Institute (\$5, 183.81). (See, Plaintiff's Exhibit 1 and 2 to Motion for Summary Judgment and Plaintiff's Exhibit 1 in Reply Affirmation; See also Defendant's Exhibit D to Notice of Cross Motion).

An insurance carrier's failure to deny a claim within thirty (30) calendar days is generally precluded from asserting a defense against payment of the claim. (See, Insurance Law §5106(a); 11 NYCRR 65-3.8 ( c); Presbyterian Hospital in City of N.Y. v.

Maryland Cas. Co. 90 NY 2d 274 [1997]). If an insurer seeks additional verification, however, the thirty (30) day window is tolled until it receives the relevant information requested. (See, 11 NYRCC 65-3.8 (a)(11)). Further, case law consistently holds that a carrier's failure to seek verification or object to the adequacy of claim forms pursuant to 11 NYCRR 65-3.5 precludes it from interposing any defenses based on such deficiencies. (Hospital for Joint Diseases v. Travelers Property Casualty Ins. Co., 2007 WL 4104143, 2007 N.Y. Slip. Op. 09067 [Nov. 20, 2007]; Westchester Medical Center v. Safeco Ins. Co. of America, 40 AD 2d 984 [2d Dept. 2007]). Here, defendant failed to timely deny or object to plaintiff claim or the DRG Code used in its form even after the verification was provided. (Fair Price Medical Supply Corp. V. Travelers Indemnity Co., 42 AD 3d 277 [2d Dept. 2007]). Further, based upon the proofs submitted by plaintiff, it appears to this Court's satisfaction that the amount and codes employed in the billing form corresponds to the correct medical provider. Accordingly, plaintiff motion for summary judgment as to this claim is granted in all respects.

St. Vincents Hospital of Richmond a/a/o Joseph Briggs

Plaintiff hospital is the assignee for no-fault medical services rendered to Joseph Briggs for treatment rendered from July 15, 2006 to July 17, 2006 as a result of an auto accident that occurred on July 14, 2006. Plaintiff hospital billed defendant insurance carrier on October 4, 2006 using a Form N-F5 and UB-92 in the amount of \$3,274.20. This bill was received by defendant on October 6, 2006. The defendant denied this bill

on December 12, 2006 and on February 28, 2007 claiming fraud was committed by Briggs. The denial of claim form states, "injuries are not casually related to the loss of July 14, 2006. A statement taken from Joseph Briggs on November 4, 2006 verified injuries sustained are related to the accident of July 15, 2006. Therefore, all no fault benefits are denied." (Defendant's Exhibit F). Defendant claims that in a sworn statement, the assignor, Joseph Briggs, stated he was in a low impact rear-end collision on July 14, 2006 with another vehicle wherein he was transported to the hospital and release a short time later. The following day, July 15, 2006, Briggs was alleged to be in a more serious accident when he crashed into a tree after falling asleep at the wheel sustaining more serious injuries for which he failed to notify the defendant carrier and attributed the subsequent medical treatment to the July 14, 2006 accident in order to "bulk up his personal injury lawsuit" (Defendant's Affirmation, p.6, par. 8) The defendant carrier disclaimed no-fault coverage based on Brigg's alleged fraudulent concealment of the second accident and while attributing his injuries to the first accident.

As stated previously, an insurer's failure to pay or deny a claim within thirty (30) days will generally result in the insurer being precluded from asserting a defense against payment of the claim (Presbyterian Hospital in City of New York, supra). There is, however, a recognized narrow exception to this preclusion remedy for situations where an insurance company raises a defense of lack of coverage (See, Central General Hospital v. Chubb Group of Ins. Cos., 90 NY 2d 195 [1997]). In those instances, an

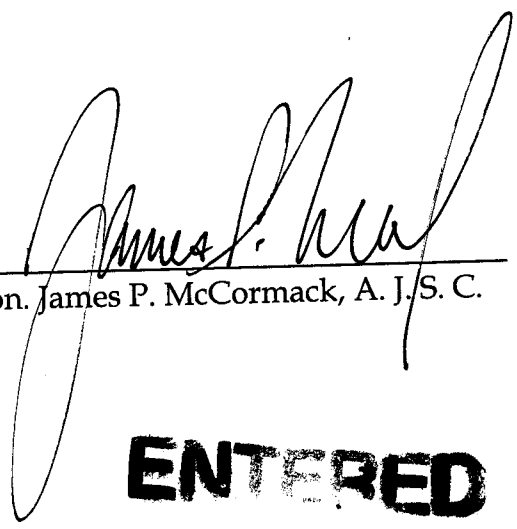
insurer who fails to issue a timely disclaimer is not prohibited from later raising the defense because “the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create a coverage where it never existed.” (Matter of Westchester Ins. Co. v. Bettenhauser, 95 NY 2d 185 [2000]). Here, there is no dispute that there existed coverage for Briggs whether for injuries sustained in the accident on July 14, 2006 or July 15, 2006. In this Court’s view, the fact that Briggs may have misrepresented or failed to notify the defendant of his subsequent accident one day later, does not implicate a lack of coverage warranting exemption from the preclusion rule. (Hospital for Joint Diseases v. Travelers Property Casualty Ins. Co., supra). Indeed, in the defendant’s denial of claim form, the word “fraud” is absent and states simply that the injuries for which treatment was billed was “not casually related to the loss of July 14, 2006.” As the denial was well beyond the thirty (30) days of receipt of the NF-5 and UB-92 forms, defendant insurance carrier is precluded from interposing a defense. (See, Insurance Law §5106(a); Fair Price Medical Supply Corp. V. Travelers Indemnity Co., supra at 282-284, Nyack Hospital v. State Farm Mutual Auto Ins. Co. 11 AD 3d 664 [2d Dept. 2004]). Accordingly, as to this third cause of action, plaintiff motion for summary judgment is granted in all respects and defendant’s cross motion to dismiss is denied.

In conclusion, plaintiff’s motion for summary judgment on the second cause of action in the sum of \$1,322.87 and the sum of \$3,274.20 on the third cause of action plus

statutory interest and attorneys fees pursuant to 11 NY CRR 65-4.6(e) on both causes of action is granted. Submit judgment on notice.

This constitutes the Decision and Order of the Court.

Dated: December 11, 2007  
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

**ENTERED**  
DEC 16 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE