

**Westchester Med. Ctr. v USAA Cas.  
Ins. Co.**

2007 NY Slip Op 34231(U)

December 13, 2007

Supreme Court, Nassau County

Docket Number: 4835-07/

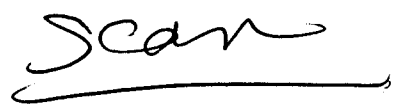
Judge: William R. LaMarca

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**SHORT FORM ORDER**

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



**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**WESTCHESTER MEDICAL CENTER a/a/o  
CASEY DECKER, KRISTA BOTTINI,  
HUNTER CONRAD SAWYER; NEW YORK  
UNIVERSITY HOSPITAL TISCH INSTITUTE  
a/a/o DORIS MILMAN,**

**Motion Sequence # 001  
Submitted September 10, 2007**

**Plaintiff,**

**-against-**

**INDEX NO: 4835/07**

**USAA CASUALTY INSURANCE COMPANY,**

**Defendant.**

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**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

Initially, the Court notes that the first and second causes of action with respect to plaintiff, WESTCHESTER MEDICAL CENTER a/a/o CASEY DECKER and KRISTA BOTTINI v. USAA CASUALTY INSURANCE COMPANY hereinafter referred to as "USAA"), have been settled. The instant motion concerns the third and fourth causes of action, WESTCHESTER MEDICAL CENTER (hereinafter referred to as "WESTCHESTER) a/a/o HUNTER CONRAD SAWYER v. USSA and NEW YORK UNIVERSITY HOSPITAL

TISCH INSTITUTE a/a/o DORIS MILMAN (hereinafter referred to as "NYU") v. USSA, in which plaintiffs seek an order, pursuant to CPLR §3212, granting summary judgment against defendant, USSA, on the ground that the payment of no-fault benefits are overdue. Defendant, USSA, opposes the motion, which is determined as follows:

As to WESTCHESTER, a/a/o HUNTER CONRAD SAWYER

Plaintiff, WESTCHESTER, is the assignee for health services rendered to HUNTER CONRAD SAWYER during the period from January 15, 2006 through January 17, 2006, arising out of an automobile accident that occurred on January 15, 2006. Plaintiff claims that it billed USAA with a Hospital Facility Form (Form N-F5) and a UB-92 on January 26, 2006 in the sum of \$6,109.53, and that USAA paid the sum of \$5,984.68 on February 23, 2006. Plaintiff states that on July 31, 2006, it billed USAA with an amended corrected Diagnosis Related Grouping (DRG) rate Hospital Facility Form (Form N-F5) and a UB-92 for payment of the hospital bill in the sum of \$6,866.30, and that the balance due is \$881.62. Plaintiff claims that it mailed the amended bill by Certified Mail, Return Receipt Requested, which was received by USAA on August 2, 2006. It is plaintiff's position that USAA has either failed to pay the full hospital bill or to issue a Denial of Claim Form and that its partial payment of the hospital bill was untimely. Counsel asserts that plaintiff is entitled to summary judgment on the third cause of action.

In opposition to the motion, counsel for USAA submits the affidavit of Elisa Lazarus, Vice-President of Auto Injury Solutions (AIS), responsible for auditing bills submitted by medical providers for treatment rendered, together with relevant documents, which counsel states reflects that the July 31, 2006 re-bill was timely denied in an August 2, 2006 NF-10 Form because plaintiff's DRG computation is different from the defendants. Counsel

states that questions of fact remain as to which DRG rate is appropriate and that summary judgment should be denied.

As to NYU a/a/o DORIS MILMAN

Plaintiff, NYU, is the assignee for health services rendered to DORIS MILMAN during the period from December 24, 2004 through January 7, 2005, arising out of an automobile accident that occurred on December 24, 2004. Plaintiff claims that it billed USAA with a Hospital Facility Form (Form N-F5) and a UB-92, on September 20, 2005, in the sum of \$26,290.52, by Certified Mail, Return Receipt Requested, which was received by USSA on September 26, 2005. Plaintiff states that USAA paid \$1,380.34 on October 19, 2005, and \$23,638.08 on December 21, 2006, for a total of \$25,018.42, leaving a balance of \$1,272.10. It is plaintiff's position that USAA has either failed to pay the full hospital bill or to issue a Denial of Claim Form and that its partial payment of the hospital bill was untimely. Counsel asserts that plaintiff is entitled to summary judgment on the fourth cause of action.

In opposition to the motion, counsel for USAA submits the affidavit of Elisa Lazarus, Vice-President of Auto Injury Solutions ( AIS), responsible for auditing bills submitted by medical providers for treatment rendered, together with relevant documents, which counsel states reflects that the September 20, 2005 bill was timely denied in an October 14, 2005 NF-10 Form because plaintiff's DRG computation is different from the defendants. Counsel states that questions of fact remain as to the appropriate DRG rate and that summary judgment should be denied.

### The Law

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 [2<sup>nd</sup> Dept. 2001]). Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept. 1988]).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs have not demonstrated that they are entitled to judgment, as a matter of law. USAA has raised issues of fact with respect to the DRG rate to be applied to these matters and what sums, if any, are outstanding of the submitted hospital bills. Accordingly, it is hereby

**ORDERED**, that WESTCHESTER and NYU's motion for summary judgment is denied; and it is further

**ORDERED**, that the parties shall appear for a Preliminary Conference on January 15, 2008, 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: December 13, 2007

WILLIAM R. LaMARCA

**ENTERED**

DEC 20 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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