SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 48**

HOSPITAL FOR JOINT DISEASES/ a/a/o SANDRA DEGROAT; THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, a/a/o HYUN LEE,

Plaintiff,

-against-

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Defendants.

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INDEX NO.: 007661/07

MOTION DATE:11-28-07
SUBMIT DATE:1-15-08
SEQ. NUMBER - 001

MOTION DATE:12-18-07
SUBMIT DATE: 1-15-08
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 11-1-07.....1
Notice of Cross Motion, dated 12-5-07.....2
Reply and Opposition to Cross Motion, dated 12-12-07...3
Reply Affirmation, dated 12-31-07.....4

As to the First Cause of action on behalf of Degroat, the motion by the plaintiff Hospital for Joint Diseases (HJD) pursuant to CPLR §3212 for summary judgment is denied. The cross motion by the defendant New York Central Mutual Fire Insurance Company (NYC) pursuant to CPLR §3212 for summary judgment is also denied.

As to the Second Cause of action on behalf of Lee the motion by plaintiff The New York Hospital Medical Center of Queens (NYH) pursuant to CPLR §3212 for summary judgment is denied. The cross motion by defendant NYC pursuant to CPLR §3212 for summary judgment is granted and the Second Cause of Action is dismissed.

As to the First Cause of Action

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 Sandra Degroat was a patient at plaintiff's facility from January 29 through January 31, 2007. By way of affidavit of an account representative for the plaintiff HJD and associated documentation, plaintiff HJD has demonstrated that a billing in the amount of $9,874.69 for this admission was mailed to the defendant on February 20, 2007, received February 22, 2007 and not paid.

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 NYC 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).

In response, however, the defendant has presented evidence demonstrating that issues of fact exist precluding judgment in plaintiff's favor. By way of affidavit of a no-fault claims representative employed by NYC and associated documentation, the defendant has met its burden.

On February 27, 2007, a written statement was sent to HJD requesting verification records and upon non-receipt thereof, a second request was made. The request for verification therefore tolled the 30-day period to pay or deny the claim until the records were received. 11 NYCRR 65-3.5(a),(b); 65-3.8; *see, New York & Presbyt. Hosp. v Progressive Cas. Ins. Co.,* 5 AD3d 568 (2d Dept. 2004).

Here, the timely notice of denial of benefits explicitly states that the policy limits have been exhausted. Accordingly, an issue of fact exists as to the basis for the denial which has not been addressed or explained by plaintiff HJD.

NYC argues further that the claim should be dismissed because the policy limits have been exhausted. However, NYC has not offered proof sufficient to establish its right to this relief. The Court finds that the NYC documentary proof is sufficient to raise an issue of fact as to the defense of policy exhaustion because the denial form paragraph 33 on page 2 of 4 (Form NF 1035) clearly states that policy limits have been exhausted. Although referenced in the plaintiff's reply, plaintiff has not submitted the Denial of Claim Form. However, at this juncture, absent specific documentary proof showing payment history, and where neither party has had the opportunity to conduct discovery on the exhaustion of benefits issue, the case is not ripe for summary judgment. See *Betz v. N.Y.C. Premier Properties, Inc.*, 38

AD3d 815 (2d Dept. 2007). *Cf New York and Presby. Hosp. v Allstate Ins. Co.*, 28 AD3d 528 (2d Dept. 2006). Hence, both the motion and the cross motion for summary judgment are denied.

As to the Second Cause of Action

Plaintiff has failed to make a prima facie showing of entitlement to relief because plaintiff's submission on its face demonstrates that the claim was submitted more than 45 days after the services were rendered. 11 NYCRR §65-1.1. Thus it would not be necessary to consider defendant's submission for a mere denial of plaintiff's motion. *Warrington v. Ryder Truck Rental*, 35 AD3d 55 (2d Dept. 2006).

However, defendant has made a prima facie showing of entitlement to relief by submitting a denial of claim form that has been timely rendered, which specifically invokes 11 NYCRR §65-1.1(d) and which also complies with 11 NYCRR §65-3.3(e). The latter provides in substance that when an insurer denies a claim based upon the failure to provide timely notice of claim or submission of proof thereof, such denial must advise the applicant that late notice will be excused where the applicant can provide reasonable justification of the failure to give timely notice. Although not addressed by either side, defendant's denial of claim form explicitly advises plaintiff of its right to submit written proof of justification for the failure to comply with the 45 day time limitation. *Cf SZ Medical P.C. v. Country-Wide Insurance Company*, 12 Misc. 3d 52, 55 (App. Term 2d Dept. 2006).

Plaintiff has failed to offer any justification for its failure to make a timely claim preferring to argue that defendant failed to use a proper denial form, that defendant failed to

set forth lack of timeliness as a reason and that plaintiff does not have a record of receiving the denial. This latter argument being offered by plaintiff's counsel who does not espouse any knowledge of the facts. *Feratovic v. Lun Wah, Inc.*, 284 AD2d 368 (3d Dept. 2001).

In any event, these arguments are without merit because the denial form clearly contains the reasons therefore and is on an officially promulgated form. *See Nyack Hospital v. State Farm Mut. Auto Ins. Co.*, 11 AD3 644 (2d Dept. 2004). Moreover, although disputed, the affidavit of defendant's employee contains sufficient facts to establish the presumption of mailing and receipt of the denial of claim and that presumption has not been rebutted by the conclusory denials of plaintiff's counsel *Westchester Medical Center v. Liberty Mutual Insurance Company*, 40 AD3d 981 (2d Dept. 2007), *Li v. Xu*, 38 AD3d 731 (2d Dept. 2007).

The Court has not considered plaintiff's sur-reply because it was served without leave of the Court, CPLR §2214 and *Traders Co. v. AST Sportswear, Inc.* 31 AD3d 276 (1st Dept. 2006).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 28, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JAN 30 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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