Sum

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

MARY IMMACULATE HOSPITAL CARITAS HEALTH CARE, a/a/o ANTIONETTE PISACANE, ISAIAH WALLACE, LATOYA FULLER,

Plaintiff,

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendants.

TRIAL TERM PART: 48

INDEX NO.: 016185/07

MOTION DATE:12-12-07
SUBMIT DATE: 1-29-08
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 11-16-07.....1
Affirmation in Opposition, dated 1-22-08.....2
Reply Affirmation, dated 1-23-08.....3

This is plaintiffs' motion for summary judgment pursuant to CPLR §3212.

Plaintiffs provided first-party no-fault benefits to persons covered by policies of insurance issued by defendant.

Plaintiff has withdrawn its cause of action on the First Cause of Action on behalf of Antoinette Pisacane.

The Second Cause of Action is for statutory interest and attorney's fees based on late payment. Defendant does not dispute that the examination under oath of the injured party was on September 17, 2007, meaning that payment was due within 30 days and that payment was sent on October 29, 2007. Hence, summary judgment is appropriate for the statutory interest if any is still due and legal fees demanded by the complaint. 11 NYCRR §65-3.10(a).

The Third Cause of Action is based upon the claim of Latoya Fuller who was treated between February 3 and 8, 2007 and billed on July 2, 2007. Defendant did not pay or deny this bill because it claims that it had reasonable cause to believe that the treatment by plaintiff was the result of an intentional act. In support of this contention, defendant relies on an entry in its computer records which states that GEICO's insured told defendant that there was an altercation involving the "PH" (no definition is given of PH) and other females. "Someone opened her door while the vehicle was moving and tried to hit her with something". "She was in an altercation with a group of females".

Defendant also relies on an entry in Fuller's emergency room record which states "pt was standing holding car door - had altercation with driver - reversed, then took off, pt hit by car door fell forward".

Summary judgment is the procedural equivalent of a trial. *S.J. Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of face exist. *Matter of Suffolk Cty Dept of Social Services v James M.*, 83 NY2d 178, 182 (1994). The proponent

must make a *prima facie* showing of entitlement to judgment as a matter of law. *Guiffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In an action for no-fault payments the plaintiff makes a *prima facie* showing of entitlement to judgment by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received, and that payment of the No-Fault benefits was overdue. Insurance Law 5106(a); *Westchester Medical Center v AIG, Inc.*, 36 AD3d 900 (2nd Dept. 2007). On this motion plaintiffs argue that they have presented a *prima facie* case for payment of no-fault benefits for services rendered to Fuller. They have submitted the requisite billing forms, certified mail receipts, signed return receipt cards, and an affidavit from a billing person stating that she personally mailed the claims. There is no dispute that Geico failed to pay or deny the claims within 30 days. On this record the Court finds that plaintiffs have presented a *prima facie* case.

In opposition Geico relies upon its affirmative defense that the incident which caused the injury was not covered by its policy because it was intentional.

Pursuant to Insurance Law 5106(a), no-fault benefits are overdue if not paid by the insurer within 30 days after submission of proof of loss. *See also*, 11 NYCRR 65-3.8, formerly 11 NYCRR 65.15(g)(3). The insurer is precluded from asserting any defenses to

payment when it fails to deny the claim within the required 30-day period. *Presbyterian Hosp. in the City of New York v Maryland Casualty Co.*, 90 NY2d 274, 278 (1997). A narrow exception to this preclusion rule is recognized for situations where the insurer raises a defense of lack of coverage. *Central General Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 198 (1997).

A defense premised on lack of coverage has been found not subject to the rigorous 30-day rule because there was, in fact, no "accident." *See, Matter of Allstate Ins. Co v Massre,* 14 AD3d 610 (2nd Dept. 2005); *State Farm Mutual Automobile Ins. Co. v Laguerre*, 305 AD2d 490 (2nd Dept. 2003); *Metro Medical Diagnostics, P.C. v Eagle Ins. Co.*, 293 AD2d 751 (2nd Dept. 2002); *see also, VA Acutherapy Acupuncture, P.C. v State Farm Ins. Co.*, 16 Misc 3d 126(A)(App Term, 2nd &11th Jud Dists 2007) and *Vista Surgical Supplies Inc v State Farm Ins. Co.*, 14 Misc 3d 135(A)(App Term, 2nd & 11th Jud Dists 2007).

To avail itself of the benefit of this noncoverage, the insurance carrier must demonstrate that an issue exists as to whether there was any coverage at all.

In this case, even assuming that the defense of lack of coverage is available despite lack of denial of the claim, the defendant is not relieved of its burden of demonstrating the existence of triable issues of fact. This defendant has failed to do.

The two documents relied upon by defendant are not sufficient to raise a question of fact.

The cryptic and virtually unintelligible entry of the defendant's conversation with the owner of the vehicle is inadmissible hearsay. It is not a business record because the source of the information was under no business duty convey her knowledge CPLR §4518(a)

Hochhauser v. Electric Ins. Co., 46 AD3d 174 (2d Dept. 2007), and it does not constitute an admission because the informant is not a party to this action. Prince-Richardson on Evidence §8-201 (11th Edition 1995).

The emergency room record also fails to establish an issue of fact. The entry does not disclose the source of the information and is not relevant to diagnosis or treatment *Berrios v. TEG Management Corp.*, 35 AD3d 775 (2d Dept. 2006); *Passino v. DeRosa*, 199 AD2d 1017 (4th Dept. 1993), *Gunn v. City of New York*, 104 AD2d 848 (2d Dept. 1984); *Cf People v. White,* 306 AD2d 886 (4th Dept. 2003).

Hence although a noncovered event may be proffered as a defense, in this summary judgment motion defendant has failed to come forward with any competent evidence to support its contention and thus the motion is granted.

Based on the foregoing the First Cause of Action is withdrawn, judgment is granted in favor of the plaintiff for legal fees and interest, if any, as to the Second Cause of Action (Wallace) and summary judgment is granted as to the Third Cause of Action (Fuller).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 25, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Joseph Henig, P.C.
Attorney for Plaintiff
1598 Bellmore Avenue
P.O. Box 1144
Bellmore, NY 11710

Law Office of Teresa M. Spina
Attorney for Defendant
170 Froehlich Farm Boulevard
Woodbury, NY 11797