Westchester Med. Ctr. v One Beacon Ins. Co.

2008 NY Slip Op 33278(U)

December 1, 2008

Supreme Court, Nassau County

Docket Number: 014141/08

Judge: Daniel R. Palmieri

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

scan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

---x TRIAL TERM PART: 48

WESTCHESTER MEDICAL CENTER,
a/a/o EFROSENE BEGETIS,

INDEX NO.: 014141/08

Plaintiff,

MOTION DATE:10-6-08
SUBMIT DATE:11-24-08
SEQ. NUMBER - 001

-against-

ONE BEACON INSURANCE COMPANY,

MOTION DATE: 11-24-08
SUBMIT DATE: 11-14-08
SEQ. NUMBER - 002

Defendant.

---x

The following papers have been read on this motion:

Notice of Motion, dated 9-8-08..1
Notice of Cross Motion, dated 11-3-08.................................2
Reply and Opposition to Cross Motion, dated 11-14-08.......3
Reply Affirmation, dated 11-21-08......................................4

These are plaintiff's motion and defendant's cross motion both for summary judgment pursuant to CPLR §3212. The motions are denied.

Plaintiff provided first-party no-fault benefits to a person covered by a policy of insurance issued by defendant.

Plaintiff treated the insured between September 11, 2007 and October 4, 2007 and billed on November 2, 2007. Defendant did not pay or deny the bill because it claims that

it had reasonable cause to believe that the accidents and later treatment by plaintiff were the result of intoxication and thus excluded from coverage. Ins. Law §5103(b)(2), 11 NYCRR 6-3.8(g). The regulation provides that "if an insurer has reason to believe that the applicant was operating a motor vehicle while intoxicated or impaired and such intoxication or impairment was a contributing cause of the automobile accident, the insurer shall be entitled to all available information relating to the applicant's condition at the time of the accident. The statute provides that an insurer may exclude from coverage a person who is injured as a result of operating a motor vehicle while intoxicated or impaired within the meaning of the VTL §1192.

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 fact 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 plaintiff argues that it has presented a *prima facie* case for payment of no-fault benefits for services rendered. Plaintiff has submitted the requisite billing forms, certified mail receipts, signed return receipt cards, and an affidavit from a billing person stating that she/he personally mailed the claims. There is no dispute that defendant failed to pay or deny the claims within 30 days. On this record the Court finds that plaintiff has presented a *prima facie* case.

In opposition defendant relies upon its affirmative defense that the incident which caused the injuries were excluded from coverage because the injured party was intoxicated and injured as a result of such condition.

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. 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). However, intoxication has been held to constitute an exclusion from coverage rather than no coverage thus requiring an insurer to deny or pay the claim or make avail of the regulations which address the exclusion and extend the time within which to pay or deny the claim. *Presbyterian Hospital in the City of New York v. Maryland Casualty Co.*, 90 NY2d 274

(1997).

A variation of the requirement that an insurer must either deny or pay a claim exists with respect to persons injured when believed to have been operating their vehicle while intoxicated. If an insurer has reason to believe that alcohol consumption was a contributing factor in causing the accident, the insurer is entitled to all available information relating to the applicant's condition at the time of the accident 22 NYCRR §65-3.8(g) and proof of claim shall not be completed until information, which has been requested pursuant to subdivision 65-8.5(a) or (b), has been furnished to the insurer by the applicant or the authorized representative. Regulation §65-3.5(c) provides that an insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification is requested. This latter section does not confine or require the insurer to seek information solely from the provider but rather contemplates that verification information may be sought from any source.

In sum, intoxication may operate as an exclusion from coverage rather than as a non-covered event , thus requiring either timely payment or denial or in lieu thereof, timely requests for verification. A provider establishes a *prima facie* case for summary judgment by showing proper billing, mailing and lack of payment but an insurer may demonstrate the existence of triable factual issues by showing that it made timely requests for verification regarding alleged intoxication that were not answered. *Westchester Med. v. Allstate Ins. Co.*, 53 Ad3d 481 (2d Dept. 2008); *Westchester Med. v. State Farm Mut. Auto*., 44 AD3d 750 (2d Dept. 2007).

The insurer has raised questions of fact sufficient to deny summary judgment to plaintiff by showing that it had reason to believe that intoxication was a contributing cause of the accident causing injury and made timely requests for verification (including follow-up requests) from plaintiff and the police.

The incident was a one car accident, the driver was charged with driving while intoxicated and the affirmed supporting deposition of the laboratory technician contains information that the blood alcohol level was 0.19%, a level sufficient to fall within the scope of the statute.

A dispute over whether a toxicology report was ever sent has been held to create a question of fact so as to bar summary judgment, *Westchester Medical Center v. Allstate Insurance Company*, *supra*; *Westchester Medical Center v. progressive Casualty Insurance Co.*, 51 AD3d 1012 (2d Dept. 2008); *cf Nyack Hospital v. State Farm Mut. Ins. Co.*, 19 AD3d 569 (2d Dept. 2005).

There is no factual dispute here as to plaintiff's compliance with the request for verification as to the possible intoxication condition of the insured. Plaintiff does not refute defendant's numerous requests for toxicology results or deny its response that defendant should obtain such results from the police authorities. Thus, there is no issue of fact as to plaintiff's noncompliance. See, *Central Suffolk Hospital v. New York Cent. Mut. Fire Ins. Co.*, 24 AD3d 492 (2d Dept. 2005).

In *Westchester Medical Center v. Progressive Casualty Insurance Company*, 43 AD2d 1039 (2d Dept. 2007), and in *Central Suffolk Hosp. v. New York Cent. Mut. Fire Ins. Co.*,

supra, the court granted summary judgment in favor of a defendant against a plaintiff because there was no issue of fact as to the hospital's failure to provide verification as to intoxication.

With respect to defendant's cross motion, it has not been established as a matter of law that the injured person was intoxicated and that the intoxication contributed to the injury causing accident. Defendant's evidence is sufficient to raise questions of fact as to whether the exclusion for intoxication is applicable. Notably absent here are any specifics as to how the acident was caused by plaintiff's intoxication. *See Westchester Medical Center v. Progressive Casualty Insurance Company*, 51 AD3d 1014 (2d Dept. 2008); *Lynch v. Progressive Ins. Co.*, 12 AD3d 570 (2d Dept. 2004).

Although plaintiff does not dispute the request for verification and its inability to provide such information, plaintiff contends that the denial of claim is lacking in specificity, there by rendering defendant's ultimate denial as ineffective. See *General Acc. Ins. Group v. Circucci*, 46 NY2d 862 (1979); *Todaro v. Geico Gen. Ins. Co.*, 46 AD3d 1086 (3rd Dept. 2007); *Olympic Chiropractic, P.C., v. American Transit Ins. Co.*, 14 Misc 3d 129(A). (App. Term 2d and 11th Judicial Districts 2007). The denial of claim form dated October 21, 2008 which is not attached, addressed or disputed by plaintiff, specifies by reference to regulation and the insured as to intoxication or impairment and thus provides enough detail as the reason for the denial. Plaintiff's contention that it had no way of knowing the basis for denial is based solely on a subsequent denial of claim and fails to take into account requests for verification followed by the first denial. See *St. Vincent's Hosp. Of Richmond v. Government Employees Ins. Co.*, 50 AD3d 1123 (2d Dept. 2008).

Based on the foregoing, questions of fact exist as to whether the insured was intoxicated and whether such condition contributed to causing the injury, necessitating denial of both plaintiff's motions and defendant's cross motions for summary judgment.

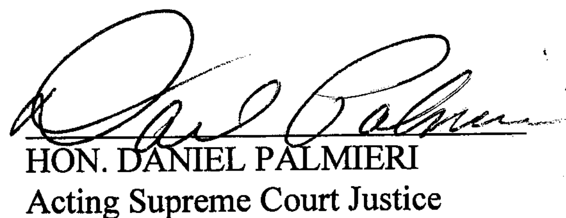
All parties shall appear at a Preliminary Conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on December 18, 2008 , at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

Based on the foregoing, summary judgment is denied to both plaintiff and defendant as to the Second and Third Causes of Action.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 1, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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

McDonnell & Adels, P.C.
Attorneys for Defendant
401 Franklin Avenue
Garden City, NY 11530

ENTERED
DEC 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE