

**St. Vincent's Hosp. & Med. Ctr. v
Government Empls. Ins. Co.**

2008 NY Slip Op 33319(U)

November 25, 2008

Supreme Court, Nassau County

Docket Number: 7579/08

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

PRESENT: HON. WILLIAM R. LaMARCA
Justice

ST. VINCENT'S HOSPITAL & MEDICAL
CENTER, a/a/o SAMUEL FUENTES,

Motion Sequence #001
Submitted August 27, 2008

Plaintiff,

-against-

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GOVERNMENT EMPLOYEES INSURANCE
COMPANY,

Defendant.

The following papers were read on these motions:

| | |
|--------------------------------|---|
| Notice of Motion..... | 1 |
| Affirmation in Opposition..... | 2 |
| Reply Affirmation..... | 3 |

Relief Requested

Plaintiff, ST. VINCENT'S HOSPITAL & MEDICAL CENTER, a/a/o SAMUEL FUENTES (hereinafter referred to as "ST. VINCENT'S"), moves for an order, pursuant to CPLR §3212, granting it summary judgment against defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY (hereinafter referred to as "GEICO"), based upon its alleged failure to make timely payments under the no-fault policies of the respective patient/assignors. Plaintiff contends that GEICO has failed to act in accordance with Insurance Law §5106 which requires timely payment or denial of the requests for no fault

benefits within thirty (30) days of the claim. GEICO opposes the motion, which is determined as follows:

The Statute

11 NYCRR, Part 65, the regulations implementing the Comprehensive Motor Vehicle Insurance Reparations Act, commonly referred to as the No-Fault Law, provides that “No-Fault Benefits are overdue if not paid within 30 calendar days after the insurer receives proof of Claim...”. (11 NYCRR 65-3.8[a][1]). Within thirty (30) days of receiving a claim, the insurer is required to either pay or deny the claim in whole or in part (see, Insurance Law §5106[a]; 11 NYCRR 65-3.8 [c]). However, this thirty (30) day period may be extended by a timely demand by the insurance company for further verification of a claim (see, 11 NYCRR 65-3.5). Within 10 business days after receipt of the completed application for no fault benefits, the insurer must forward, to the parties required to complete them, the prescribed verification forms it will require prior to payment of the initial claim (see, 11 NYCRR 65-3.5[a]). If the demanded verification is not received within thirty (30) days, the insurance company must follow up within ten (10) calendar days of the claimant’s failure to respond, either by telephone call or mail (see, 11 KNOCKER 65-3.6[b]); *New York Hospital Medical Center of Queens v State Farm Mutual Automobile Insurance Company*, 293 AD2d 588, 741 NYS2d 86 [2nd Dept. 2002]). As a complete proof of claim is a prerequisite to receiving no-fault benefits, a claim need not be paid or denied until all demanded verification is provided (see, 11 NYCRR 65-3.5[c]; *Montefiore Medical Center v New York Central Mutual Fire Insurance Company*, 9 AD3d 354, 780 NYS2d 161 (2nd Dept. 2004); *New York & Presbyterian Hospital v American Transit Insurance Co.*, 287

AD2d 699, 733 NYS2d 80 (2nd Dept. 2001); *Hospital for Joint Diseases v Elrac, Inc.*, 11 AD3d 432, 783 NYS2d 612 (2nd Dept. 2004). Statutory interest and attorneys fees may be directed If payment is not timely made on a completed claim. See, Insurance Law § 5106(a), 11 NYCRR §65-3.9 and §3.10.

Background

On the instant action, ST. VINCENT'S is the assignee for health services rendered to SAMUEL FUENTES during the period from January 4 through February 25, 2008, arising out of an automobile accident that occurred on December 29, 2007. Plaintiff claims that it billed GEICO with a Hospital Facility Form (Form N-F5) and a UB-92 on March 18, 2008, in the sum of \$79,492.13, which was received by GECIO on March 20, 2008. It is plaintiff's position that GEICO failed to either pay the hospital bill within thirty (30) days or to issue a Denial of Claim Form. Although plaintiff acknowledges that partial payment of \$49,336.89 was made, on May 7, 2008, plaintiff asserts that said payment was untimely and that no-fault interest and attorney fees are due as a matter of law.

In opposition to the motion, the Affidavit of Greer Vargas, a GEICO employee who is the Custodian of the File at its Claims Division with personal knowledge of the claim procedures, represents that the records kept in the regular course of business reflect that GECIO initially received a bill from ST. VINCENT'S in the sum of \$354,759.34, on March 8, 2008, for services provided to Mr. FUENTES. Thereafter, it appears that GEICO received an amended NF-5 Form from ST. VINCENT'S billing service, Hospital Receivables Inc., in the sum of \$190,920.84, dated March 11, 2008 and another amended NF-5 Form in the sum of \$71,492.13, dated March 17, 2008. In response to the March 8

bill, Ms. Vargas states that GEICO sent out requests for additional verification, on March 12, 2008 and April 12, 2008, and that GEICO received the requested information on April 15, 2008. It is GEICO's position that timely payment of the bill on May 1, 2008, in the amount of \$49,336.89, exhausted the relevant policy limit of \$75,000.00, and that no further monies are due and owing. Ms. Vargas states that a denial of benefits for the balance of the bill was issued on May 5, 2008. Counsel for GEICO states that the payment record reflects that other bills were paid and received before the subject bill was paid because the proof of claim was received prior to the April 15, 2008 completion of ST. VINCENT'S claim and, as such, a priority was created for those entities. Moreover, counsel states that the payment to ST. VINCENT in the sum of \$53,752.55 reflects the surcharge to the State. Counsel urges that GEICO's legal obligation ceases at the outer limits of the policy and that coverage cannot materialize out of thin air, citing *Central General Hospital v Chubb*, 90 NY2d 195, 659 NYS2d 246, 681 NE2d 413 (C.A. 1997).

Although plaintiff claims that it would be entitled to the full amount of \$71,492.13 if its bill were received by the defendant prior to the other bills, and that GEICO's verification requests were defective because the first request for verification preceded plaintiff's March 20, 2008 bill, based upon the record before it, the Court is unable to find that plaintiff is entitled to summary judgment awarding attorneys fees and interest as a matter of 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 [2nd Dept. 2001]). Indeed, "[e]ven

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

Conclusion

Based on the foregoing, it is hereby


ORDERED, that ST. VINCENT's motion for summary judgment is denied; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on January 13, 2009, at 2:30 A.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: November 25, 2008


WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**