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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: 47**

WESTCHESTER MEDICAL CENTER, a/a/o ANDREW FEOLA; THE NYACK HOSPITAL, a/a/o CHRISTOPHER CORLETTA; MARY IMMACULATE HOSPITAL-CARITAS HEALTH CARE, a/a/o XIAOLINA TANG, PHILIP MCINTOSH,

INDEX NO.:020491/08

Plaintiff,

MOTION DATE:2-20-09
SUBMIT DATE:4-13-09
SEQ. NUMBER - 001

-against-

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 1-23-09.....1
Affirmation in Opposition, dated 4-1-09.....2
Reply Affirmation, dated 4-6-09.....3

The motion by plaintiff Mary Immaculate Hospital for summary judgment as to the Fourth Cause of Action with respect to patient McIntosh is granted.

The motions by the other plaintiffs for summary judgment as to the First, Second and Third Causes of Action have been withdrawn because those actions have been settled.

Plaintiff's assignor was injured in an automobile accident, involving an automobile for which defendant issued a policy for no-fault benefits. The patient McIntosh, while riding a bicycle, came into contact with the automobile, was hospitalized from July 27, 2008, through July 28, 2008, and plaintiff billed the defendant for that stay in the sum of $3,340.25, on September 23, 2008. Within two days of receipt of the claim, defendant issued a letter to plaintiff that it was investigating the facts of the loss, needed statements from those involved in the loss and that an examination under oath (EUO) of the injured party may be required. Then, on October 17, 2008, defendant issued another letter to plaintiff that it was in need of recorded statements from all parties and an EUO from the patient. On November 10, 2008, defendant sent a letter to plaintiff stating that it needed statements from all parties involved, statements from the investigating police officer and that an EUO may be required. On November 18, 2008, defendant requested recorded statements and an EUO. The EUO (a copy of which has been submitted) took place on December 10, 2008, and the claim was denied on January 7, 2009. Affidavits from the driver and a witness given after this action commenced are also submitted. The basis for the ultimate denial is that McIntosh intentionally ran his bicycle into the vehicle.

Plaintiff commenced this action and moved herein seeking full payment of its bill on the grounds that defendant did not pay or deny the claims within 30 days after submission, in violation of Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1).

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact *Bhatti v. Roche,* 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out

meritless claims *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, even when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]). The burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must 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 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (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 (2d Dept. 1988). Conclusory allegations are insufficient *Zuckerman v. City of New York*, *supra*, and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 2002); *Toth v. Carver Street Associates*, 191 AD2d 631 2d Dept. 1995).

On such a motion the court must draw all reasonable inferences in favor of the nonmoving party *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 2d Dept. 1995). The role of

the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993). The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned *Sexstone v. Amato*, 8 AD3d 1116 (4th Dept. 2004). The Court may also search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of a motion for summary judgment without the necessity of a cross-motion CPLR 3212(b); *Katz v. Waitkins*, 306 AD2d 442 (2d Dept. 2003).

Insurance Law §5106(a) provides as follows:

> Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

Section 11NYCRR §65-3.2(c) provides:

> Do not demand verification of facts unless there are good reasons to do so. When verification of facts is necessary, it should be done as expeditiously as possible.

Section 11NYCRR §65-3.5(e) provides in pertinent part:

> When an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination.

Section 11 NYCRR 65-3.8(a)(1) of the regulations provides:

> No-fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to section 65-3.5 of this Subpart. In the case of an examination under oath or a medical examination, the verification is deemed to have been received by the insurer on the day the examination was performed.

This requirement is modified, however, by 11 NYCRR 65-3.5(b) which provides:

> Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms. Any requests by an insurer for additional verification need not be made on any prescribed or particular form.

With respect to the form used 11 NYCRR §65-3.5(f) and (g), provides :

(f) An insurer must accept proof of claim submitted on a form other than a prescribed form if it contains substantially the same information as the prescribed form. An insurer, however, may require the submission of the prescribed application for motor vehicle no-fault benefits, the prescribed verification of treatment by attending physician or other provider of health service, and the prescribed hospital facility form.

(g) In lieu of a prescribed application for motor vehicle no-fault benefits submitted by an applicant and a verification of hospital treatment (NYS form NF-4) an insurer shall accept a completed hospital facility form (NYS form

> NF-5) (or an NF-5 and uniform billing form [UBF-1] which together supply all the information requested by the NF-5) submitted by a provider of health services with respect to the claim of such provider.

It has not been disputed that the claim was neither paid nor denied and thus the claim is overdue. *New York & Presbyterian Hosp. v. Progressive Cas. Ins. Co,* 5 AD3d 568 (2d Dept. 2004); *New York Hosp. Medical Center of Queens v. Country-Wide Insurance Company.*, 295 AD2d 583 (2d Dept. 2002).

However, an insurer is not obligated to pay or deny a claim if it instead has asked for verification of information needed to evaluate such claim, which has the effect of tolling that period until such verification is received. 11 NYCRR 65-3.5(a); 11 NYCRR 65-3.8; *see, New York & Presbyt. Hosp. v Progressive Cas. Ins. Co.,* 5 AD3d 568 (2d Dept. 2004).

In this case, the plaintiff has demonstrated that the claim assigned to it was received by the defendant and no payment or denial was issued within 30 days. Plaintiff has thus made out a *prima facie* showing that it is entitled to judgment on the claim as a matter of law.

Here, because it is indefinite and vague, the initial letter dated two days post receipt of the claim does not constitute a request for verification or a request for an EUO. Moreover, there is no proof that verification or the EUO request was made upon the persons from whom such information or EUO was required.

Although the second letter is more definite in its EUO request, it is untimely and for the first time requests recorded statements from all parties. 11 NYCRR §65-3.5(a).

Moreover, there is no evidence to support the requirement that a request for an EUO must be based upon "the application of objective standards". 11NYCRR §65-3.5(e).

In sum, defendant did not issue a timely request for verification, did not timely follow-up its request (11NYCRR §65-3.6(a)), did not provide an objective basis for the requested EUO, did not provide evidence that it requested information from the parties, witnesses or police officer from who it required such information and does not provide any evidence as to when the EUO was demanded.

At best, the letters submitted by defendant constitute little more than an expression of intent to conduct an investigation as to the facts and circumstances of the accident.

Defendant has demonstrated that it was investigating the cause of the accident, however, it has been held that in the absence of a timely denial or a properly founded request for verification, failure to pay a claim because an investigation is being conducted, does not constitute a defense. *Westchester Medical Center v. Lincoln General Insurance Company* __AD3d __ 2009 WL 879649 (2d Dept. 2009); *Nyack Hosp. v. Encompass Ins. Co.*, 23 AD3d 535 (2d Dept. 2005).

Although defendant suggests that the accident was staged because the injured party intentionally ran his bicycle into the insured automobile, the evidence submitted to support that contention, the two affidavits and the EUO of the injured party, are insufficient to raise a question of fact. The injured party says he does not remember anything about the accident and the two witnesses, while not denying contact between the bicycle and the car, intimate or express their belief that McIntosh intended to cause the event.

To interpose a defense of a staged accident fraud sufficient to raise a triable issue of fact, a defendant must establish the fact or founded belief that the injuries do not arise out of an insured incident. *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 (1997). Here, the evidence submitted is not enough to raise a question of fact that the bicyclist intentionally caused the incident. Based on the foregoing, plaintiff's motion for summary judgment on the Fourth Cause of Action (McIntosh) is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 17, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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