

**Lenox Hill Hosp. v Country Wide Ins.
Co.**

2009 NY Slip Op 31120(U)

March 30, 2009

Supreme Court, New York County

Docket Number: 12684/08

Judge: F. Dana Winslow

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

LENOX HILL HOSPITAL, a/a/o ELOUISE TYSON;
THE NEW YORK AND PRESBYTERIAN HOSPITAL,
a/a/o ROBERT ACOSTA; THE NEW YORK HOSPITAL
MEDICAL CENTER OF QUEENS, a/a/o FRANCESCO
MURRO, SUNNY HUANG,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001 +002
MOTION DATE: 1/9/09

COUNTRY WIDE INSURANCE COMPANY,

Defendants.

INDEX NO.: 12684/08

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....	1
Notice of Cross Motion.....	2
Reply and Opposition to Cross Motion.....	3

This motion by plaintiffs Lenox Hill Hospital, a/a/o Elouise Tyson; The New York and Presbyterian Hospital, a/a/o Robert Acosta; and, The New York Hospital Medical Center of Queens, a/a/o Francesco Murro and Sunny Huang, for an order pursuant to CPLR 3212 granting them summary judgment, is **granted** as provided herein.

This cross-motion by defendant Country Wide Insurance Company for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint is **denied**.

This is an action pursuant to Insurance Law § 5106(a) in which the plaintiff

hospitals as assignees of the insured individual patients seek to recover no-fault medical payments as well as attorneys' fees.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The plaintiff Lenox Hill hospital, as assignee of Elouise Tyson has established its *prima facie* entitlement to summary judgment by submitting the prescribed statutory billing form, an affidavit of the biller who actually mailed the bill, the certified mail receipt and the signed return receipt card referencing Tyson and the forms. See, Kingsbrook Jewish Medical Center v Allstate Ins. Co., 871 NYS2d 680, __ AD2d __ (2nd Dept. 2009), citing Westchester Med. Ctr. v Allstate Ins. Co., 53 AD3d 481 (2nd Dept. 2008); Hospital for Joint Diseases v New York Cent. Mut. Fire Ins. Co., 44 AD3d 903 (2nd Dept. 2007); New York and

Presbyterian Hosp. v Travelers Prop. Cas. Ins. Co., 37 AD3d 683, 683-684 (2nd Dept. 2007). The evidence submitted demonstrates that the defendant Lenox Hill received proof of the claim and failed to pay the bill or issue a denial of claim form within the requisite 30-day period. Westchester Medical Center v Country Wide Insurance Company, 45 AD3d 676 (2nd Dept. 2007).

The plaintiff New York and Presbyterian Hospital as assignee of Robert Acosta has established its *prima facie* entitlement to summary judgment by, again, submitting the prescribed statutory billing form, an affidavit of the biller who actually mailed the bill, the certified mail receipt and the signed return receipt card referencing Acosta and the forms. See, Kingsbrook Jewish Medical Center v Allstate Ins. Co., *supra*, citing Westchester Med. Ctr. v Allstate Ins. Co., *supra*; Hospital for Joint Diseases v New York Cent. Mut.Fire Ins. Co., *supra*; New York and Presbyterian Hosp. v Travelers Prop. Cas. Ins. Co., *supra*. Again, the evidence submitted demonstrates that the defendant New York and Presbyterian Hospital received proof of the claim and failed to pay the bill or issue a denial of claim form within the requisite 30-day period. Westchester Medical Center v Country Wide Insurance Company, *supra*.

The plaintiff New York Hospital Medical Center of Queens as assignee of Francesco Murro and Sunny Huang has established its *prima facie* entitlement to summary judgment by submitting the prescribed statutory billing form, an affidavit of the biller who actually mailed the bills, the certified mail receipts and the signed return receipt cards referencing Murro and Huang and the forms. See, Kingsbrook Jewish Medical Center v Allstate Ins. Co., *supra*, citing Westchester Med. Ctr. v Allstate Ins. Co., *supra*; Hospital for Joint Diseases v New York Cent. Mut.Fire Ins. Co., *supra*; New York and Presbyterian Hosp. v Travelers Prop. Cas.

Ins. Co., supra. Again, the evidence submitted demonstrates that the defendant New York Hospital Medical Center of Queens received proof of the claim and failed to pay the bill or issue a denial of claim form within the requisite 30-day period. Westchester Medical Center v Country Wide Insurance Company, supra.

The burden accordingly shifts to the defendants to establish the existence of material issues of fact.

Country Wide has not opposed The New York Hospital Medical Center as assignee of Sunny Huang's motion. It is **granted**.

In opposition to the plaintiffs' motion, the defendants maintain that Tyson, Acosta and Murro's claims are premature because neither the assignors nor their assignees responded to verification requests. See, 11 NYCRR 65-3.5(b); New York & Presbyterian Hosp. v Progressive Cas. Ins. Co., 5 AD3d 568, 570 (2nd Dept. 2004) . Country Wide maintains that a verification request seeking a completed NF-5 on the revised form, the complete hospital record and the assignment of benefits on the revised form was sent to Tyson with a carbon copy to Lenox Hill Hospital on June 3, 2008 and that when no reply was received, a second verification request was "issued" on July 3, 2008. Country Wide maintains that to date, no response has been received.

Country Wide maintains that a verification request seeking a completed NF-5 on the revised form, the complete hospital record and the assignment of benefits on the revised form was sent to Acosta with a carbon copy to the New York and Presbyterian Hospital on December 19, 2007 and that when no reply was received ,a second verification request was sent on January 18, 2008. Country Wide maintains that to date, no response has been received.

Country Wide maintains that a verification request seeking a completed NF-

5 on the revised form, the complete hospital record and the assignment of benefits on the revised form was sent to Murro on June 10, 2008 and that when no reply was received, a second verification request was sent on July 10, 2008. Country Wide maintains that to date, no response has been received.

Country Wide seeks to establish the mailing of the aforementioned verification requests via the affidavit of Eric Lyons, a Litigation Supervisor. He describes Country Wide's office practice and procedure regarding the mailing of verification requests. He also states that Tyson's first verification request was "sent" and a second verification was "issued;" Acosta's first verification request was "sent," as was the second one; and, Murro's first verification request was "sent," as was the second one.

Mr. Lyons has not established that a second verification request was "sent" to Tyson. In any event, Mr. Lyons has not established the proper mailing of any of the verification request forms because he has entirely failed to establish that the office's practice and procedure was designed to ensure that the verification requests were properly addressed. Westchester Medical Center v Country Wide Insurance Company, 45 AD3d 676, 676-677 (2nd Dept. 2007); compare, St. Vincent's Hosp. of Richmond v Government Employees Ins. Co., 50 AD3d 1123 (2nd Dept. 2008) ("the defendant submitted admissible evidence in the form of an affidavit of an employee with knowledge of the defendant's standard office practices or procedures designed to ensure that items were **properly addressed and mailed [emphasis added]**").

Defendant Country Wide correctly maintains that interest pursuant to Insurance Law § 5106(a) on the claims did not begin to accrue until the complaint in this action was filed. East Acupuncture, P.C. v Allstate Ins. Co., 873 NYS2d

335 (2nd Dept. 2009), interpreting 11 NYCRR 65-3.9(c); but see, LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co., 46 AD3d 1290 (3rd Dept. 2007), lv granted 10 NY3d 717 (2008).

Lastly, attorneys' fees under 11 NYCRR 65-4.6(e) are to be calculated on a "per claim" basis. Fortune Medical, P.C. v New York Cont. Mut. Fire Ins., 20 Misc3d 32 (N.Y. sup. App. Term 2008), citing LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co., supra, at p. 1292; see also, Smithtown Gen. Hosp. v State Farm Mut. Auto. Ins. Co., 207 AD2d 338 (2nd Dept. 1994).

This constitutes the Order of the Court.

Dated:

3/30/09

ENTER:

[Handwritten Signature]
J.S.C.

ENTERED

MAY 05 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE