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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 600993/2008

PROGRESSIVE NORTHEASTERN INSURANCE

VS.

MANHATTAN MEDICAL IMAGING COMPANY

SEQUENCE NUMBER : # 001

DECLARATORY JUDGMENT

INDEX NO. 600993-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 02 2009

COUNTY CLERK'S OFFICE NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/29/09

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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PROGRESSIVE NORTHEASTERN INSURANCE COMPANY, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, PROGRESSIVE NORTHERN INSURANCE COMPANY, MOUNTAIN LAUREL ASSURANCE COMPANY, NATIONAL CONTINENTAL INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE GULF INSURANCE COMPANY, PROGRESSIVE SPECIALTY INSURANCE COMPANY, PROGRESSIVE EXPRESS INSURANCE COMPANY, and PROGRESSIVE BAYSIDE INSURANCE COMPANY,

Plaintiffs, Index #600993/2008

-against-

MANHATTAN MEDICAL IMAGING, P.C.,

Defendant.

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YORK, J.:

In this action commenced by plaintiff insurance companies (collectively referred to hereinafter as "Progressive") against Manhattan Medical Imaging, P.C. (Manhattan), which seeks a judgment declaring that Manhattan, as assignee of various no-fault claimants, is barred from receiving assigned first-party no-fault payments from Progressive for radiological services rendered to the assignors, because Manhattan failed to appear for an examination under oath ("EUO"), as requested by Progressive,

Progressive moves for an order granting it summary judgment based on Manhattan's failure to comply with a condition precedent to no-fault coverage under the policies, namely Progressive's requests for further verification in the form of an EUO.

Background

Claims for no-fault benefits were submitted to Progressive by approximately 200 assignors and by Manhattan, which also submitted verification of treatment forms. Complaint, ¶¶ 14, 17, 18; Auciello aff. at ¶ 6. In order to process these claims, Progressive sought verification in the form of an EUO from Manhattan. The policies in issue contained the No-Fault Mandatory Personal Injury Protection Endorsement set forth in 11 NYCRR 65-1.1, which under the "Conditions" section provided that "[u]pon the request of the Company, the eligible injured person or that person's assignee ... shall ... as may reasonably be required submit to examinations under oath."

Letters dated July 20, 2007 were sent by Progressive to Manhattan, regarding a small number of claims, and advised that an EUO would take place on August 8, 2007. Manhattan failed to appear. By letters dated August 13, 2007 Progressive advised Manhattan that an EUO would take place on August 30, 2007. That EUO was to cover services rendered by Manhattan to the patients

listed in the prior EUO request, as well as additional patients. Again, Manhattan failed to appear. By letters dated September 14, 2007, Progressive advised Manhattan of a third EUO appointment for October 3, 2007 for 94 claims, which covered those from the two prior notices, plus additional ones. Again, Manhattan did not appear, but allegedly Progressive was advised that Manhattan's doctor was booked and that Manhattan needed a new date for the EUO. Auciello aff., exh. 6. By letters dated October 26, 2007, Progressive advised Manhattan and its then counsel that a fourth attempt to hold an EUO would occur on December 6, 2007, this time involving 116 claims. Apparently on this occasion, an adjournment was requested and granted. Auciello aff. at 9. By letters dated December 21, 2007, Progressive advised Manhattan that an EUO was scheduled for January 4, 2008 and that this was "your second appointment for the attached listed claims." Auciello aff., exh. 8. However, it appears that new claims were also added to the list for that EUO. *Id.* Evidently, by fax dated January 2, 2008, the law firm of Friedman, Harfenist, Langer & Kraut ("Friedman") advised Progressive that it was then representing Manhattan. Torczyner aff., exh. A. Manhattan failed to appear at the January 4, 2008 EUO.

On January 28, 2008, Neil Torczyner of Friedman sent a letter to Progressive's counsel reminding him that, under the insurance regulations, insurers were to have as their "basic goal the prompt and fair payment" of claims and that they should not "demand verification of facts unless there are good reasons to do so." 11 NYCRR 65-3.2 (a), (c). Torczyner stated that, in light of the huge number of claims Progressive wanted to examine Manhattan about, it was evident that Progressive was determined not to pay the claims, and that Manhattan would be forced to expend a great deal of money to retain counsel, with little hope that its expenses would be recouped. In light of that, Torczyner declined to produce Manhattan for an EUO and requested that Progressive determine the claims based on the materials it already possessed.

Via letters dated February 4 and 5, 2008, to Manhattan and Friedman, Progressive advised of an EUO scheduled for February 26. Again, additional claims were included. By letter to Progressive dated February 11, 2008, Torczyner indicated that he had received the February 4 and 5 letters noticing the EUO, summarized his January 28, letter to Progressive's counsel, and asserted that Progressive's current request to verify over two hundred and thirty claims, many of which were allegedly submitted

six months to a year before, constituted a tactic that was not a good faith verification request and would result in a long and costly process. Thus, Torczyner asked Progressive to accept Manhattan's declination to testify and decide the claims. Torczyner further indicated that if Progressive were willing to reduce the number of claims it wished to verify by EUO, and would indicate that there was a real possibility of payment following the EUO, he would reconsider the issue of his client testifying.

Progressive's counsel responded by letter, dated February 21, 2008, that Progressive expected Manhattan to be at the February 26 EUO, unless the date was not convenient and Torczyner called to work out a new date. Progressive's counsel further advised that Torczyner was not entitled know in advance how Progressive would process the claims, but that Progressive would be willing to consider holding the EUO with respect to a representative sample of 25 claims, as long as Manhattan provided the various documents requested in the February 4 and 5 letters and agreed that its other claims would be delayed by the EUO. On February 25, Friedman advised Progressive that they would not be producing their client for an EUO, and neither Friedman nor Manhattan appeared at the February 26, 2008 EUO.

By letters dated March 10, 2008, Progressive advised Friedman and Manhattan of an EUO scheduled for March 26, 2008, with respect to a limited number of claims, including claims that were not previously noticed in any of the aforementioned EUO requests. Evidently, before that date, Manhattan or its counsel advised that it would not appear. Auciello aff. at 9. Progressive commenced this declaratory judgment action on April 4, 2008, and on April 8, 2008 service was made on Manhattan through the Secretary of State.

Progressive now moves for summary judgment on the complaint. It asserts that Manhattan's failure to attend an EUO constituted a breach of a condition precedent under the policy, thereby entitling Progressive to a declaration that Manhattan, as assignee of the claims/assignors listed in the complaint, was not entitled to the payment of assigned first-party no-fault benefits with respect to the claims, and that Manhattan may not seek to assert a lien against its assignors. In addition, Progressive seeks its statutory costs and disbursements.

Progressive's counsel asserts in his moving affirmation that, under the no-fault regulations' claim procedure provisions (11 NYCRR 65-3.5), an EUO may be required to establish proof of claim, and that such regulation specifically recognizes an EUO as

a form of verification (11 NYCRR 65-3.5 [e]). Progressive's counsel further asserts that payment or denial of a claim within the requisite 30 calendar days is conditioned on an applicant's verification of the claim, in this case by appearing at the EUO, pursuant to 11 NYCRR 65-3.5. *See* 11 NYCRR 65-3.8(a)(1). Progressive's counsel, relying on 11 NYCRR 65-3.8(f), maintains, in essence, that the right to proof of claim, including via an EUO, is so important that the insurer's failure to observe any of the regulatory time frames will not prevent it from seeking proof of claim. Auciello aff. at 19. Then, Progressive, without indicating whether it in fact complied with any of the applicable time frames, goes on to attempt to show that it notified Manhattan of the seven scheduled EUOs, via the various letters, and that Manhattan never appeared for an EUO.

Manhattan opposes the motion. It does not quarrel with Progressive's showing that Manhattan and its counsel were notified of the scheduled EUOs and that Manhattan never appeared. Rather, it asserts that Progressive has failed to meet its burden of establishing that its demands for an EUO were timely and reasonable under the no-fault regulations. Manhattan maintains that under the no-fault regulations the insurer must pay or deny the claim or request additional verification within thirty

calendar days of the claim, or the denial is untimely and subject to preclusion. Manhattan further maintains that the EUO must be held within 30 days of receipt of the claim.

Manhattan also asserts that on this motion Progressive is required to demonstrate that it has objective standards for demanding EUOs and how the demand for an EUO in this case met those standards, and that since it has not done so, it has failed to demonstrate that its demand for an EUO was reasonable and made in good faith. Finally, Manhattan asserts that the motion is premature under CPLR 3212(f), since Progressive has failed to respond to its May 2008 document demands and interrogatories which seek, among other things, a copy of Progressive's objective standards for requesting EUOs, and endeavor to ascertain how Progressive's EUO demands were made pursuant to those standards and when Progressive received bills and demanded additional verification.

In reply, relying on State of New York Insurance Department Opinions letters (Zevgaras reply aff., exhs. A, B), which it asserts are entitled to judicial deference, Progressive maintains that it is not required to inform an applicant of the reason for an EUO request, nor must it provide the applicant with a copy of their internal guidelines for requesting an EUO. Progressive

urges, in essence, that an insurer is not required to tip its hand while investigating potential insurance abuse.

While noting that it has no duty to show why the EUO was requested, Progressive maintains that it had good reason to seek an EUO. Specifically, Progressive asserts that evidence provided in another case suggests that Manhattan, in contravention to the law, may have been partly owned by an individual who was not a physician. In addition, New Jersey's Department of Law & Public Safety has ordered that the medical care of Dr. Steven Brownstein, one of Manhattan's owners, be monitored for two years. Further, Progressive asserts that in three other insurance cases Dr. Brownstein has been ordered to provide testimony about, among other things, Manhattan's formation and corporate structure and its relationship with its assignors' other healthcare providers.

Progressive, which recognizes in its reply memorandum of law the applicability of the time period in which to seek verification of a claim (11 NYCRR §§ 65-3.5 [b]; 65-3.8 [j]) and that its 30-day period to pay or deny a claim is extended by "a timely and proper request for additional verification" (reply memorandum at 3-4), asserts, without going through each and every claim, that its requests for EUOs were timely because they were

made within 30 days of the date of each bill, as allegedly reflected in a schedule attached to the first EUO request. *Id.* at 3; Zevgaras reply aff. at ¶ 4. The only bill specifically mentioned in the reply memorandum is one dated May 30, 2007. Progressive evidently asserts that the first EUO request dated July 20, 2007 was timely as to that bill. Progressive, without referring to any particular claim, also asserts that the schedule attached to exhibit "6" of its original moving papers, which was appended to the third EUO request, shows when the claims were received, and demonstrates that its request for an EUO was timely. Reply memorandum at 4. Thus, Progressive claims that it has "proved that its demand for verification was timely." Reply memorandum at 3. Finally, Progressive asserts that Manhattan has not demonstrated the need for discovery to resist the motion.

Discussion

A major goal of no-fault reform was "to provide prompt uncontested, first-party insurance benefits." *Presbyterian Hosp. v Maryland Cas. Co.*, 90 NY2d 274, 285 (1997), rearg. den. 90 NY2d 927; Presbyterian Hosp. v Aetna Cas. & Surety Co., 233 AD2d 431, 432 (2d Dept 1996), lv den 90 NY2d 802. Under 11 NYCRR 65-3.8 an insurer is required to pay or deny a claim within 30 calendar days of receipt of proof of the claim. An insurer which fails to

pay or deny the claim within 30 calendar days may, with limited exceptions (*See e.g., Central Gen. Hosp. v Chubb*, 90 NY2d 195 [1997]), be precluded from asserting defenses. *Presbyterian Hosp.*, 90 NY2d at 274; *Nyack Hosp. v State Farm Mut.Auto. Ins. Co.*, 11 AD3d 664 (2d Dept 2004); *Mt. Sinai Hosp. v Triboro Coach, Inc.*, 263 AD2d 11 (2d Dept 1999). Preclusion ensues because no-fault reform was enacted to ensure prompt reimbursement with minimal litigation. *Presbyterian Hosp.*, 233 AD2d at 432.

An exception to the 30-day period is when the insurer timely seeks additional verification within 15 business days of receipt of the claim. 11 NYCRR 65-3.5 (b). *Nyack Hosp. v General Motors Acceptance Corp.*, 27 AD3d 96, 100 (2d Dept 2005), affd as mod 8 NY3d 294 (2007); *New York & Presbyterian Hosp. v American Transit Ins. Co.*, 287 AD2d 699 (2d Dept 2001); *See also A.B. Medical Services PLLC v Eagle Ins. CO.*, 3 Misc3d 8 (App Term, 2d Dept, 2003). A request for an EUO is, as acknowledged by Progressive, a request for verification under 11 NYCRR 65-3.5. A timely request for additional verification tolls the 30-day period. *New York Hosp. v State Farm Mut. Auto. Ins. Co.*, 293 AD2d 588 (2d Dept 2002); *See also Montifiore Med. Center v GEICO*, 34 AD3d 771 (2d Dept 2006). The failure to seek verification within the 15-day period does not necessarily make the request invalid, but it

reduces the 30 calendar days allowed for paying or denying a claim. *Nyack Hosp.*, 8 NY3d at 300; 11 NYCRR 65-3.8 (j).

While the verification process should proceed as quickly as possible (11 NYCRR 65-3.2 [c]), an EUO need not be held within 30 days of the receipt of a claim, as is urged by Manhattan. *Eagle Surgical Supply, Inc. v Progressive Cas. Ins. Co.*, 21 Misc3d 49 (Sup Ct, NY County 2008). Also, an insurer is not required to provide the claimant with a copy of its internal guidelines for conducting an EUO or of its reasons for requesting an EUO. *See* State of New York Insurance Department Opinion letters of October 15, 2002, regarding EUO Standards Under No-Fault, and of December 22, 2006 regarding No-Fault Examinations Under Oath, reply aff., exhs. A, B.

The no-fault regulations further provide that "[a]t minimum, if any requested verification has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom verification was requested, either by phone call, properly documented in the file, or by mail." 11 NYCRR 65-3.6 (b); see generally *New York & Presbyterian Hosp.*, 287 AD2d at 699; *Westchester County Medical Center v New York Central Mut. Fire Ins. Co.*, 262 AD2d 553 (2d Dept 1999). The failure to timely

follow up may result in a preclusion of the insurer's defenses. Presbyterian Hosp., 233 AD2d at 431; *Sea Side Medical, P.C. v State Farm Mutual Auto Ins. Co.*, 12 Misc3d 1127 (Civ Ct Richmond County 2006); *Bronx Medical Services, P.C. v Windsor Ins. Co.*, 2003 WL 21173634 (App Term, 1st Dept 2003); *Metro Medical Diagnostics, P.C. v Lumbermens Ins. Co.*, 189 Misc2d 597 (App Term, 2d Dept 2001).

On a motion for summary judgment the movant must prima facie establish its entitlement to the relief sought. The burden of prima facie establishing that verification requests (and hence, follow up requests) were timely is on the movant. *New York & Presbyterian Hosp. v Allstate Ins. Co.*, 30 AD3d 492 (2d Dept 2006); *Prime Psychology Services, P.C. v Nationwide Property and Cas. Ins. Co.*, -NYS2d-, 2009 WL 606260 (Civ Ct, Richmond County 2009); *Eagle Surgical Supply, Inc. v Progressive Cas. Ins. Co.*, 21 Misc3d 49 (App Term, 2d & 11th Jud Dists 2008); *Lenox Hill Radiology MIA, P.C. v American Transit Ins. Co.*, 19 Misc3d 358 (Civ Ct, NY County 2008).

Progressive, has failed to meet its prima facie burden of establishing that it timely sent out verification requests as to each claim or that its follow up requests as to each claim was timely. Its initial moving papers did not even attempt to

demonstrate timeliness, and urged that timeliness was irrelevant under the regulations. I do not agree, since the very purpose of no-fault reform was the expeditious payment of claims with minimal litigation. *See Lenox Hill Radiology MIA, P.C.*, 19 Misc3d at 358. Moreover, 11 NYCRR 65-3.8 (j) (*See also Nyack Hosp.*, 8 NY3d at 300) would be rendered meaningless if the insurer could delay the verification process indefinitely.

Progressive's attempt, made for the first time in its reply papers, to show that it timely complied with its obligations, by asserting that various documents appended to several of its EOU requests demonstrate timeliness because they contain bill dates or receipt of bill dates, is unavailing. Progressive has not established the admissibility of those documents. Its Medical Claims Manager's affidavit [1] did not specifically refer to those particular documents, and, in any event, even if it had, it did not allege that its documents were made in the regular course of business. It only spoke of business records having been "maintain[ed]" in the regular course of business. *See* CPLR 4518.

Also, Progressive's apparent claim that each bill date and/or receipt date was within 30 days of the EOU requests is

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[1] That affidavit refers to an exhibit "A". However no such exhibit was attached.

inaccurate. Further, Progressive lumps all the claims together without recognizing that it kept adding new claims to each request. As to the claims added on the final EUO request, there is no assertion that there was a timely follow up request for verification. Finally, Progressive does not dispute that it failed to respond to Manhattan's discovery demands relevant to the timeliness of the verification and follow up requests. Thus, Progressive's motion is denied without prejudice to renewal following discovery. On any renewed application, Progressive shall separately address each claim as to the timeliness of the verification request(s) and follow up request(s), if any.

Accordingly, it is

ORDERED that Progressive's motion for summary judgment is denied without prejudice to renewal after discovery.

Dated: 5/29/09

J.S.C.

LOUIS B. YORK
J.S.C.