

Westchester Med. Ctr. v Progressive Cas. Ins. Co.

2009 NY Slip Op 31556(U)

July 7, 2009

Supreme Court, Nassau County

Docket Number: 15679/08

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mod,md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

WESTCHESTER MEDICAL CENTER, et al.,

Plaintiff(s),

MOTION DATE: 5/14/09

INDEX No.:15679/08

-against-

MOTION SEQUENCE NO:1,2

x x x

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-5
Notice of Cross Motion.....	6-8
Answering Affidavits.....	9-12
Replying Affidavits.....	13,14
Briefs:	

Upon the foregoing papers, it is ordered that this motion by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to their first and third causes of action and cross motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint are disposed of as follows.

The plaintiffs Westchester Medical Center ["Westchester"], and St. Barnabas Hospital ["Barnabas"], rendered health care to Nikura Lopez and Antonio Santiago in June of 2007 and November of 2007, respectively, and thereafter obtained assignments of their claims for first party, no-fault benefits.

With respect to Santiago, Westchester contends that it billed the defendant on July 7, 2008 in the sum of \$15,548.31, but that Progressive failed to either fully pay or deny the claim within

thirty days of its receipt of the bill on July 9, 2007 (see, Insurance Law, § 5106[a]).

According to the plaintiff, Progressive issued a partial untimely denial on August 11, 2008, and later on August 20, 2008, made an untimely partial payment of \$9,075.31.

Progressive's denial was predicated upon the assertion that the fees billed exceeded the allowable charges authorized pursuant to allegedly applicable Workers Compensation fee schedules and/or DRG rates and (2) that Santiago had already exhausted the \$50,000.00 policy limit in payable benefits.

With respect to Lopez, the plaintiffs assert that on July 24, 2008, St. Barnabas billed Progressive for services rendered in the sum of \$4,690.49, after which, on August 18, 2008, Progressive made a partial payment of \$3,622.81 - thereby leaving an unpaid balance of \$1,067.86. Prior thereto, Progressive has issued a timely partial denial of the claim stating that the bill was not in accord with the appropriate DRG fee schedule.

Thereafter, the plaintiffs commenced the within action seeking the recovery of, inter alia, the above-referenced hospital expenses, together with statutory interest and counsel fees (Insurance Law § 5106[a]).

Progressive has opposed the motion and cross moves for summary judgment dismissing the complaint.

Significantly, as to Santiago, Progressive concedes that its partial denial and partial payment were untimely, but argues that (1) Westchester's bill utilized incorrect DRG billing codes and was therefore incorrect and (2) that in any event, Santiago's \$55,000.00 accident coverage limit was exhausted to the extent indicated on the partial denial and that no further benefits are payable or available.

As to Lopez, Progressive claims that its timely, partial denial was correct since the plaintiffs' again allegedly applied the incorrect billing codes.

With respect their first cause of action (Santiago), the plaintiffs have demonstrated their prima facie entitlement to judgment as a matter of law by establishing that the prescribed, statutory billing forms had been mailed and received, and that the defendant thereafter failed to either fully pay or timely deny the claims at issue within the requisite, 30-day period (*Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.*, 9 NY3d 312 [2007]; *Westchester Medical Center v. Lincoln General Ins. Co.*, 60 AD3d 1045, 1046; *Westchester Medical Center v. Countrywide Ins. Co.*; 45 AD3d 676).

To the extent that Progressive relies upon the allegedly improper billing codes utilized by the plaintiffs as to Santiago that claim has been waived by virtue of the untimely denial which was issued (*Westchester Medical Center v. American Transit Ins. Co.*, 17 AD3d 581, 582; *New York Hosp. Medical Center of Queens v. Country-Wide Ins. Co.*, 295 AD2d 583, 585-586; *Gotham Acupuncture, P.C. v. Country Wide Ins. Co.*, 20 Misc.3d 141(A), 2008 WL 2884324 [Appellate Term 2nd Dept. 2008]; *P.L.P. Acupuncture, P.C. v. Travelers Indem. Co.*, 19 Misc.3d 126(A), 2008 WL 682582 [Appellate Term 2nd Dept. 2008]).

Nor has Progressive generated a triable issue of fact in opposition to the motion as to Santiago by arguing that the subject policy benefits were exhausted.

Significantly, it is settled that the "failure to issue a denial of the claim within 30 days does not "preclude a defense that the coverage limits of the subject policy have been exhausted" (*New York and Presbyterian Hosp. v. Allstate Ins. Co.*, 12 AD3d 579, 580; *Presbyterian Hosp. in City of N.Y. v. General Acc. Ins. Co. of Am.*, 229 AD2d 479, 480; *Presbyterian Hosp. of N.Y. v. Liberty Mut. Ins. Co.*, 216 AD2d 448 see also, *Nyack Hosp. v. General Motors Acceptance Corp.*, 8 NY3d 294 [2007]; *Mount Sinai Hosp. v. Allstate Ins. Co.*, 28 AD3d 727, 728 cf., *Westchester Medical Center v. Hartford Cas. Ins. Co.*, 58 AD3d 832).

Although Progressive's exhaustion claim is not precluded as a matter of law by virtue of its untimely, partial denial (*Mount Sinai Hosp. v. Allstate Ins. Co.*, *supra*), Progressive has nevertheless failed to create a triable issue of fact with respect

to that defense (see, *Westchester Medical Center v. Auto One Ins. Co.*, ___Misc3d___, 2007 WL 3351956 [Supreme Court, Nassau County 2007]).

Specifically, and in arguing that Santiago's policy limits were exhausted, Progressive's Litigation Representative - Angel Rogers relies - *inter alia*, upon an untitled, one page print-out which purports to lists the various payments previously made to Santiago under the subject policy.

This unsworn document does not even mention Progressive by name and is, at best, fleetingly referenced by Rogers in his affidavit, which contains no discussion of precisely how the document qualifies as a competent submission on the motion (CPLR 4518[a]; *Westchester Medical Center v. Auto One Ins. Co.*, *supra* cf., *Mount Sinai Hosp. v. Zurich American Ins. Co.*, 15 AD3d 550).

More particularly, Rogers does not indicate where the subject document came from; how it was generated; and/or whether he or someone else created it. Nor does he identify or describe the systematic office practices and procedures by which the information it contains was reliably developed and compiled (see, *Westchester Medical Center v. Auto One Ins. Co.*, *supra* see also, *A.B. Medical Services, PLLC v. American Transit Ins. Co.*, ___Misc3d___, 2009 WL 1774818 [Appellate Term 2nd Dept. 2009]; *Infinity Health Products, Ltd. v. New York Cent. Fire Ins. Co.*, 20 Misc.3d 145(A), 2008 WL 4222116 [Appellate Term 2nd Dept. 2008]; *Align for Health Chiropractic, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 20 Misc.3d 144(A), 2008 WL 4222082 [Appellate Term 2nd Dept. 2008] see generally, *Matter of Leon RR*, 48 NY2d 117, 122 [1979]; *Art of Healing Medicine, P.C. v. Travelers Home and Marine Ins. Co.*, 55 AD3d 644).

Under these circumstances, that branch of the plaintiffs' motion which is for summary judgment on the first cause of action as to Santiago, is granted. The corresponding branch of Progressive's cross motion as to Santiago is therefore denied.

Lastly, those branches of the parties' motions which are for relief relating to the plaintiffs' third cause of action (Lopez), are denied.

The court finds that the parties' conflicting submissions with respect to the allegedly proper DRG codes and/or rate schedules, are conclusory, bare-boned and lacking in adequate, explanatory detail, i.e., they consist of unelaborated, contradictory assertions which fall well short of supporting any determinative conclusion relative to the disputed billing code issue. Accordingly, and as to Lopez, summary judgment must be denied.

The court has considered the parties' remaining contentions and concludes that they are lacking in merit.

Dated: JUL 07 2009



J.S.C.

ENTERED
JUL 10 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE