SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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ST. BARNABAS HOSPITAL a/a/o JESSY BONILLA, NYU-HOSPITAL FOR JOINT DISEASES a/a/o IGOR BERDICHEVSKY

Plaintiffs,

-against-

AUTO ONE INSURANCE COMPANY,

Defendants.

----------x

TRIAL PART: 19

NASSAU COUNTY

INDEX NO: 016853/09

MOTION SEQ. NO: 1,2

SUBMIT DATE: 10/30/09

The following papers having been read on this motion:

Notice of motion..... 1
Cross-Motion..... 2
Opposition, Reply..... 3

Plaintiff, St. Barnabas Hospital, a/a/o Jessy Bonilla, and Plaintiff, NYU-Hospital for Joint Diseases, a/a/o Igor Berdichevsky, move pursuant to CPLR §3212 for an order granting summary (Sequence #001).

Defendant, Auto One Insurance Company, cross-moves for an order granting summary judgment dismissing the within complaint (Sequence #002).

This no-fault action arises out of two separate and unrelated automobile accidents involving two different assignors.

The first cause of action contained in the complaint was commenced with respect to assignor, Jessy Bonilla, who was involved in an automobile accident on January 24, 2009, and as a consequence of which he sustained physical injury and was thereafter treated at St. Barnabas Hospital between January 24, 2009 thorough January 27, 2009. Subsequently, a hospital facility form (NF-5) and a UB-04 were submitted to Auto One Insurance Company [hereinafter Auto One] for

payment of the hospital bill in the sum of $8,805.76. Said claim forms were mailed to the defendant via certified mail, return receipt requested on April 8, 2009 and were received by the defendant on April 10, 2009 (*see* Affirmation in Support at Exhs. 1,2). This is evidenced by the annexed copies of the dated postal receipt and a signed return receipt card (*id.*).

In addition to the postal receipts, the plaintiff proffers the affidavit of Pat Thompson, a Hospital Biller and Account Representative with Hospital Receivables System, Inc., the company responsible for handling No-Fault accounts for St. Barnabas Hospital. Pat Thompson states that as to assignor Bonilla, the respective bills were mailed to the defendant insurer on April 8, 2009 and that the defendant failed to timely issue a proper denial of claim (*id.* at Exhs. 2, 3).

The second cause of action was commenced with respect to assignor Igor Berdichevsky, who was injured in an automobile accident on May 24, 2009 (*id.* at p. 3). As a result, NYU-Hospital for Joint Diseases, provided medical treatment to Mr. Bergdichevsky during the period of June 4, 2009 through June 11, 2009 (*id.* at pp. 2,3). Thereafter, a hospital facility form (NF-5) and a UB-04 were submitted to Auto One for payment of the hospital bill in the sum of $6,723.01 (*id.* at Exh. 5). Said claim forms were mailed to the defendant via certified mail, return receipt requested on June 18, 2009 and were received by the defendant on June 22, 2009 (*id.* at Exhs.5,6). As proof thereof, the plaintiff provides copies of the dated postal receipt and signed return receipt card, with the assignors name written thereon (*id.* at Exh. 6).

The plaintiff states that with respect to assignor Bonilla, while a denial of claim was issued by the defendant dated April 16, 2009, same was defective as the information therein contained was inaccurate and accordingly the defendant is precluded from interposing any defense to the within action (*see* Affirmation in Support at p. 2; *see also* Reply Affirmation at pp. 2, 3).

The instant application is opposed by Auto One, which also cross-moves for summary judgment. Counsel for the defendant insurer argues that with respect to assignor Bonilla, as the plaintiff failed to provide the defendant with notice of the subject automobile accident within 30 days

thereof as is required by 11 NYCRR §65-2.4(b), the within action should be dismissed (*see* Affirmation in Opposition at ¶¶ 6,7,8; *see also* Welch Affidavit annexed to opposition at Exh. F at ¶¶6,7).

A provider of medical services can establish a *prima facie* showing of entitlement to summary judgment by submitting admissible proof that the requisite claim forms were mailed and received by the carrier and that the payment is overdue (*Insurance Law* 5106[a]; *New York and Presbyterian Hospital v Countrywide Insurance, Company*, 44 AD3d 729 [2d Dept 2007]; *Westchester Medical Center v Liberty Mutual Insurance Company,* 40 AD3d 981 [2d Dept 2007]; *New York & Presbyterian Hospital*, 30 AD3d 492 [2d Dept 2006]; *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 AD3d 742 [2004]). Pursuant to 11 NYCRR 65-3.8 (a)(1) "No-fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim . . . " (*see also* Insurance Law 5106; *Presbyterian Hospital in the City of New York v Maryland Casualty Company*, 90 NY2d 274 [1997]). Further, Insurance Regulation11 NYCRR 65-3.8(c) provides "Within 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part." An insurance carrier which fails to properly deny a claim within the required 30 days may be precluded from putting forth a defense to the cause of action (*Presbyterian Hospital in the City of New York v Maryland Cas. Co.*, 90 NY2d 274 [1997]).

In the matter *sub judice*, the plaintiff, St. Barnabas Hospital, a/a/o Jessy Bonilla, has established it's *prima facie* entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Here, the annexed copies of the statutory billing forms, the signed return receipts, together with annexed affidavit of Pat Thompson is sufficient demonstrate entitlement to judgment as a matter of law (*New York And Presbyterian Hospital v Countrywide Insurance, Company*, 44 AD2d 729 [2d Dept 2007], *supra*; *Westchester Medical Center v Liberty Mutual Insurance Company,* 40 AD3d 981 [2d Dept 2007], *supra*; *New York & Presbyterian Hospital*, 30 AD3d 492 [2d Dept 2006], *supra*; *Mary Immaculate Hospital v. Allstate Insurance Company*, 5

AD3d 742 [2004], *supra*).

In opposing the application, the defendant has failed to raise a triable issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986], *supra*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). As noted above, counsel for the defendant argues that the plaintiff failed to notify Auto One with respect to the happening of the accident within 30 days thereafter as is expressly required by 11 NYCRR §65-2.4(b). However, inasmuch as the defendant received from the plaintiff a completed hospital facility form (NF-5), the notice requirements as embodied in 11 NYCRR §65-2.4 are deemed satisfied (11 NYCRR §65-3.3[d]).

Additionally, a timely issued denial of claim, does not, in and of itself, insulate an insurer from being precluded from asserting a defense to an action where the denial of claim is "factually insufficient, conclusory, vague, or otherwise involves a defense which has no merit at law" (*St. Barnabas Hospital v Allstate Insurance Company*, 2009 WL 3486391 [2d Dept 2009]; *Nyack Hospital v State Farm Mutual Automobile Insurance Company*, 11 AD3d 664 [2d Dept 2004]). A properly issued denial of claim "must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (*Nyack Hospital v State Farm Mutual Automobile Insurance Company*, 11 AD3d 664 [2d Dept 2004], *supra* quoting *General Acc. Ins. Group v Cirucci*, 46 NY2d 862 [1979]; *St. Barnabas Hospital v Allstate Insurance Company*, 2009 WL 3486391 [2d Dept 2009], *supra*).

In the instant matter, it appears that two denials of claim were issued relative to assignor Bonilla, the first of which on April 13, 2009 and the second of which on April 16, 2009. While both of these denial were timely, same are both defective and accordingly the defendant is precluded from raising a defense to the instant action (*id.*). More specifically, the denial issued on April 13, 2009 contains no information whatsoever with respect to the bill provided by the plaintiff in terms of the date it was submitted or the amounts allegedly claimed in connection thereto. As to the denial subsequently issued on April 16, 2009, same does not correspond to the claim submitted. A review

of the record herein clearly reveals that the plaintiff submitted the hospital bill in reference to assignor Bonilla in the amount of $8,805.76, yet the denial issued in connection thereto refers to a claim in the amount of $22,185.34.

Based upon the foregoing, it is ordered that on the first cause of action the plaintiff, St. Barnabas Hospital, is awarded summary judgment in the amount of $8,805.76, plus statutory interest and attorney fees pursuant to 11 NYCRR § 65-4.6(e), together with costs and disbursements, and the defendant's cross-motion which seeks dismissal of the first cause of action as to assignor Bonilla is accordingly denied as moot.

Cross-Motion

Addressing now the defendant's cross-motion, with particular respect to assignor Berdichevsky, counsel argues that it is entitled to summary judgment dismissing the complaint as additional verification was requested of the plaintiff on July 1 and August 4, 2009 respectively, and notwithstanding such requests, the information has yet to be provided (*see* Affirmation in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment at ¶¶9,11,12,13,14,17,18). Counsel provides the annexed affidavit of Ms. Suzanne Telesca, who is employed by the defendant in the capacity of a Claim Representative (*id.* at Exh. J). Ms. Telesca avers that she received the bills relevant to Mr. Berdichevsky on June 22, 2009, and in response to which she mailed a letter seeking additional verification including an examination under oath of the parties, coverage information, and hospital records (*id.*). Ms. Telesca further states the requested information was not provided and as a result she mailed a second request for said information on August 4, 2009 (*id.*). As of October 15, 2009, the requested information had yet to be provided (*id.*).

11 NYCRR 65-3.5(a) provides that "Within 10 business days after receipt of the completed application for motor vehicle no-fault benefits (NYS form NF-2) or other substantially equivalent written notice, the insurer shall forward, to the parties required to complete them, those prescribed

verification forms it will require prior to payment of the initial claim." If the verification which has been requested has not been provided to the carrier within 30 days of the original request, "the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail" (11 NYCRR §65-3.6[b]). As noted above, "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 relevant information requested pursuant to section 65-3.5 of this Subpart." (11 NYCRR § 65-3.8 [a][1]). When a hospital fails to provide the requested information demanded in the verification request, "the 30-day period in which to pay or deny the claim does not begin to run, and any claim for payment is premature" (*Mount Sinai Hospital v Chubb Group of Insurance Companies,* 43 AD3d 889 [2d Dept 2007] quoting *New York & Presbyterian Hospital v Progressive Cas. Ins. Co.*, 5 AD3d 568 [2d Dept 2004]).

In his affirmation in Reply dated October 21, 2009, counsel for NYU-Hospital for Joint Diseases states that the mailing of the hospital records was delayed but will now be supplied (*see* Henig Affirmation in Reply and in Opposition to Cross-Motion at p. 3). Thus, as the defendant has not yet received the requested verification, the 30 day period in which Auto One was required to respond to the plaintiff's claim has not begun to run, and accordingly the defendant's application is GRANTED and the within action is hereby dismissed as premature (*Mount Sinai Hospital v Chubb Group of Insurance Companies,* 43 AD3d 889 [2d Dept 2007], *supra*; *New York & Presbyterian Hospital v Progressive Cas. Ins. Co.*, 5 AD3d 568 [2d Dept 2004], *supra; see also St. Vincent's Hospital of Richmond v American Transit Insurance Company,* 299 AD2d 338 [2d Dept 2002]).

This constitutes the decision and order of this Court.

ENTER

DATED: November 20 , 2009

HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED
NOV 25 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

To:

Attorney for Plaintiff
LAW OFFICES OF JOSEPH HENIG, P.C.
1598 Bellmore Avenue
P.O. Box 1144
Bellmore, New York 11710

Attorney for Defendant
BRUNO, GERBINO & SORIANO, LLP
445 broad Holllow road, Suite 220
Melville, New York 11747