

**New York Diagnostic Med. Care P.C. v GEICO Cas.
Ins. Co.**

2009 NY Slip Op 33147(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 600715/09

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EMILY JANE GOODMAN

PRESENT

PART 17

Index Number : 600715/2009
NY DIAGNOSTIC MEDICAL CARE, P.C.,
VS.
GEICO CASUALTY INSURANCE CO.,
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

Justice _____

INDEX NO. 600715-09
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

no needed for attached

FILED

JAN 07 2010

NEW YORK
COUNTY CLERK

Dated: 12/23/09

[Signature]

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

NEW YORK DIAGNOSTIC MEDICAL CARE P.C.
a/a/o Dawn Meyer-Barrett et al.,

Plaintiff,

Index No. 600715/09

-against-

GEICO CASUALTY INSURANCE CO. Defendant.

FILED
JAN 07 2010
NEW YORK
COUNTY CLERK OFFICE

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EMILY JANE GOODMAN, J.S.C.:

Plaintiff New York Diagnostic Medical Care P.C. a/a/o Dawn Meyer-Barrett et al. (Diagnostic) moves, pursuant to CPLR 3212, for summary judgment in the amount of \$60,714.54, plus interest and attorney's fees, and for summary judgment dismissing the defense of lack of medical necessity.

FACTS

Diagnostic is a medical facility that performs magnetic resonance imaging (MRI). In this action, it is the assignee of various patients that had MRIs performed at the facility. Diagnostic seeks to recover assigned first party no-fault benefits. Defendant Geico Casualty Insurance Co. (Geico) is the no-fault carrier covering each of the assignors. Diagnostic mailed a claim form for each assignor, as well as an assignment form. The claims were all timely made. Geico denied each of the claims based upon a peer review concluding that each MRI was not

medically necessary. Diagnostic contends that the no-fault regulations do not authorize the denial of a medical claim based upon a peer review, and that, therefore, Geico's failure to pay the submitted claims within 30 days of the submission of the claim was improper.

DISCUSSION

The insurance regulations require an insurance company covering no-fault accidents to either pay or deny a claim within 30 days after the company receives the claim. 11 NYCRR 65-3.8. The regulations further provide:

(4) If the specific reason for a denial of a no-fault claim, or any element thereof, is a medical examination or peer review report requested by the insurer, the insurer shall release a copy of that report to the applicant for benefits, the applicant's attorney, or the applicant's treating physician, upon the written request of any of these parties.

11 NYCRR 65-3.8 (b).

In accordance with this regulation, the courts have concluded that an insurer can rely on a peer review report to support a denial of medical benefits. See e.g. *Channel Chiropractic, P.C. v Country-Wide Ins. Co.*, 38 AD3d 294 (1st Dept 2007); *A.B. Med. Servs., PLLC v GEICO Cas. Ins. Co.*, 39 AD3d 778, 779 (2d Dept 2007); *A.B. Med. Servs., PLLC v Liberty Mut. Ins. Co.*, 39 AD3d 779 (2d Dept 2007); *New York Univ. Hosp. Rusk Inst. v Government Empls. Ins. Co.*, 39 AD3d 832 (2d Dept 2007). Diagnostic unpersuasively attempts to distinguish these cases,

and points to inapplicable health insurance cases (not no-fault cases) that have concluded that, in order to use peer review to reject a medical claim, an insurer must demonstrate that the policy granted it such a right. See *Strassberg v Connecticut Gen. Life Ins. Co.*, 182 AD2d 1055 (3d Dept 1992); *Penoyer v Guardian Life Ins. Co. of Am.*, 167 AD2d 915 (4th Dept 1990). In the cases cited by Diagnostic the policies stated that they would cover expenses for care that was prescribed by a physician. Thus, those policies did not provide for the insurance company to evaluate the validity of such expenses, unlike the no-fault law. Further, the no-fault statute, Insurance Law § 5102 (a) (1), states that no-fault insurance is to cover "All necessary expenses incurred." Peer review is used by insurers to support their determination as whether an expense is necessary and nothing Diagnostic has argued supports a court interpretation that would, as a matter of law, prohibit peer review when the plain language of the regulation indicates that such review is contemplated in order to ascertain the necessity of any given medical procedure. If, as Diagnostic argues, the danger of peer review in denying legitimate claims is more serious than the dangers of unneeded procedures being ordered and paid for by no-fault, that is an issue for the Legislature to address.

Diagnostic's arguments comparing workers' compensation laws and social security benefits are inapposite. Different bodies of

law are involved in those areas, and those rules cannot be imported into no-fault laws and regulations, especially when the no-fault statutes and regulations specifically note the existence of peer review. Similarly, Diagnostic's attempt to limit peer reviews to dentists or plastic surgeons seeking compensation for non-emergency treatment is not compelling. The controlling regulation for that matter, 11 NYCRR 65-3.16 (11), concerns a proposed course of treatment, and there is nothing in that subsection which indicates that it is only under those conditions that a no-fault carrier can ascertain whether a procedure is medically necessary. To the contrary, both Insurance Law § 5102 and 11 NYCRR 65-3.8 (b) (4) presume an insurer's ability to utilize peer review.

Inasmuch as there is no serious question that Geico denied the claims in a timely manner, summary judgment is not warranted on the basis of any alleged failure to respond in a timely manner.

Diagnostic has failed to offer any evidence that the MRIs that it performed were medically necessary. Geico has submitted the peer review reports indicating the reasons that the MRIs were not medically necessary. Although Geico has not cross-moved for summary judgment, it asked that the court search the record, and grant it summary judgment if Diagnostic fails to rebut the medical evidence that it submitted. The court declines to do so.

While the court can search the record and grant reverse summary judgment in appropriate circumstances, here, Diagnostic's prima facie burden did not include evidence that the MRIs were medically necessary. Rather, medical necessity is a defense raised by Geico. Thus, the question of medical necessity need not be reached in evaluating Diagnostic's claim, and it was under no obligation to present such evidence. Accordingly, this is not a matter in which searching the record is appropriate, because it would impose a burden on Diagnostic which was not part of its motion. Thus, even though a failure to rebut the medical necessity evidence presented by Geico could result in summary judgment in Geico's favor had Geico cross-moved for such relief (see e.g. *A Khodadadi Radiology, P.C. v N.Y. Cent. Mut. Fire Ins. Co.*, 16 Misc 3d 131[A], 2007 NY Slip Op 51342[U] (App Term, 2d & 11th Jud Dists 2007)), that outcome is inappropriate at this time, and the question of medical necessity will be addressed at trial.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the parties appear for a pretrial conference on February 18, 2010.

Dated: December 23, 2009

FILED
 JAN 07 2010
 COUNTY CLERK'S OFFICE

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 JAN 07 2010
 NEW YORK COUNTY CLERK'S OFFICE
 ENTER: *[Signature]*
 J.S.C.
EMILY JANE GOODMAN