

**Mary Immaculate Hosp.-Caritas Health Care v
Government Empl. Ins. Co.**

2009 NY Slip Op 33183(U)

December 22, 2009

Supreme Court, Nassau County

Docket Number: 9356/09

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

PRESENT: HON. WILLIAM R. LaMARCA
Justice

MARY IMMACULATE HOSPITAL-CARITAS
HEALTH CARE a/a/o RENE KALAW;
NEW YORK UNIVERSITY TISCH a/a/o
TYSON SCHALLIPP; NEW YORK HOSPITAL
MEDICAL CENTER OF QUEENS a/a/o
NUNU KHIN and DENISE RIVERA,

Motion Sequence #1
Submitted October 22, 2009

Plaintiffs,

-against-

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GOVERNMENT EMPLOYEES INSURANCE
COMPANY,

Defendant.

The following papers were read on these motions:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Relief Requested

Plaintiffs, MARY IMMACULATE HOSPITAL-CARITAS HEALTH CARE a/a/o RENE
KALAW, NEW YORK UNIVERSITY HOSPITAL TISCH INSTITUTE a/a/o TYSON
SCHALLIPP and THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS a/a/o
NUNU KHIN and DENISE RIVERA, move for an order granting them summary judgment

against defendant, GOVERNMENT EMPLOYEES INSURANCE COMPANY (hereinafter referred to as "GEICO"), based upon its alleged failure to make timely payments under the no-fault policies of the respective patient/assignors. Plaintiffs contend that GEICO has failed to act on four (4) separate no-fault billings in accordance with Insurance Law §5106 which requires timely payment or denial of the requests for no fault benefits within thirty (30) days of the claim. GEICO opposes the motion, which is determined as follows:

Background

This matter arises out of the alleged failure of GEICO to pay four (4) separate no-fault billings and counsel for plaintiffs states that the actions are joined pursuant to CPLR §1002(a) as the claims arise out of a uniform contract of insurance and involve the interpretation of the same no-fault provisions of the Insurance Law, citing *Hempstead General Hospital v Liberty Mutual Insurance Company*, 134 AD2d 569, 521 NYS2d 469 (2nd Dept. 1987).

The Statute

11 NYCRR, Part 65, the regulations implementing the Comprehensive Motor Vehicle Insurance Reparations Act, commonly referred to as the No-Fault Law, provides that "No-Fault Benefits are overdue if not paid within 30 calendar days after the insurer receives proof of Claim..." (11 NYCRR 65-3.8[a][1]). Within thirty (30) days of receiving a claim, the insurer is required to either pay or deny the claim in whole or in part (see, Insurance Law §5106[a]; 11 NYCRR 65-3.8 [c]). However, this thirty (30) day period may be extended by a timely demand by the insurance company for further verification of a claim (see, 11 NYCRR 65-3.5). Within 10 business days after receipt of the completed

application for no fault benefits, the insurer must forward, to the parties required to complete them, the prescribed verification forms it will require prior to payment of the initial claim (see, 11 NYCRR 65-3.5[a]). If the demanded verification is not received within thirty (30) days, the insurance company must follow up within ten (10) calendar days of the insurers failure to respond, either by telephone call or mail (see, 11 NYCRR 65-3.6[b]); *New York Hospital Medical Center of Queens v State Farm Mutual Automobile Insurance Company*, 293 AD2d 588, 741 NYS2d 86 [2nd Dept. 2002]). As a complete proof of claim is a prerequisite to receiving no-fault benefits, a claim need not be paid or denied until all demanded verification is provided (see, 11 NYCRR 65-3.5[c]; *Montefiore Medical Center v New York Central Mutual Fire Insurance Company*, 9 AD3d 354, 780 NYS2d 161 (2nd Dept. 2004); *New York & Presbyterian Hospital v American Transit Insurance Co.*, 287 AD2d 699, 733 NYS2d 80 (2nd Dept. 2001); *Hospital for Joint Diseases v Elrac, Inc.*, 11 AD3d 432, 783 NYS2d 612 (2nd Dept. 2004). Statutory interest and attorneys fees may be directed if payment is not timely made on a completed claim. See, Insurance Law § 5106(a), 11 NYCRR §65-3.9 and §3.10.

First Cause of Action- MARY IMMACULATE HOSPITAL-CARITAS HEALTH CARE a/a/o
RENE KALAW

Plaintiff, MARY IMMACULATE HOSPITAL-CARITAS HEALTH CARE, is the assignee for health services rendered to RENE KALAW during the period from February 7, 2009 through February 10, 2009, arising out of an automobile accident that occurred on February 6, 2009. Plaintiff claims that it billed GEICO with a Hospital Facility Form (Form N-F5) and a UB-04 on February 25, 2009, in the sum of \$5,395.28, which was received

[* 4]

by GEICO on February 27, 2009. It is plaintiff's position that GEICO failed to either pay the bill or issue a denial of claim form and that plaintiff is entitled to summary judgment and to interest and attorney fees as a matter of law. Counsel for GEICO asserts that on March 12, 2009, it sent plaintiff a timely request for additional verification, which was sent in accordance with the standard practices of GEICO in the regular course of business, and that the information was received on March 13 2009. Thereafter, GEICO had the bill and record reviewed by an independent peer doctor, who found that claimant suffered from syncope, a "loss of consciousness resulting from insufficient blood flow to the brain", and concluded that claimants hospitalization was the result of a syncopal incident and not a traumatic event. Based on said peer review, GEICO denied the claim on March 25, 2009. In reply, counsel for plaintiff points out that the casualty review refers to services rendered by "Long Island Jewish Medical Center" and not the plaintiff herein and is, therefore, insufficient to deny no-fault benefits to the plaintiff as GEICO has failed to sustain its burden. The Court finds that the payment in the first cause of action was overdue and that MARY IMMACULATE HOSPITAL-CARITAS HEALTH CARE is entitled to summary judgment and to statutory interest and attorney fees, as a matter of law. *Nyack Hospital v Encompass Insurance Company*, 23 AD3d 535, 806 NYS2d 643 (2nd Dept. 2005). *Hempstead General Hospital v Insurance Company of North America*, 208 AD2d 501, 617 NYS2d 478 (2nd Dept. 1994).

Second Cause of Action - NEW YORK UNIVERSITY HOSPITAL TISCH INSTITUTE
a/a/o TYSON SCHALLIPP

Plaintiff, NEW YORK UNIVERSITY HOSPITAL TISCH INSTITUTE, is the assignee for health services rendered to TYSON SCHALLIPP, during the period from February 28, 2009 through March 3, 2009, arising out of an automobile accident that occurred on September 28, 2009. Plaintiff claims that it billed GEICO with a Hospital Facility Form (Form N-F5) and a UB-04, on March 11, 2009, in the sum of \$5,286.88, which was received by GEICO on March 12, 2009. It is plaintiff's position that GEICO failed to either pay the bill or issue a denial of claim form and that plaintiff is entitled to summary judgment and to interest and attorney fees as a matter of law. The keeper of the file for GEICO states that, on March 18, 2009, GEICO sent a request for additional verification to plaintiff, which was mailed in accordance with delineated and regular mailing procedures, and on April 29, 2009 a second verification request was sent. Counsel for GEICO states that, to date, the requested information has not been received and the time to pay or deny the claim has been tolled. In reply, counsel for plaintiff states that it has no record of receiving the defendant's verification requests and points out that the requests refer to a different hospital bill for \$37,922.61. Plaintiff argues that the affidavit of the keeper of the files is insufficient to prove that the verification requests were properly mailed. After a careful reading of the submissions herein, it is the judgment of the Court that plaintiff has not demonstrated that it is entitled to judgment, as a matter of law. The record before the Court raises questions of fact with respect to the service of requests for verification and whether same were timely mailed to an appropriate address, which precludes the granting

of summary judgment.

Third Cause of Action- THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS

a/a/o NUNU KHIN

Plaintiff, THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, is the assignee for health services rendered to NUNU KHIN, during the period from October 28, 2008 through October 30, 2008, arising out of an automobile accident that occurred on October 28, 2008. Plaintiff claims that it billed GEICO with a Hospital Facility Form (Form N-F5) and a UB-04, on February 18, 2009, in the sum of \$7,523.03, which was received by GEICO on February 23, 2009. It is plaintiff's position that GEICO failed to either pay the bill or issue a timely denial of claim form and that plaintiff is entitled to summary judgment and to interest and attorney fees as a matter of law. Counsel for plaintiff states that, on March 25, 2009, GEICO issued an untimely and defective denial of claim form that referred to an incorrect "Amount of Bill" and an incorrect "Amount in Dispute". Plaintiff also claims that the denial referred to incorrect dates of verification, which were received by plaintiff on March 3, 2009 and June 6, 2009, and were untimely. Counsel for plaintiff asserts that the reason for the denial— that the bill was paid by another source— is false, since the bill remains unpaid. Plaintiff claims there is no proof of payment and that it is entitled to summary judgment. Counsel for GEICO asserts that the subject bill has been paid prior to commencement of the action by Ingenix Subrogation, and the keeper of the files annexes copies of a payment summary that reflects that the subject bill for the dates on this claim have been paid, and that plaintiff has been fully reimbursed. In reply, counsel for plaintiff states that it has no record of receiving payment on the claim and that a letter

from third party "Ingenix" is unknown to plaintiff. After a careful reading of the submissions herein, it is the judgment of the Court that plaintiff has not demonstrated that it is entitled to judgment, as a matter of law. The record before the Court raises questions of fact with respect to whether the bill was timely paid. The Court finds that GEICO's denial on March 25, 2009 was timely, but questions remain as to whether payment by Ingenix Subrogation was in fact made, which precludes the granting of summary judgment.

Fourth Cause of Action- THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS
a/a/o DENISE RIVERA

Plaintiff, THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, is the assignee for health services rendered to DENISE RIVERA, during the period from October 22, 2008 through October 23, 2008, arising out of an automobile accident that occurred on October 22, 2008. Plaintiff claims that it billed GEICO with a Hospital Facility Form (Form N-F5) and a UB-04, on December 18, 2008, in the sum of \$2,934.84, which was received by GEICO on December 23, 2008. It is plaintiff's position that GEICO issued an untimely denial of claim form, on March 24, 2009, and that plaintiff is entitled to summary judgment and to interest and attorney fees as a matter of law. Counsel for GEICO asserts that it sent additional verification requests, on December 26, 2008 and January 26, 2009, which were mailed in accordance with delineated and regular procedures, and that the additional information was received on February 6, 2009. It is GEICO's position that the claim was denied because the information disclosed that claimant was intoxicated when he presented to the hospital with a blood alcohol level of .116 which is over the legal limit. Counsel for plaintiff points out that the denial on March 24, 2009 was more than thirty (30) days after

GEICO received the requested information and was untimely as a matter of law, citing *Presbyterian Hospital in City of New York v Maryland Casualty Co.*, 90 NY2d 274, 660 NYS2d 536, 683 NE2d 1 (C.A. 1997). The Court agrees. The Court finds that the payment in the fourth cause of action was overdue and that THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS is entitled to summary judgment and to statutory interest and attorney fees, as a matter of law. *Nyack Hospital v Encompass Insurance Company*, *supra*; *Hempstead General Hospital v Insurance Company of North America*, *supra*.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A. 1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden

on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]). Based on the foregoing, it is hereby

ORDERED, that the motion by MARY IMMACULATE HOSPITAL-CARITAS HEALTH CARE for summary judgment on the First cause of action is granted; and it is further

ORDERED, that the motion by NEW YORK UNIVERSITY HOSPITAL TISCH INSTITUTE for summary judgment on the second cause of action is denied; and it is further

ORDERED, that the motion by THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS on the Third cause of action is denied; and it is further

ORDERED, that the motion by THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS on the Fourth cause of action is granted; and it is further

ORDERED, that plaintiff shall settle judgment on the First and Fourth causes of action; and it is further

ORDERED, that the Second and Third causes of action are severed and continued and the parties shall appear for a Preliminary Conference on February 2, 2010, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

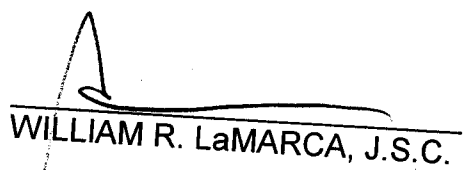
This constitutes the decision and order of the Court.

Dated: December 22, 2009

TO: Joseph Henig, PC
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maryimmaculate,nyutisch&nyhoptial-kalaw,schallip,khin,rivera,#1/sumjudg


WILLIAM R. LaMARCA, J.S.C.

ENTERED

DEC 28 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**