

**Wyckoff Hgt.s Med. Ctr. v Country Wide Ins. Co.**

2009 NY Slip Op 33263(U)

May 12, 2009

Sup Ct, Nassau County

Docket Number: 020087/08

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**  
*Justice.*

TRIAL/IAS PART 4  
NASSAU COUNTY

WYCKOFF HEIGHTS MEDICAL CENTER,  
a/a/o RAMONA RODRIGUEZ;  
NEW YORK AND PRESBYTERIAN HOSPITAL,  
a/a/o JOAQUIN BENITEZ,

Plaintiffs,

ORIGINAL RETURN DATE: 03/24/09  
SUBMISSION DATE: 03/24/09  
Index No. 020087/08

-against-

COUNTRY WIDE INSURANCE COMPANY,

Defendant.

MOTION SEQUENCE #1, 2

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Reply.....	3

Motion by plaintiffs and cross-motion by defendant, each seeking an order pursuant to CPLR 3212 awarding them summary judgment in their favor, are decided as follows:

The instant action seeks monetary damages as a result of defendant's alleged failure to make timely payments on no-fault claims. Plaintiffs' action seeks recoveries on behalf of two different hospitals for services rendered to two different patients, each of whom was involved in unrelated automobile accidents.

The first cause of action is brought by Wyckoff Heights Medical Center ("Wyckoff") a/a/o Ramona Rodriguez seeking \$3,044.23 plus interest and attorney's fees following an accident on August 7, 2008.

The second cause of action is brought by New York and Presbyterian Hospital ("New York") a/a/o Joaquin Benitez seeking \$48,697.63 plus interest and attorney's fees following an accident on July 19, 2008.

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It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If this initial burden is not met, the motion must be denied (*Id.*).

“[P]laintiff sustains its burden of proof by presenting a timely and proper notice of claim, for which there has been no payment or proper denial” *Fifth Ave. Pain Control Ctr. v. Allstate Ins. Co.*, 196 Misc.2d 801, 766 NYS2d 748 [Civ. Ct. Queens Co. 2003].

Plaintiff New York has provided evidentiary proof that it submitted the hospital facility form (N-F5) to defendant by certified mail, return receipt requested, and that the billing was overdue. Plaintiff annexes a copy of the certified mail receipt showing that it was received by defendant on August 28, 2008 (Ex. 5). Defendant’s argument that plaintiff New York failed to submit timely notice of claim is unavailing. 11 NYCRR 65-2.4(c) provides, in pertinent part, that proof of claim shall be submitted “in no event later than 45 days after the date services are rendered.” Here the services were rendered between July 19, 2008, and July 26, 2008, and the notice was received by defendant on August 28, 2008. The defendant’s submissions in opposition to the motion were insufficient to raise a triable issue of fact” (*Westchester Med. Ctr. v. AIG, Inc.*, 36 AD3d 900 [2d Dept. 2007]). Accordingly, plaintiff New York’s motion for summary judgment is granted and defendant’s cross-motion is denied with respect to New York.

Submit Clerk’s judgment on the second cause of action in the amount of \$48,697.63, plus attorney’s fees in amount of \$850.00, together with interest thereon at the rate of 2% per month from November 6, 2008, the date of commencement of this action. (*See*, 11 NYCRR § 65-3.9(c); *Hempstead Gen. Hosp. v. Insurance Co. of N.A.*, 208 AD2d 501 [2d Dept. 1994]).

The causes of action were brought on behalf of unrelated assignors involved in separate, unrelated motor vehicle accidents. The only common element between the claims is the identity of the insurance carrier and that carrier’s failure to pay the no-fault benefits. Under such circumstances, severance is appropriate (*see*, *Mount Sinai v. Motor Veh. Acc. Indem. Corp.*, 291 AD2d 536 [2d Dept., 1992]; *Berger v. Liberty Mut. Ins. Co.*, 10 Misc. 3d 139 [App. Term, 2d Dept., 2005]).

Pursuant to CPLR 325(d), plaintiff Wyckoff’s cause of action is severed from the cause of action by New York and removed from the Supreme Court and transferred to the Nassau County District Court to be heard and determined.

Plaintiff Wyckoff’s counsel shall serve a copy of this order upon the Nassau County Clerk, the Clerk of the District Court and upon adverse counsel.

The severed cause of action shall be memorialized in separate pleadings which shall be served

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upon adverse counsel.

The corresponding affidavit of service shall be filed under a separate index number with the Clerk of the Nassau County District Court within 20 days of service. The expense associated therewith shall be borne by the respective plaintiff. Issue is to be joined within thirty days after proof of service is filed with the Clerk of the Nassau County District Court.

- Upon issuance of the District Court Index Number, the Clerk of the District Court shall mail notification to the parties as to the next scheduled appearance of the actions before the District Court.
- The caption of this action shall be amended to read as follows:

NEW YORK AND PRESBYTERIAN HOSPITAL,  
a/a/o JOAQUIN BENITEZ,

Plaintiff,

-against-

COUNTRY WIDE INSURANCE COMPANY,

Defendant.

This decision constitutes the order of the court.

Dated: 5-12-09

~~HON THOMAS P. PHELAN~~

THOMAS P. PHELAN, J.S.C. XXX

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**ENTERED**

MAY 14 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**