

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

2010 NY Slip Op 30360(U)

February 22, 2010

Supreme Court, New York County

Docket Number: 104271/09

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

*My Diagnostic Medical Care PC et al.
v/a/o Allan Springer et al.,
- v -
plaintiffs*

INDEX NO. 10127169

MOTION DATE _____

MOTION SEQ. NO. 001

*Health Care Services Insurance Co.,
defendant.*

MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 24 2010

CLERK
OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: February 22, 2010

JMK
JOAN M. KENNEY J.S.C.

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 8

-----X

NEW YORK DIAGNOSTIC MEDICAL CARE P.C.,
a/a/o Allen Springer, et. al.,

Plaintiffs,

-against-

GEICO CASUALTY INSURANCE CO.,

Defendant.

-----X

KENNEY, JOAN M., J.

DECISION AND ORDER
Index Number.: 104271/09
Motion Cal.: 2/4/10
Motion Seq. No. 001

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers

Numbered

Notice of Motion, Affidavit, Exhibits and Memorandum of Law	1-6
Affirmation in Opposition and Exhibits	7-9
Reply Memorandum of Law	10

Appearances

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Upon the foregoing cited papers, the Decision and Order of this Motion is as follows:

In this action to recover no-fault benefits, plaintiff, New York Diagnostic Medical Care P.C., seeks an Order, pursuant to CPLR 3212, granting plaintiff judgment in the amount of \$40,071.34 plus interest and attorneys' fees. Plaintiff also seeks an Order, pursuant to CPLR 3211 (b), dismissing the defense of lack of medical necessity. Alternatively, plaintiff seeks an Order, pursuant to CPLR 3212 (g), specifying that plaintiff has established its prima facie case for purposes of trial.

Briefly, plaintiff avers that it was assigned the no-fault benefits of thirty-four individuals (named as assignors herein) who were alleged to have been involved in either one or 40 different car accidents. The papers are unclear. Plaintiff did not specify when the accidents occurred and/or

whether these individuals were involved in the same accident. In fact, plaintiff's papers are woefully inadequate, and as a result this Court must find that plaintiff did not justify its *prima facie* entitlement to summary judgment, let alone for purposes of trial (see plaintiff's alternative relief sought).

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]). Additionally, pursuant to Ins Law §5106(a) and 11 NYCRR 65.15(g)(3), an insurer is required to either pay or deny the claim for no-fault benefits, within 30 days from the date the applicant provides proof of the claim.

Here, plaintiff failed to specify when the claims were submitted and/or if the claims, or part thereof, were paid/or denied and/or whether the 30 day time limit was tolled upon a request for further verification (see 11 NYCRR 65.15[d]). Plaintiff's self-serving statement that it has "established the receipt by defendant of the claim forms upon which this action is based," (see ¶ 7 of Leonard Rubin affidavit dated March 11, 2009), is insufficient and without merit. Plaintiff has not proven that it mailed the claims in a timely fashion let alone that defendant received same in a timely manner. There are 40 individuals named in the lawsuit. It was incumbent upon plaintiff to establish when (specific dates) the mailings were done and when (specifically) the claims were received by defendant for each of the thirty-four individually named assignors, and finally that payment was overdue on each of the submitted claims.

In support of its motion, plaintiff annexed an affidavit from Leonard Rubin (Mr. Ryubin),

dated March 24, 2009.¹ Mr. Rubin identifies himself as the “medical biller and billing manager” since “its inception” (see affidavit ¶1). There is no indication as to what “its inception” is referring to. The inception of his title as the “medical biller and billing manger”? The inception of the location where plaintiff performed medical services? The “inception” of plaintiff as a PC? No dates were provided as to the “inception” or even a description as to the “inception” of what.

Mr. Rubin never affirmatively states that the claims pertinent the 40 individuals were actually reviewed, approved and mailed by him. Rather, Mr. Rubin merely states that it was his business duty to review the claims (see affidavit ¶2). Furthermore, Mr. Rubin states that he made certain that each claim form was mailed out, yet failed to affirmatively state which claim forms were reviewed and when, specifically, it was mailed. Instead, plaintiff annexed volumes of documents as Exhibit “C” to its moving papers without identifying the documents and/or how they were to be considered in support of the herein sought reliefs.

Plaintiff’s memorandum of law also served no probative value in considering the instant application. The memorandum of law merely recites cases and statutes without applying the case law or statutory references to the facts of this case (or the facts surrounding the 40 individual claims).

Lastly, plaintiff failed to submit an affidavit from someone with personal knowledge of the facts with regard to its application to dismiss the defense of lack of medical necessity interposed by defendant. Plaintiff did not establish that the supplies/procedures provided to these 40 individuals were medically necessary. Plaintiff also failed to submit an affirmation from a doctor to rebut this

¹Note, this court is considering the affidavit stale, having been dated more than six months from the date the within motion was deemed submitted to this court for final determination.

defense.

Plaintiff's attempted to persuade this Court that denying a no-fault claim based on lack of medical necessity, is improper, lacks substantive legal support and such legal posture is simply without merit. A denial of a claim based upon the fact that the medical services provided "lacked medical necessity," can be a defense to non-payment of no-fault benefits, and can in fact defeat a motion for summary judgment even where plaintiff establishes a prima facie entitlement to such relief (see *Countrywide Insurance Company v 563 Grand Medical*, PC 50 AD3d 313 [1st Dept 2008]).

In this case, however, plaintiff has not made out a *prima facie* showing of entitlement to summary judgment as a matter of law, and therefore, defendant is under no obligation to come forward with evidentiary proof creating a triable issue of fact to defeat the within motion (see *Cugini v System Lumber Co.*, 111 A.D.2d 114, [1st Dept 1985]). Moreover, a motion for summary judgment is a drastic measure to be used sparingly and should only be granted when there are no issues of triable fact (*Mandel v Michael O'Conner, Indep. Professional Servs.*, _NY2d_, 2001 NY Slip Op 40052U [February 7, 2001]). Here, plaintiff has not even established what the undisputed facts are for each of the 40 individual assignors in this matter. Accordingly, it is

ORDERED, that plaintiff's motion is denied, in its entirety; and it is further

ORDERED, that the parties appear for a preliminary conference on April 8, 2010 at 9:30 a.m. in Room 304 at 71 Thomas Street, New York, New York 10013.

DATED: February 22, 2010

FILED
FEB 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


Hon. Joan M. Kenney
J.S.C.