SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL TERM PART: 45

NYU-HOSPITAL FOR JOINT DISEASES, a/a/o FRANCISCO ROMERO, CHITRANIE SINGH; WESTCHESTER MEDICAL CENTER, a/a/o SONIA VILLARROEL,

Plaintiffs,

-against-

AMERICAN INTERNATIONAL GROUP, INC., A/K/A 21ST CENTURY INSURANCE COMPANY,

Defendants.

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INDEX NO.: 018951/09

MOTION DATE:12-3-09
SUBMIT DATE:3-17-10
SEQ. NUMBER - 001

MOTION DATE: 1-5-10
SUBMIT DATE: 3-17-10
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 1-4-09.....1
Notice of Cross Motion, dated 12-10-09.....2
Reply and Opposition to Cross Motion, dated 12-24-09.....3
Reply and Opposition to Cross Motion, dated 12-29-09.....4

These are plaintiff's motion and defendant's cross motion both for summary judgment as to the Third Cause of Action on behalf of Villarroel, pursuant to CPLR §3212. The motions are denied. The First and Second Cause of action as to Romero and Singh have been withdrawn as settled.

Plaintiff provided first-party no-fault benefits to a person covered by a policy of insurance issued by defendant.

Plaintiff treated the insured Villarroel between May 31, 2009 and June 1, 2009. A bill on June 22, 2009 was received by defendant on June 28, 2009. Defendant did not pay or deny the bill because it claims that it had reasonable cause to believe that the accident and later treatment by plaintiff were the result of intoxication and thus excluded from coverage. Ins. Law §5103(b)(2), 11 NYCRR 6-3.8(g). The regulation provides that "if an insurer has reason to believe that the applicant was operating a motor vehicle while intoxicated or impaired and such intoxication or impairment was a contributing cause of the automobile accident, the insurer shall be entitled to all available information relating to the applicant's condition at the time of the accident. The statute provides that an insurer may exclude from coverage a person who is injured as a result of operating a motor vehicle while intoxicated or impaired within the meaning of the VTL §1192.

Summary judgment is the procedural equivalent of a trial. *S.J. Capelin Assoc. Inc. v Globe Mfg. Corp.,* 34 NY2d 338, 341 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. *Matter of Suffolk Cty Dept of Social Services v James M.*, 83 NY2d 178, 182 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law. *Guiffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In an action for no-fault payments the plaintiff makes a *prima facie* showing of entitlement to judgment by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received, and that payment of the No-Fault benefits was overdue. Insurance Law 5106(a); *Westchester Medical Center v AIG, Inc.*, 36 AD3d 900 (2nd Dept. 2007). On this motion plaintiff argues that it has presented a *prima facie* case for payment of no-fault benefits for services rendered. Plaintiff has submitted the requisite billing forms, certified mail receipts, signed return receipt cards, and an affidavit from a billing person stating that she/he personally mailed the claims. There is no dispute that defendant failed to pay or deny the claims within 30 days. On this record the Court finds that plaintiff has presented a *prima facie* case.

In opposition defendant relies upon its affirmative defense that the incident which caused the injuries was excluded from coverage because the injured party was intoxicated and injured as a result of such condition.

Pursuant to Insurance Law 5106(a), no-fault benefits are overdue if not paid by the insurer within 30 days after submission of proof of loss. *See also*, 11 NYCRR 65-3.8. The insurer is precluded from asserting any defenses to payment when it fails to deny the claim within the required 30-day period. *Presbyterian Hosp. in the City of New York v Maryland Casualty Co.*, 90 NY2d 274, 278 (1997). A narrow exception to this preclusion rule is recognized for situations where the insurer raises a defense of lack of coverage. *Central General Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 198 (1997). However, intoxication has been held to constitute an exclusion from coverage rather than no coverage

thus requiring an insurer to deny or pay the claim or make avail of the regulations which address the exclusion and extend the time within which to pay or deny the claim. *Presbyterian Hospital in the City of New York v. Maryland Casualty Co.*, 90 NY2d 274 (1997).

A variation of the requirement that an insurer must either deny or pay a claim exists with respect to persons injured when believed to have been operating their vehicle while intoxicated. If an insurer has reason to believe that alcohol consumption was a contributing factor in causing the accident, the insurer is entitled to all available information relating to the applicant's condition at the time of the accident 22 NYCRR §65-3.8(g) and proof of claim shall not be completed until information, which has been requested pursuant to subdivision 65-8.5(a) or (b), has been furnished to the insurer by the applicant or the authorized representative. Regulation §65-3.5(c) provides that an insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification is requested. This latter section does not confine or require the insurer to seek information solely from the provider but rather contemplates that verification information may be sought from any source.

In sum, intoxication may operate as an exclusion from coverage rather than as a non-covered event , thus requiring either timely payment or denial or in lieu thereof, timely requests for verification. A provider establishes a *prima facie* case for summary judgment by showing proper billing, mailing and lack of payment but an insurer may demonstrate the existence of triable factual issues by showing that it made timely requests for verification

regarding alleged intoxication that were not answered. *Westchester Med. v. Allstate Ins. Co.*, 53 Ad3d 481 (2d Dept. 2008); *Westchester Med. v. State Farm Mut. Auto.*, 44 AD3d 750 (2d Dept. 2007).

The insurer has raised questions of fact sufficient to deny summary judgment to plaintiff by showing that it had reason to believe that intoxication was a contributing cause of the accident causing injury and made timely requests for verification (including follow-up requests) from plaintiff.

The incident was a one car accident, the driver was charged and convicted of driving while intoxicated and the affirmed supporting deposition of the laboratory technician contains information that the blood alcohol level was 0.21%, a level sufficient to fall within the scope of the statute.

A dispute over whether a toxicology report was ever sent has been held to create a question of fact so as to bar summary judgment, *Westchester Medical Center v. Allstate Insurance Company, supra*; *Westchester Medical Center v. progressive Casualty Insurance Co.*, 51 AD3d 1012 (2d Dept. 2008); *cf Nyack Hospital v. State Farm Mut. Ins. Co.*, 19 AD3d 569 (2d Dept. 2005). Defendant claims by way of a detailed fact filled affidavit that it made a timely request and follow-up request for the patient's blood alcohol information that was not received until November 24, 2009, following which it immediately issued its denial. The conviction fax information is also dated that same day. Plaintiff claims by way of reply that it sent its own "lab test results" by fax on July 28, 2009. This claim is unavailing to establish entitlement to summary judgment because the letter is not

authenticated by a person with knowledge, plaintiff has not attached the lab test results that it claims to have sent and such results are not a substitute for the sworn deposition of the Westchester County Toxicologist who tested a blood sample received on the day after the accident.

There is a factual dispute here as to plaintiff's compliance with the request for verification as to the possible intoxication condition of the insured. See, *Central Suffolk Hospital v. New York Cent. Mut. Fire Ins. Co.*, 24 AD3d 492 (2d Dept. 2005). Defendant has not, however, stated when it requested information from the police authority. Hence, the Court cannot state whether there was a timely request for that information.

In *Westchester Medical Center v. Progressive Casualty Insurance Company*, 43 AD2d 1039 (2d Dept. 2007), and in *Central Suffolk Hosp. v. New York Cent. Mut. Fire Ins. Co., supra,* the court granted summary judgment in favor of a defendant against a plaintiff because there was no issue of fact as to the hospital's failure to provide verification as to intoxication. Here, compliance by plaintiff is an issue of fact.

With respect to defendant's cross motion, it has not been established as a matter of law that the injured person was intoxicated and that the intoxication contributed to the injury causing accident. Defendant's evidence is sufficient to raise questions of fact as to whether the exclusion for intoxication is applicable, but not to establish entitlement to summary judgment. Notably absent here are any specifics as to how the accident was caused by plaintiff's intoxication. *See Westchester Medical Center v. Progressive Casualty Insurance Company*, 51 AD3d 1014 (2d Dept. 2008); *Lynch v. Progressive Ins. Co.*, 12 AD3d 570 (2d Dept. 2004). *Cernik v. Sentry Ins.*, 131 AD2d 952 (3d Dept. 1987).

Plaintiff also contends that the denial of claim is lacking in specificity, thereby rendering defendant's ultimate denial as ineffective. See *General Acc. Ins. Group v. Circucci*, 46 NY2d 862 (1979); *Todaro v. Geico Gen. Ins. Co.*, 46 AD3d 1086 (3rd Dept. 2007); *Olympic Chiropractic, P.C., v. American Transit Ins. Co.*, 14 Misc 3d 129(A). (App. Term 2d and 11th Judicial Districts 2007). The denial of claim form specifies by reference to regulation and the insured as to intoxication or impairment and thus provides enough detail as to the reason for the denial. *St. Vincent's Hosp. Of Richmond v. Government Employees Ins. Co.*, 50 AD3d 1123 (2d Dept. 2008). Plaintiff correctly points out and defendant concedes that when it denied the claim, it designated the amount that was specified in Form UB-04 ($29,277.39) rather than the amount billed ($4,733.11) on June 22, 2009. However, where as here the amount billed is not relevant to the reason for the denial and the parties have had an exchange of correspondence which clearly identifies the claim and defines the dispute, the conceded mistake should not be grounds for negating the denial. Reliance by plaintiff on, *St. Barnabas Hosp. v. Allstate Ins. Co.*, 66 AD3d 996 (2d Dept. 2009), is misplaced because the error there was that the wrong reason for the denial was given, in addition to the wrong amount.

Here, the denial apprised the plaintiff with a high degree of certainty and specificity of the grounds and is not factually insufficient, conclusory, vague or meritless. *Id.*

On defendant's cross motion, questions of fact exist as to whether the insured was intoxicated and whether such condition contributed to causing the injury, necessitating denial thereof. A question of fact exists on plaintiff's motion as to whether and when it complied with defendant's verification request regarding possible intoxication.

All parties shall appear at a Preliminary Conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on April 27, 2010, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

The summary judgment is denied to both plaintiff and defendant as to the Third Cause of Action.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 26, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
MAR 30 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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