

**Bath Med. Supply Inc. v Motor Veh. Acc. Indem.
Corp.**

2010 NY Slip Op 31281(U)

May 13, 2010

Sup Ct, Nassau County

Docket Number: 6013/08

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mod, mod

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

BATH MEDICAL SUPPLY INC.,
Plaintiff,

Motion Sequence #1, #002
Submitted March 24, 2010

-against-

INDEX NO: 6013/08

MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORP.,
Defendant.

The following papers were read on these motions for dismissal:

Notice of Motion and Affs.....	1-5
Notice of Cross-Motion and Affs.....	6-9
Affs in Opposition.....	10-12
Memorandum of Law.....	13&13a

Upon the foregoing papers, it is ordered that this motion by defendant, Vehicle Accident Indemnification Corp. ("MVAIC"), for an order pursuant to CPLR 214(2), 3211(a)(1) and 3212(b) dismissing plaintiff's complaint is determined as hereinafter provided. Cross-motion by plaintiff Bath Medical Supply Inc. ("Bath") for an order pursuant to CPLR 3211(b) dismissing the defenses to certain claims and for summary judgment on these claims is granted as to Mohammed Redwin Bari and is otherwise denied.

This is an action to recover the cost of first party no-fault health service benefits rendered by plaintiff health service provider Bath.

Initially, we note that the claims for Yeva Skverchak, Abdura Braddow and Josefina Reyes have been settled and paid. The claims of Lubov Arkhipova and Creciano Rodriguez have been withdrawn from the instant action.

Hence, this court need only address the claims of Olga Ramirez, Lamar Blackwood, Marie Obas, Maya Bernshteyn, Joseph Yechia Anatian, Jacquelin Cherelus and Mohammed Redwan Bari.

OLGA RAMIREZ
Claims of \$796 and \$1,845

On January 20, 2005, MVAIC received a notice of claim. On February 14, 2005 and March 14, 2005, MVAIC received bills in the amount of \$796 and \$1845 for services rendered on January 5, 2005 and February 2, 2005. Thereafter, MVAIC issued three letters to Olga Ramirez's attorney advising that MVAIC cannot provide coverage for Olga Ramirez until a copy of the notarized household affidavit, applicant's social security or proof of residency, written proof showing lack of insurance from the identified carrier and police report were received. To date, Ramirez and her attorney have not provided the requested documents to establish coverage with MVAIC.

LAMAR BLACKWOOD
Claims of \$1,121 and \$1,075

On January 28, 2005, MVAIC received a notice of claim. On March 7, 2005 and April 11, 2005, MVAIC received bills in the amount of \$1,121 and \$1,075 for services rendered on January 29, 2005 and February 27, 2005. Thereafter, MVAIC issued five letters to Blackwood's attorney advising that MVAIC cannot provide coverage for Lamar

Blackwood until a copy of the notarized household affidavit, original notice of intention to make claim (signed and notarized), applicant's social security or proof of residency or school records, written confirmation of insurance or lack thereof from the Department of Motor Vehicles from the state in which the vehicle was registered at the time of the accident, written proof showing lack of insurance from the identified carrier, and non-resident revocation or affidavit of no insurance was received. To date, Lamar Blackwood and his attorney have not provided the required documents to establish coverage with MVAIC.

MARIE OBAS
Claim of \$705

On February 8, 2005, MVAIC received a notice of claim and a notarized household affidavit from Marie Obas. On March 1, 2005, MVAIC received bills in the amount of \$705 for services rendered on January 19, 2005. Thereafter, MVAIC issued two letters advising her that MVAIC cannot provide coverage until a copy of the written proof showing lack of insurance from the identified carrier and DMV of the State of Pennsylvania received. To date, Obas has failed to provide the required documents to establish coverage.

MAYA BERNSHTEYN
Claim of \$997

On December 30, 2004, MVAIC received a notice of claim and on January 26, 2005, MVAIC received her bill in the amount of \$997 for services rendered on December 15, 2004. Thereafter, MVAIC sent four letters advising that MVAIC cannot provide coverage for Bernshteyn until a copy of the notarized household affidavit, written proof showing lack of insurance from the identified carrier, police report and ambulance call report were received. To date, Bernshteyn and her attorney have not provided the

requested documents.

JOSEPH YECHIA ANATIAN
Claim of \$1,111

On December 23, 2004, MVAIC received a notice of claim and on January 11, 2005, MVAIC received his bill in the amount of \$1,111 for services rendered on December 5, 2004. Thereafter, MVAIC issued five letters advising Anatian's attorney that MVAIC cannot provide coverage until a copy of the notarized household affidavit, written proof showing lack of insurance from the identified carrier and police accident report were received. To date, Anatian and his attorney have not provided the requested documents.

PARTIES' CONTENTIONS

As to Blackwood, Obas, Bernshteyn, Anatian, defendant seeks summary judgment asserting that the assignors failed to comply with all of the applicable requirements of Insurance Law Article § 52. Specifically, defendant argues that plaintiff's assignors, Olga Ramirez, Lamar Blackwood, Marie Obas, Maya Bernshteyn and Joseph Yechia Anatian failed to provide either proof of lack of insurance from vehicle owner, proof of residency, proof of household affidavit and police report/ambulance report. In support thereof, MVAIC relies upon the affidavit of Imna LaPorte, JoEella Lewis and Cheryl Story, claim representatives employed by MVAIC.

In opposition, plaintiff argues that defendant's motion "focuses mainly on defendant's justification for failing to pay or deny plaintiff's claims on the ground that the assignors were not qualified by defendant to receive the benefits."

LAW

Insurance Law Article § 52 created MVAIC to “close such gaps in the motor vehicle financial security act through the incorporation and operation of the motor vehicle accident indemnification corporation.” (Insurance Law § 5201; *Lloyd v Motor Vehicle Acc. Indemnification Corp.*, 23 NY2d 478). An individual must follow the applicable requirements of Insurance Law Article § 52 to ensure coverage with MVAIC.

Insurance Law §5208 specifically provides, in pertinent part:

“(a) The protection provided by the corporation on account of motor vehicle accidents caused by financially irresponsible motorists shall be available to: (2)(A) Any qualified person having a cause of action because of death or bodily injury, arising out of a motor vehicle accident occurring within this state and reported within twenty-four hours after the occurrence to a police, peace or judicial officer in the vicinity or to the commissioner, and who files with the corporation within ninety days of the accrual of the cause of action, as a condition precedent to the right to apply for payment from the corporation, an affidavit stating that: (i) the person has the cause of action for damages arising out of the accident and setting forth the supporting facts, (ii) the cause of action is against a person whose identity is unascertainable, and (iii) the person is making a claim for those damages.” (*Hempstead General Hospital v MVAIC*, 97 AD2d 544).

Insurance Law § 5521(b)(2) provides that: “A qualified person who has complied with all the applicable requirements of this article shall be deemed to be a covered person and shall have only such rights as a covered person may have under article fifty-one of this chapter.”

As with any other claimant for no-fault first party benefits, pursuant to Article 51 and the Insurance Department Regulations implementing the Comprehensive Motor Vehicle Reparations Act, 22 NYCRR Ch. III, Subch. B, Pt. 65, to establish a *prima facie* case the

plaintiff need only demonstrate “that [it] submitted claims, setting forth the fact and the amount of the loss sustained, and the payment of no-fault benefits was overdue (citations omitted).” (*Maple Medical a/a/o Glasgow v MVAIC*, 15 Misc 3d 1124[A] [Dist. Ct. Nassau Co. 2007] quoting *A.B. Medical Services PLLC v Motor Vehicle Accident Indemnification Corp.*, 6 Misc. 3d 131(A) [App. Term 2nd and 11th Jud. Dists. 2005]). Plaintiff need not plead or prove its assignor’s compliance with these requirements as part of its *prima facie* case. (*Kipor Medicine, P.C. v MVAIC*, 23 Misc. 3d 948 [N.Y. City Civ. Ct. 2009]; *Maple Metal a/a/o Glasgow v MVAIC, supra*).

There is no dispute that MVAIC did not deny claims for Ramirez, Blackwood, Obas, Bernshteyn, Anatian, and Cherelus within 30 days after receiving them. The only “denials” tendered were letters indicating that these assignors failed to comply with certain reporting requirements, i.e., the accident was not reported to the police within 24 hours of its outcome as required by Insurance Law § 5208(2)(A).

MVAIC’s time to pay or deny a claim begins to run upon receipt of the claim without regard to whether MVAIC has determined that plaintiff’s assignor is a qualified person within the purview of Insurance Law § 5202(b). (*New York Hosp. Medical Center of Queens v MVAIC*, 12 AD3d 429 *lv. to app. denied* 4 NY3d 705; *Complete Medical Services, P.C. v MVAIC*, 20 Misc 3d 85 [App. Term 2008]). Plaintiff’s assignor’s status as a qualified person is not dependent upon MVAIC’s receipt of all of the reporting requirements set forth in Insurance Law Article § 52 (*Id.*).

On this record, Bath has “made a *prima facie* showing of entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms

had been mailed and received and that payment of no-fault benefits was overdue” (see Insurance Law § 5106[a]; 11 NYCRR 65.15[g][3]; *New York Hospital Medical Center of Queens v MVAIC, supra*; *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 AD3d 742, 742-743; *St. Luke’s Roosevelt Hosp. v American Tr. Ins. Co.*, 1 AD3d 498).

On this record, we find an issue of fact exists as to whether plaintiff’s assignors are “qualified” persons and thus, whether they are “covered” persons entitled to rights under Insurance Law Article § 52 (see *Howard M. Rombon, Ph.D. P.C. v MVAIC*, 21 Misc 3d 131[1] [Sup. Ct. App. Term 2nd Dept. 2008]). Hence, neither party is entitled to summary judgment on these claims.

JACQUELIN CHERELUS
Claims of \$670 and \$1,095

As to Cherelus, MVAIC disclaimed liability on the ground that there was available coverage with ESIS Insurance of New Jersey (“ESIS”) under claim number 9946254167691-7.

Upon receipt of plaintiff’s cross-motion, MVAIC conducted a further review on ESIS and contacted ESIS. MVAIC was advised by Kevin Turner, a claims manager at ESIS, that ESIS is a third-party claims administrator who processes claims for Ace American Insurance Company. Kevin Turner of ESIS advised that there is available coverage for Jacquelin Cherelus under claim number 9946254167691-7. Since there is available coverage with ESIS, MVAIC properly denied coverage. Therefore, the cause of action regarding Jacquelin Cherelus should be dismissed.

Mohammed Redwan Bari
Claims of \$921, \$570, \$330, \$1,275

As to Bari, MVAIC asserts that the claims are barred by the applicable statute of limitations. On September 20, 2004, MVAIC received the following documents: plaintiff's bill in the amount of \$921 for services allegedly rendered to plaintiff's assignor on May 2, 2004; plaintiff's bill in the amount of \$570 for services allegedly rendered to plaintiff's assignor on May 13, 2004; plaintiff's bill in the amount of \$330 for services rendered to plaintiff's assignor on June 11, 2004; and plaintiff's bill in the amount of \$1,275 (\$880 paid) for services allegedly rendered to plaintiff's assignor on June 20, 2004.

On March 1, 2007, MVAIC received final verification. On March 21, 2007, MVAIC issued and mailed a denial for the first three bills and on March 27, 2007 MVAIC issued and mailed a denial as to the last bill.

Defendant argues that plaintiff missed the applicable three-year statute of limitations by waiting four years after the claims were received before commencing the action. Plaintiff asserts that the action was timely commenced as it was brought within three years after defendant issued its denial.

Pursuant to CPLR § 214(2), an action must be commenced within three years to recover upon a "liability created or imposed by statute." Since MVAIC was created and imposed by statute, "MVAIC's obligation to pay no-fault benefits to an injured party where the accident vehicle's insurer denies such coverage is purely statutory, established under the no-fault scheme" (*MVAIC v Aetna*, 89 NY2d 214). Thus, the three years statute of limitations would apply because "MVAIC's obligation to pay the claimant's first-party benefits . . . were both created and imposed by statute, but for which they would not exist."

Id.

The claim for first party benefits normally accrues when the payment of benefits becomes overdue (see *Micha v Merchants Mut. Ins. Co.*, 94 AD2d 835). Payments will be overdue when the carrier has failed to either pay on a claim or issue a timely valid denial. 11 NYCRR 65-3.8(c). Where there are outstanding verification requests, the claim cannot be overdue (*Infinity Health Products, Ltd. v Eveready Ins. Co.*, 67 AD3d 862). Hence, until the requested verification was received, plaintiff did not have any right to sue, and the right accrues after the verification was received (see *Id.*). Once the insurer issues a denial of claim, there is a codified right to commence suit. (11 NYCRR § 65-3.10).

At bar, defendant received final verification on March 1, 2007 and denied the claim on March 21, 2007. Since the within action was commenced on April 23, 2008, it falls within the three year applicable statute of limitations and is timely.

In view of the foregoing, defendant's motion is denied and plaintiff's motion is granted as to Bari.

Dated: May 13, 2010



UTE WOLFF LALLY, J.S.C.

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