

**NYU-Hosp. for Joint Diseases v Progressive Cas.
Ins. Co.**

2010 NY Slip Op 31948(U)

June 16, 2010

Supreme Court, Nassau County

Docket Number: 14583/09

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**NYU-HOSPITAL FOR JOINT DISEASES,
a/a/o ARLENE J. RIVERAFIGUEROA;
THE NEW YORK AND PRESBYTERIAN
HOSPITAL, a/a/o CARL REID,**

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 3/10/10**

**PROGRESSIVE CASUALTY INSURANCE
COMPANY**

INDEX NO.: 14583/09

Defendants.

The following papers having been read on the motion (numbered 1-3):

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

Motion by the attorney for the plaintiff NYU-Hospital for Joint Diseases, for summary judgment, pursuant to § 3212 of the CPLR, against the defendant, Progressive Casualty Insurance Company, on the first cause of action in the sum of \$2,951.58, plus statutory interest and attorney fees pursuant to 11 NYCRR 65-4.6(e) and for the plaintiff The New York and Presbyterian Hospital on the second cause of action in the sum of \$13,555.68, plus statutory interest and attorney fees pursuant to 11 NYCRR 65-4.6(e), together with the costs and disbursements of this action are determined as follows.

FIRST CAUSE OF ACTION - RIVERAFIGUEROA

Plaintiff NYU-Hospital for Joint Diseases, is the assignee for health services

rendered to Arlene Riverafiguero during the period May 9, 2009 through May 15, 2009 arising out of an automobile accident on February 12, 2007. On May 19, 2009, plaintiff billed the defendant with a Hospital Facility Form (Form N-F 5) for payment of a hospital bill in the sum of \$16,600.56. A form UB-04 and DRG Master Output Report were attached to the bill. The bill was mailed Certified Mail, Return Receipt Requested, and received by the defendant on May 21, 2009. On or about June 19, 2009, defendant asserts that a comprehensive denial of claim, NF-10 Form was generated in its regular course of business in duplicate, and timely mailed with a check in the amount of \$13,648.98 to NYU Hospital Center, P.O. Box 414049, Boston, MA 02241-4049. After further review of the claim, defendant alleges that services were provided by the Hospital for Joint Diseases which although affiliated with NYU is a separate entity from NYU with a reduced reimbursement rate than that of NYU. According to defendant the reduced rate should result in a reimbursement claim of \$5,694.06, resulting in an overpayment of \$7,954.92. Although the Personal Injury Protection (PIP) Litigation Manager who submitted an affidavit in opposition to the motion states that defendant requested leave to amend the answer to include a counterclaim for reimbursement of the alleged overpayment, there is no cross-motion or proposed amended answer before the court seeking a refund for the alleged overpayment. In further support of its motion, the plaintiff asserts the following: Ms. Riverafigueroa was treated for traumatic injuries resulting from a motor vehicle accident; at the rehab center she was classified in a "non-exempt status," the correct DRG code being 462 and; the hospital rate for this code is \$16,600.56, for which the plaintiff correctly billed the defendant.

To grant summary judgment, "it must clearly appear that no material and triable issue of fact is presented." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Zuckerman v City of New York*, 49 NY2d 557. A plaintiff establishes a prima

[* 3]

facie entitlement to judgment as a matter of law “by submitting evidentiary proof that the prescribed statutory billing form has been mailed and received, and that payment of no-fault benefits was overdue.” *Mary Immaculate Hosp. v Allstate Ins.*, 5 AD3d 742. The burden then shifts to the defendant in a no fault case to show a triable issue of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320. To defeat an award of summary judgment to plaintiff, defendant must provide proof, in evidentiary form, that it either paid or denied the claim within 30 days of receipt or that it asserts a non-precludable defense. See *Central General Hospital v Chubb Insurance Co.*, 90 NY2d 195; *Presbyterian Hosp. City of NY v Maryland Casualty Co.*, 90 NY2d 274.

Plaintiff has made a *prima facie* showing of entitlement to summary judgment on the first cause of action. Defendant has timely denied payment based on what each party perceives to be the appropriate reimbursement rate, thereby raising a substantive issue of fact that precludes granting summary judgment on the first cause of action which is consequently **denied**.

SECOND CAUSE OF ACTION - REID

Plaintiff, The New York and Presbyterian Hospital, is the assignee for health services rendered to Carl Reid during the period March 23, 2009 through March 25, 2009 arising out of an automobile accident on August 28, 2008. On April 22, 2009, plaintiff billed the defendant with a Hospital Facility Form (Form N-F 5) for payment of a hospital bill in the sum of \$13,555.68. A Form UB-04 and DRG Master Output Report were attached to the bill. The bill was mailed Certified Mail, Return Receipt Requested, and was received by the defendant on April 24, 2009.

In opposition to the motion defendant submitted an affirmation by Lee M. Kupersmith, M.D. who reviewed the case of Carl Reid for a peer review with regard to the causal relationship of the services claimed and the motor vehicle

accident on August 29, 2008. Based on his review of lab work, test results, MRI's, EGG testing, x-rays, CAT scans, notes from treating doctors and hospital records Dr. Kupersmith concluded that due to the fact that Mr. Reid had a foraminal stenosis at C5-6 and C6-7, which was pre-existing in nature, his complaints with regard to his neck were not causally related to the subject motor accident on August 29, 2008. Dr. Kupersmith never examined Mr. Reid. Dr. Kupersmith stated:

Upon review of the extensive records at this time, I see no evidence of causality between the claimant's cervical complaints, his radicular symptoms and his surgery and the motor vehicle accident of 8/29/08. As noted above he had a pre-existing history of cervical stenosis and had been treated previously with physical therapy, epidural injections, and had previously been recommended to undergo surgery at those levels. Due to the fact that the claimant had a pre-existing history of C5-6 and C6-7 stenosis and had been previously recommended surgery for this condition and previously received treatment, I see no indication of any evidence of causality between the motor vehicle accident of 8/28/08 and the claimant's symptoms. As such there is no evidence of causality of the following services and the 8/28/09 motor vehicle accident.

The attorney for the plaintiff argues that Dr. Kupersmith ignores the fact that the aggravation of a prior injury is also covered by no-fault. Also plaintiff asserts Dr. Kupersmith failed to discuss the trauma to Mr. Reid's "pre-existing"

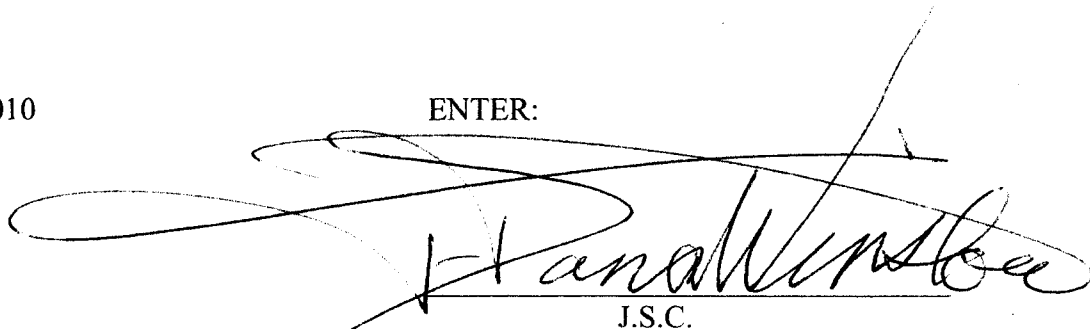
condition, and the alleged aggravation of a prior condition—factors that are most relevant in a no-fault claim. Defendant’s expert affidavit is sufficient to raise a question of fact as to causality so as to preclude the granting of summary judgment on the second cause of action. *See Kingsbrook Jewish Medical Center v Allstate Insurance Company*, 61 AD3d 13, 22; *Mount Sinai Hospital v Triboro Coach*, 263 AD2d 11, 19, thus this summary judgment motion is also **denied**.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the **21st day of July 2010, at 9:30 AM**. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

This Constitutes the Order of the Court.

Dated: June 16, 2010

ENTER:


J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE