

**Sound Shore Med. Ctr. v Progressive Cas. Ins. Co.**

2010 NY Slip Op 31950(U)

July 15, 2010

Supreme Court, Nassau County

Docket Number: 026625/09

Judge: Thomas P. Phelan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 3  
NASSAU COUNTY

SOUND SHORE MEDICAL CENTER,  
a/a/o CARL H. ISAAC,

Plaintiff(s),

-against-

PROGRESSIVE CASUALTY INSURANCE  
COMPANY,

Defendant(s).

ORIGINAL RETURN DATE:03/26/10  
SUBMISSION DATE: 06/23/10  
INDEX No.: 026625/09

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Reply.....	4,5

Motion and cross-motion pursuant to CPLR 3212 by plaintiff Sound Shore Medical Center (Sound Shore) and defendant Progressive Insurance Company (Progressive) respectively for summary judgment are denied.

In this action, plaintiff Sound Shore, as assignee of Carl H. Isaac, seeks to recover no-fault medical payments allegedly due and owing for treatment rendered to the assignor arising from injuries he sustained in a single vehicle accident at 3:30 A.M. on the morning of September 5, 2009.

Plaintiff Sound Shore seeks summary judgment predicated on the grounds that although defendant Progressive received the prescribed statutory billing forms seeking payment of no-fault benefits on October 19, 2008, it neither paid nor denied the benefits within thirty days thereof as required by 11 NYCRR 65-3.8(e); *Westchester Medical Center v American Transit Ins.*, 60 AD3d 848, 849 [2d Dept. 2009]. In opposition to plaintiff's motion, however, defendant Progressive has raised a factual issue as to whether it properly and timely denied the claim based on plaintiff's assignor's

alleged intoxication at the time of the accident by issuance of a denial of coverage on that ground on December 2, 2009, i.e., within 30 days of said defendant's receipt on November 25, 2009, of the additional verification it requested concerning the claim.

Pursuant to Insurance Law § 5106(a), no-fault benefits are overdue if not paid by the insurer within 30 days after proof of loss. 11 NYCRR 65-3.8(c); *Mount Sinai Hosp. v Chubb Group of Ins. Companies*, 43 AD3d 889, 890 [2d Dept. 2007]. Generally an insurer is precluded from asserting any defenses to payment when it fails to deny the claim within the required 30-day period. *Fair Price Medical Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 563 [2008]. A narrow exception to the rule is, however, recognized for situations where the insurer raises a defense of lack of coverage. *Hospital for Joint Diseases v Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 318 [2002]. Intoxication has been held to constitute an exclusion from coverage rather than no coverage.

Where a denial of no-fault benefits rests on the statutory exclusion pursuant to Insurance law § 5103(b)(2), the regulations promulgated thereunder trigger certain timing and notification requirements that extend the 30-day statutory period in which the insurer must pay or deny the claim. *Westchester Medical Center v Progressive Cas. Ins. Co.*, 51 AD3d 1014, 1017 [2d Dept. 2008]; *Westchester Medical Center v State Farm Mut. Auto Ins. Co.*, 44 AD3d 750, 752 [2d Dept. 2007]. Specifically, 11 NYCRR 65-3.8(g) provides that:

“if an insurer has reason to believe that the applicant was operating a motor vehicle while intoxicated or impaired by the use of a drug, 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. Proof of a claim shall not be complete until the information which has been requested, pursuant to section 65-3.5(a) or (b) of this Subpart, has been furnished to the insurer by the applicant or the authorized representative.”

The insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom the verification was requested [11 NYCRR 65-3.5(c)] and is not confined or required to seek information solely from the provider. Rather, verification information may be sought from any source.

While a provider of medical services establishes a *prima facie* case for summary judgment by showing proper billing, mailing and lack of payment, an insurer may demonstrate the existence of a triable issue of fact by showing that it made timely request(s) for verification regarding the injured claimant's alleged intoxication. *Westchester Medical Center v Allstate Ins. Co.*, 53 AD3d 481 [2d Dept. 2008]. Here, defendant Progressive maintains that its request for verification was timely as was its ultimate denial of plaintiff's claim when measured from November 25, 2009, the date on which the insurer received the additional information it had requested.

RE: SOUND SHORE MEDICAL v. PROGRESSIVE

Page 3.

According to the affidavit of the senior litigation representative assigned to the matter by defendant Progressive, the insurer began investigating the circumstances\* of the accident herein as early as September 11, 2009, after Rose Isaac, the injured assignor's mother, notified the insurance company that her son had been involved in an accident. The affidavit also sets forth the insurer's standard office practice and procedure used to insure that the verification requests and notice of denial were properly addressed and mailed. In so doing, defendant has established a presumption of mailing. *Custis v Travelers Property Cas. Ins. Co.*, 27 Misc3d 928, 930 [N.Y. Dist. Ct. 2010]. Plaintiff has submitted no evidentiary proof to rebut this presumption.

The record establishes that, within 10 business days of its receipt on October 19, 2009, of the Hospital Facility Form (NF-5) requesting payment in the amount of \$64,181.26 for medical treatment provided to plaintiff's assignor from September 5, 2009, to September 15, 2009, defendant Progressive mailed a verification request to plaintiff Sound Shore on October 30, 2009. Defendant sought emergency room records/all laboratory test results "to determine eligibility for benefits." Defendant also sought authorizations to obtain blood alcohol levels. Ultimately, defendant Progressive denied the claim on December 2, 2009, on the ground of intoxication.

Under the circumstances extant, plaintiff has failed to establish as a matter of law that defendant Progressive's request for verification of its claim for no-fault benefits, and the ultimate denial thereof, were either untimely or improper. As such plaintiff Sound Shore's motion for summary judgment against defendant Progressive in the amount demanded in the complaint is denied.

Because factual issues exist as to whether plaintiff's assignor was intoxicated at the time of the accident within the meaning of Insurance Law § 510.3(b)(2) and whether his intoxication was a proximate cause of the accident and resultant injuries, defendant Progressive's cross-motion for summary judgment dismissing the complaint with prejudice is hereby denied.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]. The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]. A failure to make such a *prima facie* showing requires a denial of the summary judgment motion regardless of the sufficiency of the

---

\*Two letters (September 11, 2009, and October 19, 2009) requesting certified copies of, *inter alia*, admission history, discharge summary, radiology reports, laboratory tests/results, emergency room records and blood alcohol/drug reports, including serum toxicology test results were sent to Carl Isaac and Sound Shore Medical Center. The court notes that these "delay letters" explaining that an investigation of the claim was underway did not constitute verification requests. *Nyack Hosp. v Encompass Ins. Co.*, 23 AD3d 535 [2d Dept.2005], appeal dismissed 8 NY3d 895 [2002].

opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]. If *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof, sufficient to establish the existence of a material issues of fact. *Alvarez v Prospect Hospital, supra*; *Zuckerman v City of New York, supra*. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept. 1997]. Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman v City of New York, supra*. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

Counsel are directed to appear on August 5, 2010 at 9:30 A.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: 7-15-10

HON THOMAS P. PHELAN  
THOMAS P. PHELAN  
J.S.C.

Attorneys of Record

Law Offices of Joseph Henig, P.C.  
Attn: Joseph Henig, Esq.  
Attorneys for Plaintiff  
1598 Bellmore Avenue  
P. O. Box 1144  
Bellmore, NY 11710

Carman, Callahan & Ingham, LLP  
Attn: Paul A. Barrett, Esq.  
Attorneys for Defendant  
266 Main Street  
Farmingdale, NY 11735

**ENTERED**  
JUL 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE