

**New York Univ. Hosp.-Tisch Inst. v Government  
Empls. Ins. Co.**

2011 NY Slip Op 31758(U)

June 20, 2011

Sup Ct, Nassau County

Docket Number: 22619/10

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

NEW YORK UNIVERSITY HOSPITAL- TISCH  
INSTITUTE a/a/o CHETANABEN PATEL,  
NEW YORK UNIVERSITY HOSPITAL - RUSK  
INSTITUTE a/a/o GOLDA STEINER,

Plaintiffs,

- against -

GOVERNMENT EMPLOYEES INSURANCE  
COMPANY,

Defendant.

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 22619/10  
Motion Seq. No.: 01  
Motion Date: 03/02/11

**The following papers have been read on this motion:**

	Papers Numbered
<u>Notice of Motion for Summary Judgment, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition, Affidavit and Exhibits</u>	<u>2</u>
<u>Reply Affirmation and Exhibit</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

In an action pursuant to Insurance Law § 5106(a) for the alleged failure of defendant to pay two separate no-fault billings, plaintiffs move for summary judgment. Defendant opposes plaintiffs' motion.

The actions are joined pursuant to CPLR § 1002(a), as the claims arise out of a uniform contract of insurance and involve the interpretation of the same no-fault provisions of the Insurance Law.

Pursuant to plaintiffs' moving papers, the second cause of action with respect to New York University Hospital-Rusk Institute a/a/o Golda Steiner, is hereby withdrawn.

In the first cause of action, plaintiff, New York University Hospital - Tisch Institute, is the assignee for health services rendered to Chetanaben Patel ("Patel") during the period of September 16, 2010 through September 17, 2010, arising out of an automobile accident on November 20, 2009. On September 28, 2010, plaintiff billed defendant with a Hospital Facility Form (Form N-F 5) for payment of a hospital bill in the sum of \$16,947.16. A form UB-04 and DRG Master Output Report were attached to the bill. Plaintiff claims that the bill was mailed Certified Mail, Return Receipt Requested, and was received by the defendant on September 29, 2010. Plaintiff argues that defendant failed to pay the full hospital bill within or to issue a timely Denial of Claim Form. Plaintiff submits that defendant issued an untimely, defective denial of claim dated January 19, 2011, and that, in addition to being untimely, the attached report by Dr. Ish Kumar, M.D. is defective. Plaintiff argues that defendant is precluded from interposing a defense to the action, that the bill remains unpaid and that defendant issued an untimely, defective Denial of Claim Form.

Defendant states that it received the Patel bill from plaintiff on September 29, 2010. On October 13, 2010, defendant sent an additional verification request to plaintiff. On November 16, 2010, defendant once again sent an additional verification request to plaintiff. Simultaneous to the verification requests to plaintiff, defendant had made an additional verification request to another provider, Dr. Ramesh P. Babu, who also treated Patel. Defendant contends that plaintiff failed to supply a narrative from Patel's referring doctor and a letter specifically explaining how the treatment was related to the accident, per the additional verification requests. Defendant sent

Patel's medical records and the information it received with respect to Patel to Support Claims Services to have an independent peer review conducted of said information. Dr. Ish Kumar, a board certified neurosurgeon, conducted the independent peer review and noted the following with respect to an MRI done on November 30, 2009, just ten days after the accident, "[t]here is decreased signal seen within the intervertebral disc spaces throughout the cervical spine and with degenerative disc disease." Dr. Kumar concluded, "I believe these were degenerative changes and they were pre-existing....Based on the data available to me, causality and medical necessity for the procedure(s)...has not been established" Defendant asserts that, based upon the independent peer review conducted by Dr. Kumar and his conclusions therein, it sent a denial of the Patel bill to plaintiff. Defendant argues that "[g]iven that the surgery was necessitated by a degenerative, organic condition, it does not fall within the purview of the no fault schematic. As such GEICO timely and properly denied the instant claim. No monies are due or owing."

Plaintiff replies that "[t]he opposition to plaintiff's motion must fail, as it consists of the affirmation of Dr. Ish Kumar that is neither sworn to nor affirmed to as true under the penalty of perjury (CPLR Sec. 2106). CPLR section 2106 clearly states that the physician's affirmation must be affirmed as 'true' under penalty of perjury." Plaintiff argues that defendant's medical report is a material defect, as it is the only medical evidence submitted in opposition to plaintiff's *prima facie* case. Plaintiff further alleges that "[t]he defendant included the Neurosurgeon's report of Dr. Babu who examined the patient prior to her surgery as well as the radiologist reports of the patient prior to surgery. The medical reports disclosed positive findings of injuries to the patient's neck and back resulting from the automobile accident. Dr. Babu stated in this report dated November 10, 2010, 'To the best of my ability, I feel there is a causal

relation between the accident and the current condition.” Plaintiff adds that defendant’s doctor, Dr. Kumar, did not discuss the positive MRI results of Patel’s lumbar spine and that he failed to set forth a sufficient factual basis and medical rationale for his conclusion that Patel’s injuries were not causally related to the motor vehicle accident of November 20, 2009.

With respect to the first cause of action, the Patel claim, the Court holds that plaintiff established its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the prescribed statutory billing forms had been mailed and received and that defendant had failed to either pay or deny the claim within the requisite thirty-day period. *See Westchester Medical Center v. Lincoln General Insurance Company*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dept. 2009).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the

non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

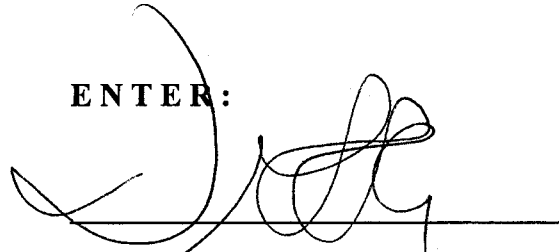
Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

As previously stated, plaintiff established its *prima facie* entitlement to judgment as a matter of law. In opposition, defendant has raised a triable issue of fact with respect to whether patient Patel's instant hospitalization was necessitated by an organic, degenerative condition and therefore was outside the scope of no-fault reimbursement. The Court notes that the report submitted by defendant's independent board certified neurosurgeon, Dr. Kumar, is certified and states, "I certify and affirm, under the penalty of perjury, that I prepared and have read the report and hereby certify and affirm my findings and conclusions and that the fees paid to me in no way influence my conclusions reached or my opinion rendered." Therefore, plaintiff's motion, pursuant to CPLR § 3212, for an order granting summary judgment on the first cause of action, the Patel claim, is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on August 4, 2011, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

A handwritten signature in black ink, appearing to read 'Denise L. Sher', written over a horizontal line.

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
June 20, 2011

**ENTERED**  
JUN 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE