

Nyack Hosp. v State Farm Mut. Auto. Ins. Co.

2011 NY Slip Op 32566(U)

September 23, 2011

Supreme Court, Nassau County

Docket Number: 0002477-11

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

**THE NYACK HOSPITAL, a/a/o LYUBOV
KOSTIVE; NYU-HOSPITAL FOR JOINT
DISEASES, a/a/o SALIU SALAU, JUNELEARA
SOUMAHORO,**

Decision and Order

Plaintiffs,

**MOTION SUBMITTED:
June 22, 2011
MOTION SEQUENCE:01,
INDEX NO. 0002477-11**

-against-

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

On July 24, 2010, Juneleara Soumahoro ("claimant") was involved in an automobile accident. Claimant was insured under an automobile liability insurance policy with the Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"). The claimant underwent dorsal and lumbar fusion surgery and treatment at NYU-Hospital for Joint Diseases ("NYU") from December 17, 2010 through December 21, 2010 for (Ex. "7" to Motion).

At the conclusion of treatment, the claimant assigned her no-fault benefits to NYU (Ex. 7 to Motion; Complaint at ¶ 29). On January 7, 2011, a no-fault billing hospital facility NF-5 Form in the amount of \$29,549.54 was mailed to State Farm certified mail/return receipt requested and received by State Farm on January 10, 2011 (Exs. "7" and "8" to Motion; Complaint at ¶¶ 30-31). Included with the hospital bill was a form UB-04 and DRG Master Output Report (Ex. "9" to

Motion).

On January 27, 2011, State Farm sent a letter to NYU acknowledging receipt of the bill but delaying payment pending an independent medical examination of the claimant to determine the medical necessity of treatment for which NYU has billed (Ex. "C" to Affirmation in Opposition). A second verification request seeking an independent medical examination was sent on March 3, 2011 (Ex. "C" to Affirmation in Opposition).

An independent medical exam was conducted by Raghava Polavarapu, MD on March 17, 2011.¹ Dr. Polavarapu indicated in his report, based upon claimant's medical examination, that:

[F]urther orthopedic treatment including physical therapy is needed from an orthopedic viewpoint. It is recommended that the claimant continue with physical therapy treatments to the lumbar spine two times a week for six weeks and then re-evaluate. Therapy treatments to the lumbar spine are based on the gold standards of treatment, although the surgery was performed for an underlying preexisting condition unrelated to the accident of July 24, 2010 (Ex. "10" to Motion).

On April 6, 2011, State Farm issued a NF-1- Denial of Claim and denied the entire claim.² The denial of claim stated as follows:

The above lumbar surgery including pre and post op care is denied based upon an independent medical examination and a medical record review performed by Raghava Polavarapu, MD on 3/17/11 advising it is not reasonable and/or medically necessary or causally related to the accident (Ex. "10" to Motion).

NYU commenced the instant action following the denial of the claim and thereafter moved for summary judgment based upon State Farm's failure to either pay no-fault benefits or deny its claim within 30 days as required by Insurance Law § 5106(a).³

In opposition to the motion, State Farm argues that it issued a timely and valid denial.

¹ The claimant failed to appear for two prior medical examinations that were scheduled on February 3, 2011 and February 17, 2011 (Ex. "D" to Affirmation in Opposition).

² While the amount at issue is \$29,549.54, State Farm's denial of claim form indicated 143,370.53 as the "amount of the bill" and the "amount in dispute" (Ex. "10" to Motion).

³ The court notes that the first and second causes of action in the complaint, which involve different assignors and claims, were settled after the within motion for summary judgment was made.

In Reply, NYU claims that, by defense counsel's expert medical affirmation, the claimant's injuries and treatment were, in part, the result of the accident and that such injuries, which are "hybrid in nature", are covered by no-fault. In this regard, NYU argues that an insurer's exemption from the 30-day rule in which to pay or deny a claim only applies where the medical condition for which the claimant was treated was not "related to the accident at all" (*see Mount Sinai Hospital v Triboro Coach*, 263 AD2d 11, 18-19 [2d Dept 1999]).

For the reasons that follow, NYU's motion is denied.

Analysis

Pursuant to Insurance Law § 5106(a), "[p]ayments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained."

Within 30 days after proof of the claim is received, the insurer shall either pay or deny the claim in whole or in part (11 NYCRR 65.15 [g][3]). An insurer which falls to properly deny a claim within the requisite 30 days may be precluded from interposing a defense to a plaintiff's lawsuit (*Presbyterian Hospital v Maryland Casualty Co.*, 90 NY2d 274 [1997]). An insurer will not be precluded, however, from asserting as a defense its denial of liability on the ground that the services rendered to treat the injuries at issue did not arise from a covered accident (*Central General Hospital v Chubb Group of Insurance Cos.*, 90 NY2d 195, 201 [1997]). "[A]n insurer, despite its failure to reject a claim within the 30-day period prescribed by Insurance Law § 5706 (a) and 11 NYCRR 65.15 (g)(3), may assert a lack of coverage defense premised on the *fact* or *founded belief* that the alleged injury does not arise out of an insured accident Strict compliance with the time requirements of both the statute and regulation may be obviated and the preclusion remedy rendered unavailable when denial of claims is premised on a lack of coverage" (*Central General Hospital v Chubb Group of Insurance Cos.*, 90 NY2d at 199, *supra* [emphasis added]; *see also Fair Price Medical Supply Corp v Travelers Indemnity Co.*, 42 AD3d 277 [2d Dept 2007] [where an insurer is entitled to deny a claim based on an absence of coverage, its failure to timely disclaim coverage does not preclude it from denying liability on that ground]; *Mount Sinai Hospital v Triboro Coach*, 263 AD2d at 19, *supra*).

Here, NYU established its *prima facie* entitlement to judgment as matter of law by demonstrating that the necessary billing forms were mailed to, and received by, State Farm and that payment of the no fault benefits was overdue (*Kingsbrook Jewish Medical Center v Allstate Insurance Co.*, 61 AD3d 13 [2d Dept 2009]; *New York and Presbyterian Hospital v American Transit Insurance Co.*, 45 AD3d 822 [2d Dept 2007]; *New York and Presbyterian Hospital v Countrywide Insurance Co.*, 44 AD729 [2d Dept 2007]). Specifically, NYU submitted, in

support of its motion, the requisite no-fault billing forms, a certified mail receipt with a signed return receipt referencing the patient, and the affidavit of Pat Thompson, a Biller/Account Representative for NYU indicating that State Farm failed to either pay the bill or issue a timely denial of claim form (Ex. "9" to Motion; *Westchester Medical Center v Progressive Casualty Insurance Co.*, 51 AD3d 1014, 1017 [2d Dept 2008]; *Hospital for Joint Diseases v New York Central Mutual Fire Insurance Co.*, 44 AD3d 903 [2d Dept 2007]).


Having established a *prima facie* case, it was incumbent upon State Farm to demonstrate that it is excused from compliance with the 30-day rule because the insurance policy at bar does not contemplate coverage in the first instance (*Fair Price Medical Supply Corp v Travelers Indemnity Co.*, 42 AD3d at 284, *supra*). In this regard, State Farm submitted the affirmation of Dr. Raghavar Polavarapu, who indicated that the claimant had degenerative disc disease and that the lumbar surgery performed at NYU on December 17, 2010 "was performed for a preexisting degenerative process which was unrelated to the accident of record. Therefore the surgery and additional surgery services including the facility services by [NYU] would not be related to the motor vehicle accident of July 24, 2010" (Ex. "E" to Affirmation in Opposition at ¶¶ 6-7; *Kingsbrook Jewish Medical Center v Allstate Insurance Co.*, 61 AD3d at 22-23, *supra* [court requires expert affidavit to conclude the absence of proximate causality or at least to find a nonspeculative question of fact as to causality]; *Mount Sinai Hospital v Triboro Coach*, 263 AD2d at 19-20, *supra*).

Contrary to NYU's contention, Dr. Polavarapu's IME report and affirmation constitute a sufficient evidentiary foundation supporting State Farm's determination that the claimant's surgery was unrelated to the accident on July 24, 2010. Therefore, the court concludes that State Farm's denial of coverage was premised on facts or, at a minimum, a "belief founded on facts", that the claimant's services at NYU from December 17, 2010 through December 21, 2010 were unrelated to the insured accident (*Mount Sinai Hospital v Triboro Coach*, 263 AD2d at 19-20, *supra*).

Accordingly, it is hereby ordered that NYU's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: September 23, 2011


 Hon. Vito M. DeStefano, J.S.C.

ENTERED
 SEP 23 2011
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE