

**Westchester Med. Ctr. v Unitrin Direct Prop. & Cas.
Co.**

2011 NY Slip Op 32692(U)

October 12, 2011

Sup Ct, Nassau County

Docket Number: 16311/10

Judge: Anthony L. Parga

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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 8
WESTCHESTER MEDICAL CENTER, As
Assignee of ANDREW NECKMAN, ST.
BARNABAS HOSPITAL, As Assignee of DANIA
HERNANDEZ,

Plaintiff(s),
-against-

INDEX NO. 16311/10
~~XXX~~
MOTION DATE: 08/18/11
SEQUENCE NO. 003, 004

UNITRIN DIRECT PROPERTY & CASUALTY
COMPANY,

Defendant(s).

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Notice of Cross-Motion, Affs. & Exs.....	<u>2</u>
Affirmation in Opposition and Reply.....	<u>3</u>
Reply Affirmation.....	<u>4</u>

Defendant's motion for summary judgment, pursuant to CPLR §3212, is granted, and plaintiff's cross-motion for summary judgment, pursuant to CPLR §3212, is denied.

The plaintiff health care providers and assignee of no-fault benefits commenced this action against the defendant, the insurer of the two assignors, to recover first party No Fault benefits. The actions were commenced by plaintiff, Westchester Medical, as assignee of Andrew Neckman, and St. Barnabas Hospital, as assignee of Dana Hernandez, in two separate causes of action arising from two separate motor vehicle accidents.

Defendant moves for summary judgment on both causes of action. With respect to the claim on behalf of Andrew Neckman, defendant contends that on July 9, 2010, it received the subject bill for \$79,428.28 (with undisputed proper no-fault DRG code adjustments to \$21,995.28) for medical services provided to Andrew Neckman on June 12, 2010 by Westchester Medical. Defendant contends that it then sent plaintiff and plaintiff's assignor timely verification letters on July 16, 2010 and August 16, 2010 requesting the radiology report, operative report, admission record, discharge record, documentation to support services billed, emergency room

report and medical report needed to support treatment given. On September 17, 2010, defendant received the requested information. Thereafter, on October 6, 2010, defendant contends that it timely issued payment in the amount of \$21,995.28, the full amount alleged in plaintiffs' summons and complaint. Defendant argues that it timely issued payment within nineteen days of receiving the requested information on September 17, 2010. In support of its motion, defendant has submitted the denial of claim form, bill, verification letters, cancelled check, and affidavit of service. It also submits the affidavit of Susan VanDitto, a no-fault litigation examiner employed by the defendant, in which Ms. VanDitto attests that the bill was received on July 9, 2010, that verification letters were timely sent on July 16, 2010 and August 16, 2010, that the requested information was received on September 17, 2010, and that the full amount of \$21,995.28 was paid on October 6, 2010. As such, defendant argues that it is entitled to summary judgment with respect to the claim on behalf of Andrew Neckman.

In opposition, and in support of its cross-motion for summary judgment, plaintiff contends that it sent the complete medical records on the hospital admission for Andrew Neckman to the defendant by certified mail on July 16, 2010. It also contends that the medical records sent included all of the medical documents requested by the defendant. In support of same, plaintiff submits a signed certified mail receipt dated July 20, 2010 which contains the notation "Medical Record Andrew Neckman." Plaintiff also submits an affidavit of Sharon Shafi, a secretary employed by Hospital Receivable Systems for the no-fault accounts of Westchester Medical Center, wherein Ms. Shafi attests that she mailed the complete medical records to the defendant on the hospital admission for Andrew Neckman on July 16, 2010 and that receipt of same by the defendant was confirmed by the return receipt for the certified mail. She further attests that said medical records contained the admission record, discharge record, emergency room report "and the documentation and reports requested in the defendant's verification request." The Court notes that Ms. Shafi's affidavit fails to state specifically that she provided the defendant with the requested radiology report, operative report, or documentation/medical reports to support the services billed.

Plaintiff also submits an affidavit of Peter Kattis, a billing supervisor and account representative employed by Hospital Receivables System, Inc. for the no-fault accounts of Westchester Medical Center. Mr. Kattis attests that on July 6, 2010, he billed the defendant for the sum of \$21,995.28 via certified mail and received confirmation that defendant received same on July 9, 2010. Plaintiff also submits the certified mail receipt and return receipt for same. As such, plaintiff argues that defendant's October 6, 2010 payment of such bill was untimely and that it is entitled to summary judgment on its interest and attorneys fees.

Defendant has made a prima facie showing of entitlement to summary judgment on the claim of Westchester Medical Center a/a/o Andrew Neckman, and the plaintiff has failed to raise a triable issue of fact sufficient to defeat such showing and has failed to make a prima facie showing of entitlement to summary judgment in its favor regarding the payment of interest and attorneys fees with respect to this claim. The affidavit of Susan VanDitto, together with the denial of claim form, bill, verification letters, cancelled check, and affidavit of service establish that verification letters were timely sent to plaintiff and that the information requested in by the defendant in its verification letters was not received by the defendant until September 17, 2010, after which defendant timely issued full payment within nineteen days. No-fault benefits are overdue if not paid within 30 calendar days after the insurer receives all of the relevant information requested in its verification. (See, 11 NYCRR §§65-3.8(a)(1), 65-3.6, and 65-3.5). The 30 day time period to pay or deny a claim is extended when the defendant requests additional verification within 15 business days of receipt of the claim, and once the defendant makes a timely request for verification, the time to pay or deny the claim is tolled until the plaintiff provides the verification information to the defendant. (See, *New York Presbyterian Hosp. v. American Transit Ins. Co.*, 287 A.D.2d 699, 733 N.Y.S.2d 80 (2d Dept. 2001); *Ocean Diagnostic Imaging, P.C. v. Nationwide Mutual Ins. Co.*, 11 Misc.3d 135(A), 816 N.Y.S.2d 698 (App. Term. 2006)).

The affidavits of Peter Kattis and Sharon Shafi, submitted on behalf of plaintiff, are insufficient to create triable issues of fact to defeat defendant's motion and are insufficient to make a prima facie showing of entitlement to summary judgment on plaintiff's cross-motion. Both affiants work for Hospital Receivables Systems, Inc., which is not a party to this action, and neither affiant provides any evidence regarding the nature of the relationship between this third party and Westchester Medical. Mr. Kattis fails to set forth the business practice and procedures that demonstrate that the plaintiff provided medical services to its assignor and that bills were generated and mailed to the defendant. (See, *Dan Medical, P.C. v. New York Central Mutual Fire Ins. Co.*, 14 Misc3d 44, 829 N.Y.S.2d 404 (App. Term. 2006)). In addition, and more significantly, Ms. Shafi's affidavit fails to specify that she sent the requested radiology report and operative report to defendant on July 16, 2010. Her conclusory statement that she provided "the documentation and reports requested in the defendant's verification request" is insufficient to demonstrate that she sent each of the requested documents listed in defendant's verification letter to the defendant on July 16, 2010. (See, *Thrift Credit Corp. v. American Overseas Trading Corp.*, 54 A.D.2d 994, 387 N.Y.S.2d 930 (3d Dept. 1976))(holding that the defendant was required to assemble, lay bare, and reveal his proofs in order to show that his defenses are real

and capable of being established upon a trial). Further, the return receipt dated July 20, 2010, does not confirm or demonstrate what documents were mailed to the defendant at said time. In addition, while plaintiff annexes the July 16, 2010 letter of Sharon Shafi which states that “enclosed is the medical record with respect to the above referenced patient’s hospitalization,” plaintiff fails to annex the medical record or records allegedly sent therewith. As such, the plaintiff has failed to raise a triable issue of fact sufficient to defeat plaintiff’s prima facie showing that the bill was paid timely after receipt of the information requested in its timely verification letters.

With respect to the claim brought on behalf of Dania Hernandez, defendant argues that the bill from St. Barnabus was timely denied based upon the assignors failure to submit to an IME, in violation of a condition of the policy. The subject bill in the amount of \$8,922.68 for medical services provided to assignor Dania Hernandez from May 23, 2010 through May 24, 2010 was received by defendant on July 20, 2010. Defendant sent plaintiff and plaintiff’s assignor a verification letter requesting additional information on August 9, 2010. On August 12, 2010, defendant received the requested information. Defendant’s review of the subject bill and relevant documents revealed that the assignor’s failure to attend the (2) scheduled IMEs was a policy violation which precluded coverage. Accordingly, defendant argues that on August 17, 2010, within thirty days from its receipt of the bill, it timely denied the claim upon said grounds. Defendant contends that Alternative Consulting and Examinations (hereinafter “ACE”) mailed an IME scheduling letter, by certified and regular mail, to the plaintiff’s assignor, Dania Hernandez, at the address listed on her no-fault application, on July 15, 2010, advising her of her appointment with neurologist, Dr. Feuer, to be held on July 29, 2010. After Ms. Hernandez missed said appointment, ACE again mailed an IME scheduling letter, by certified and regular mail, to the plaintiff’s assignor, Dania Hernandez, at the address listed on her no-fault application, on July 30, 2010, advising her of her rescheduled appointment with neurologist, Dr. Feuer, to be held on August 12, 2010. In support of its contentions regarding Ms. Hernandez’s notification of the appointments, defendant submits both IME scheduling notices, as well as the postmarked certificates of mailing indicating that same were mailed to Dania Hernandez at the address listed in her no-fault application. In addition, defendant submits the affidavit of Jim Cannon, owner and CMO of ACE. Mr. Cannon attests that the scheduling letters were mailed to Ms. Hernandez as noted above. He also attests that none of the notices were returned by the postal service as being undeliverable. Defendant further submits an affirmation by Dr. Feuer in which Dr. Feuer affirms that Dania Hernandez failed to appear for her scheduled physical examination appointments on July 29, 2010 and August 12, 2010. As such, and as Ms.

Hernandez's appearance at the designated IME appointments was a condition precedent to coverage, the defendants argue that they are entitled to summary judgment with respect to the claim on behalf of Dania Hernandez. In the alternative to said relief, defendant argues that it is entitled to summary judgment on the issue of defendant's timely denial of the subject bill as it has presented proof in admissible form to show that the denial was timely.

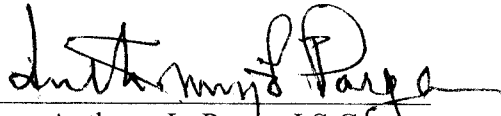
In opposition, although plaintiff admits that the bill was received by defendant (as evidenced by the return receipt) on July 19, 2010 and that defendant issued a denial of same on August 17, 2010, plaintiff contends that the defendant has failed to submit evidentiary proof that the IME notices were actually mailed to the assignor. Plaintiff contends that the defendant issued a denial of claim upon the grounds that the assignor failed to appear at her scheduled IMEs on July 29, 2010 and August 12, 2010, but argues that the affidavit of Jim Cannon is insufficient to establish that the IME notices were actually mailed. Plaintiff contends that Mr. Cannon fails to state how he acquired personal knowledge of the mailings and that his statements are insufficient to prove that the IME notices were actually sent or that the notices were properly addressed. Plaintiff also argues that the defendant does not submit the IME notices that were sent to the assignor, but the Court notes that same were annexed to defendant's motion as Exhibits C and D.

Defendant has made a prima facie showing of entitlement to summary judgment on the claim of St. Barnabus Hospital a/a/o Dania Hernandez, and the plaintiff has failed to raise a triable issue of fact sufficient to defeat such showing. When plaintiff's assignor failed to appear for the requested IMEs, defendant had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued. (*Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011); *See also, Stephen Fogel Psychological, P.C. v. Progressive*, 35 A.D.3d 720, 827 N.Y.S.2d 717 (assignor breached a condition precedent to payment on the policy by failing to appear for IMEs). Plaintiff does not contest the timeliness of the mailing of defendant's denial of said claim, but argues that the defendant does not demonstrate that the IME notices were mailed to plaintiff's assignor. The defendant has, however, sufficiently demonstrated the timely mailing of said notices, as well as Ms. Hernandez's failure to appear for the scheduled examinations, through the affidavit of Jim Cannon, together with copies of the IME notices and the postmarked certificates of mailing properly addressed to Dania Hernandez, and the affidavit of Dr. Feuer. In opposition, plaintiff has failed to submit evidence sufficient to create a question of fact regarding the notice of the IMEs to its assignor.

Accordingly, defendant's motion for summary judgment on both causes of action are granted and plaintiff's cross-motion is denied.

This constitutes the decision and order of this court.

Dated: October 12, 2011


Anthony L. Parga, J.S.C.

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ENTERED
OCT 17 2011
NASSAU COUNTY
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