

**Richmond Univ. Med. Ctr. v Progressive Cas. Ins.  
Co.**

2011 NY Slip Op 33205(U)

November 29, 2011

Supreme Court, Nassau County

Docket Number: 004049-11

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

**RICHMOND UNIVERSITY MEDICAL CENTER,  
a/a/o JASNIQUIA BURRELL, WESTCHESTER  
MEDICAL CENTER, a/a/o MILDRED V. JOHNSON,  
PETER VIEIRA,**

**Plaintiff,**

**-against-**

**PROGRESSIVE CASUALTY INSURANCE  
COMPANY,**

**Defendant.**

**Decision and Order**

**MOTION SUBMITTED:  
October 26, 2011  
MOTION SEQUENCE:01  
INDEX NO. 004049-11**

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

Notice of Motion	1
Affirmation in Opposition	2
Supplemental Affirmation in Opposition	3
Reply Affirmation	4

On October 31, 2010, Peter Vieira was involved in an accident for which he received medical treatment at Westchester Medical Center ("Hospital"). Vieira was insured pursuant to an automobile liability insurance policy with Progressive Casualty Insurance Company ("Progressive"). On November 2, 2010, the date on which Vieira was discharged, Vieira assigned his rights to no-fault benefits to the Hospital (Ex. "4" to Motion). On November 4, 2010, pursuant to Progressive's investigation of no-fault benefits eligibility, Progressive requested certified copies of Vieira's admission history, discharge summary, radiology and pathology reports, laboratory test results, consult reports, nurses notes, emergency room records, and specifically blood alcohol/drug results and any serum toxicology test results (Ex. "A" to

Supplemental Affirmation).<sup>1</sup>

On November 10, 2010 a no-fault billing in the amount of \$ 9,333.48 was mailed to Progressive, certified mail, return receipt requested. Progressive received the bill on November 12, 2010 (Ex. "5" to Motion).

On November 15, 2010, Progressive requested an authorization from Vieira to obtain his blood alcohol level from the New York State Police ("police") and also requested from the police information regarding Vieira's blood alcohol results at the time of the accident (Exs. "B" and "C" to Supplemental Affirmation).<sup>2</sup> Prior to that time, Progressive had obtained a "copy of the police report which indicated that [Vieira] was arrested for DWI" (Affidavit in Opposition at ¶ 8; Ex. "C" to Supplemental Affirmation).

On November 26, 2010, Progressive sent a verification request delaying the payment of benefits pending the receipt of Vieira's authorizations, blood and alcohol levels, supporting deposition/DWI bill of particulars and emergency room records including all laboratory tests and/or the police accident report (Ex. "A" to Supplemental Affirmation).

On December 6, 2010, the Hospital mailed the complete medical records to Progressive. The medical records included all laboratory and toxicology reports (Ex. "2" to Reply). This mailing, which was received by Progressive on December 8, 2010, also included a copy of the assignment of benefits (Ex. "3" to Reply).

On December 29, 2010, Progressive sent another "Verification Request: Follow-up Notice" seeking that which was sought in the November 26, 2010 verification request (Ex. "A" to Supplemental Affirmation).

On January 10, 2011, Progressive acknowledged receipt of the hospital records but further requested from the Hospital the results of blood alcohol testing or a certified letter from the Hospital indicating that the testing was never performed (Ex. "A" to Supplemental Affirmation).

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<sup>1</sup> On December 8, 2010, Progressive sent a "second notice" seeking the same documentation as that sought in Progressive's November 4, 2010 request (Ex. "A" to Supplemental Affirmation).

<sup>2</sup> Having not received the authorization from Vieira or blood alcohol results from the police, on December 20, 2010, Progressive again requested of Vieira an authorization to obtain his blood alcohol level from the police (Ex. "B" to Supplemental Affirmation). A second notice was similarly sent on that day to the police requesting a copy of the blood alcohol results (Ex. "C" to Supplemental Affirmation).

By letter dated February 4, 2011, Peter Kattis, a biller and account representative for Hospital Receivable Systems, an entity which represents the Hospital, informed Progressive that it had mailed the complete medical records and that the Hospital did not test for blood alcohol and drugs and, thus, did not have any serum toxicology test results (Ex. "5" to Reply Affirmation). This letter was not certified.

Having been notified by the arresting officer that Vieira had refused to take any alcohol tests at the time of the accident (Affidavit in Opposition at ¶ 16), on February 18, 2011 and March 23, 2011, Progressive wrote to the police requesting a copy of Vieira's condition report or supporting deposition-bill of particulars as is "required when tickets are issued for alcohol involvement" (Ex. "C" to Supplemental Affirmation). The police told Progressive that there was an ongoing DWI case against Vieira, that the case was going to trial, and that they would not be able to provide the requested documentation until the conclusion of the trial (Affidavit in Opposition at ¶¶ 19-20).

#### *Plaintiff's Motion for Summary Judgment*

The Hospital thereafter moved for summary judgment based upon Progressive's failure to either pay the Hospital's no-fault benefits or deny its claim within 30 days as required by Insurance Law § 5106(a), which states that: "Payments 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."<sup>3</sup>

Here, the Hospital established its *prima facie* entitlement to judgment as matter of law by demonstrating that the necessary billing forms were mailed to and received by Progressive and that payment of the no-fault benefits was overdue (*New York & Presbyterian Hosp. v American Transit Insurance Co.*, 45 AD3d 822 [2d Dept 2007]). Specifically, the Hospital submitted, in support of its motion, the requisite no-fault billing forms, the assignment of benefits form, a certified mail receipt referencing the patient, a signed return receipt card also referencing the patient, and the affidavit of Pat Thompson, a biller and account representative for the Hospital, indicating that Progressive failed to either pay the bill or issue a timely denial of claim form (Exs. "4", "5", and "6" to Motion) (*Westchester Medical Ctr 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]).

The burden then shifted to Progressive to establish whether an issue of fact exists as to

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<sup>3</sup> The causes of action asserted in the complaint with respect to Jasniquia Burrell and Mildred V. Johnson have been "withdrawn" by the Plaintiff.

whether the verification requests sent by Progressive would serve to extend its time to pay or deny the claim (*New York and Presbyterian Hosp v Countrywide Insurance Co*, 44 AD729 [2d Dept 2007]). Progressive argues that, “until all timely requested verification has been received, the claim is not overdue and [Progressive] is under no obligation to pay or issue a denial” (Supplemental Affirmation in Opposition at ¶ 12).

The law is well settled that an insurer’s 30-day period in which to deny or pay a claim may be extended where the insurer makes a request for additional information and, in doing so, the insurer is not obligated to pay or deny the claim until all the demanded verification is provided (*Hospital for Joint Diseases v New York Central Mutual Fire Insurance Co*, 44 AD3d 903 [2d Dept 2007]). Pursuant to 11 NYCRR § 65-3.8(g), if an insurer has reason to believe that an applicant was operating a motor vehicle while intoxicated, and such intoxication was a contributing cause of the accident, “the insurer shall be entitled to all available information relating to the applicant’s condition at the time of the accident.” Proof of claim shall not be complete until the information which has been requested pursuant thereto has been furnished to the insurer.<sup>4</sup> (11 NYCRR § 65-3.8[g]). Furthermore, 11 NYCRR 65-3.5(c) entitles an insurer to receive all items necessary to verify a claim directly from the parties from whom such verification was requested.

An affidavit by a personal injury protection litigation representative employed by Progressive demonstrated that there is requested verification outstanding and that such verification is needed to process the claim (Affidavit in Opposition at ¶ 21). Since all of the requested information was not provided, the 30-day period in which Progressive was obligated to pay or deny the Hospital’s claim did not begin to run (*Westchester Medical Center v State Farm Mutual Auto Insurance Co.*, 44 AD3d 750 92d Dept 2007] [insurer entitled to review information concerning Plaintiff’s intoxication]; *Hospital for Joint Diseases v New York Central Mutual Fire Insurance Co*, 44 AD3d 903 [2d Dept 2007] [insurer’s proof that hospital did not respond to the additional verification requests tolled the 30-day period in which insurer had to pay or deny the claim]; *New York & Presbyterian Hosp v Countrywide Insurance Co*, 44 AD3d 729 [2d Dept 2007] [insurer’s request for additional information tolled insurer’s time in which to deny or pay the hospital’s claim]; *Montefiore Medical Center v Government Employees Insurance Co*, 34 AD3d 771 [2d Dept 2006] [insurer’s request for additional information did not have to be set forth in prescribed form and thus tolled the insurer’s time within which to pay or deny the claim until insurer received all of the relevant information requested].

In Reply, the Hospital argues that it has fully complied with Progressive’s verification

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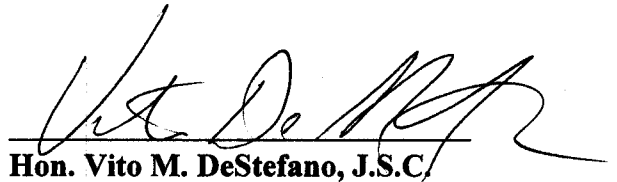
<sup>4</sup> An insurer may exclude from coverage a person who is injured as a result of operating a vehicle in an intoxicated condition (Insurance Law § 5103 [b][2]).

requests by providing medical records and advising Progressive that the Hospital did not test Vieira for blood alcohol or drugs. Contrary to the Hospital's contention, the Hospital did not fully comply with Progressive's request insofar as it did not provide to Progressive a "certified letter" from the Hospital that blood alcohol testing was not conducted. Neither the February 4, 2011 uncertified letter from a biller/account representative indicating that the Hospital did not test Vieira for blood alcohol or drugs, or the subsequent affidavit from Sharon Shafi, a secretary employed by Hospital Receivable Systems, indicating that Vieira was not tested for blood alcohol levels, was a proper response to Progressive request for a "certified letter" from the Hospital indicating that no blood alcohol testing was conducted on Vieira (Exs. "2" and "5" to Reply).<sup>5</sup> Progressive is also seeking requested documentation from the police with respect to the DWI investigation.

Based on the foregoing, it is hereby ordered that the Hospital's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: November 29, 2011



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

**ENTERED**  
DEC 07 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>5</sup> The Hospital also points out in its reply that Progressive "does not deny that it failed to issue a denial of claim." (Reply Affirmation at ¶ 1). However, 11 NYCRR 65-3.8(b)(3) prohibits the issuance of a denial prior to receipt by the insurer of verification of all relevant information.