SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : IA PART 17

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WESTCHESTER MEDICAL CENTER
as Assignee of **SEAN LANDIS,**

Plaintiff,

- against -

PROGRESSIVE PREFERRED INSURANCE COMPANY,

Defendant.

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DECISION AND ORDER

Index No.: 24084/2009

Motion Seq. Nos.: 001-002
Original Return Dates: 03/12/10
05/12/10

The following named papers numbered 1 to 11 were submitted on this Motion and Cross-Motion on June 2, 2010:

	Papers numbered:
Notice of Motion, Affirmation and Affidavit annexed	1-3
Affirmation and Affidavit in Opposition to Motion	4-5
Notice of Cross-Motion, Affirmation and Affidavit annexed	6-8
Reply Affirmation and Affidavit in Opposition to Cross-Motion	9-10
Reply Affirmation on Cross-Motion	11

The motion by the Plaintiff for an Order pursuant to C.P.L.R. 3212 granting summary judgment relief as against the Defendant (Motion Sequence Number 1), and the Cross-Motion by the Defendant for an Order pursuant to C.P.L.R. 3212 granting summary judgment relief against the Plaintiff (Motion Sequence Number 2), are decided as follows:

On or about November 24, 2009, the Plaintiff commenced the within action by filing a Summons and Complaint with the Office of the Clerk of the County of Nassau, seeking the payment of No-Fault insurance benefits for services purportedly rendered to the insured of the Defendant as the result of a motor vehicle accident occurring May 22, 2009. Issue was joined on or about January 21, 2010, by which the Defendant denied the majority of allegations contained in the Complaint, and

asserted twenty-one (21) affirmative defenses.

The within applications subsequently ensued.

Summary judgment is drastic relief as it effectively denies a party the opportunity to prosecute or defend his or her position and present evidence at trial. Thus, summary judgment should only be granted where no triable issues of fact are raised, *see* Andre v. Pomeroy, 35 N.Y.2d 361 (1974), and the cause of action or defense is established sufficiently to warrant a Court directing judgment in favor of the movant as a matter of law. *See* Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Alvarez v. Prospect Hospital *et al.*, 68 N.Y.2d 320 (1986); Rebecchi v. Whitmore, 172 A.D.2d 600 (2nd Dept. 1991). The responsibility of the Court in deciding a motion for summary judgment relief is not to resolve issues of fact or decide matters of credibility, but merely to determine whether such issues exist. *See* Hantz v. Fishman, 155 A.D.2d 415 (2nd Dept. 1989); *see also* Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v. Johnson, 147 A.D.2d 312 (2nd Dept. 1987). However, where appropriate, summary judgment should be granted by the Court.

In this matter, the Plaintiff WESTCHESTER MEDICAL CENTER seeks the payment of No-Fault benefits for hospital and medical services provided to the assignor SEAN LANDIS for the period covering May 22, 2009 through May 25, 2009 following the motor vehicle accident in which he sustained personal injuries, and that any No-Fault reimbursement to which SEAN LANDIS was entitled pursuant to the insurance policy issued by the Defendant was duly assigned to the Plaintiff. The Plaintiff asserts that it submitted a claim in proper form to the Defendant for payment in the sum of $15,262.21 of which $9,121.59 has been paid by the Defendant to date, leaving a balance claimed due of $6,140.62.

The record indicates that the Plaintiff submitted a Diagnosis Related Group (D.R.G.) Master Output Report, a medical claim form (UB-04), and a No-Fault Hospital Facility form (NF-5) by certified mail return receipt requested, which were received by the Defendant on or about August 7, 2009. It further appears that following the commencement of this action, the Defendant made a partial payment of $9,121.59. The Plaintiff seeks the balance claimed due, together with attorneys fees pursuant to 11 N.Y.C.R.R. Section 65-4.6(e), as it is asserts that the Defendant failed to timely submit a denial of claim.

In opposition to the Motion and in support of the Cross-Motion, the Defendant contends that its review of the claim of the Plaintiff revealed that the Assignor's injuries may have resulted from the his operation of the motor vehicle while under the influence of alcohol, which would form a basis upon which to deny him coverage based upon statutory law and the applicable policy terms and conditions. As stated by GEORGIA PAPE, a Personal Injury Protection ("P.I.P.") Senior Litigation Representative employed by the Defendant: "The accident involved two vehicles and occurred on Friday morning at 4:41 am. The police report indicates that Mr. Landis was driving while intoxicated and disregarded a traffic control device resulting in the accident. Further although it was nighttime and dark out he failed to have his headlights on."

In an attempt to verify the claim, the Defendant mailed an authorization form to Assignor SEAN LANDIS on July 30, 2009, to enable it to obtain his blood alcohol level from the Town of Newburgh which had investigated the motor vehicle accident. On August 10, 2009, the Defendant received the Plaintiff's bill for $15,262.21, and on August 26, 2009, the Defendant notified the Plaintiff that its claim for benefits was delayed pending its receipt of the authorization for blood alcohol level information from the applicable entity; the Assignor's submission of an authorization

to obtain the supporting deposition/DWI Bill of Particulars and receipt of these documents from the applicable authority; receipt of the complete emergency room records including all laboratory test results; and/or the police accident report to determine the Assignor's eligibility for benefits. An additional authorization was sent to the Assignor on September 3, 2009, and on September 29, 2009, the Defendant sent a second notification to the Plaintiff that its claim was delayed pending receipt of the above mentioned records and documentation. On November 5, 2009, a third request for authorization was sent to the Assignor, and the Plaintiff send a request the blood-alcohol test results directly to the Town of Newburgh Police.

On November 18, 2009, a verification request was sent to hospital facility rendering emergency room care to SEAN LANDIS, seeking certified copies of the medical records of the Assignor. The Defendant claims to have finally received such medical records from the treating hospital on November 30, 2009, which indicated that the blood-alcohol level of SEAN LANDIS immediately following the motor vehicle accident was in excess of the legal limit. Thus, on December 22, 2009 and within thirty (30) days of receiving the additional verification sought, the Defendant generated and mailed a Denial of Claim form (NF-10). The underlying action was commenced in the interim on or about November 24, 2009.

The Defendant further attests that the applicable policy's Med Pay coverage of $10,000.00 was exhausted due to the payment to the Plaintiff of $9,121.59 and a required payment of $878.41 to New York City Human Resources Administration. SEAN LANDIS was sent a Med Pay policy exhaustion letter on December 23, 2009.

The statute concerning the payment of No-Fault claims was promulgated "to 'assure claimants of expeditious compensation for their injuries through prompt payment of first-party

benefits without regard to fault and without expense to them' (citations omitted)." Kingsbrook Jewish Medical Center v. Allstate Insurance Co., 61 A.D.3d 13, 17 (2nd Dept. 2009). The Appellate Division Second Department has summarized the time table governing the submission and payment of such benefits as follows:

> Pursuant to the statutory and regulatory framework governing the payment of no-fault benefits, insurance companies are required either to pay or deny a claim for first-party benefits within 30 days of receipt of the claim (*see* Insurance Law §5106[a]; (additional citations omitted)). Within 10 business days after receipt of the claim notice, the insurer may send an initial request for verification of the claim (*see* 11 NYCRR 65-3.5[a]). After receipt of verification, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt (*see* 11 NYCRR 653.5[b]). The 30-day period in which to either pay or deny a claim is extended where the insurer makes a request for additional verification within the requisite 15-day time period (citations omitted). Thus, a timely additional verification request tolls the insurer's time within which to pay or deny a claim (citations omitted). Id. at 18.

However, " '[a]n insurer is not obligated to pay or deny a claim until it has received verification of all relevant information requested. 11 NYCRR 65.15(g)(1)(i); (2)(ii).' " Central Suffolk Hospital v. New York Cent. Mut. Fire Ins. Co., 24 A.D.3d 492, 493 (2nd Dept. 2005) lv den., 7 N.Y.3d 704 (2006), quoting St. Vincent's Hosp. of Richmond v American Tr. Ins. Co., 299 A.D.2d 338, 340 (2nd Dept. 2002); *see also* Presbyterian Hospital v Maryland Casualty Co., 90 N.Y.2d 274 (1997). An action for payment which is brought before requested verified information has been supplied is premature. Westchester Medical Center v Progressive Cas. Ins. Co., 43 AD3d 1039 (2nd Dept. 2007). Indeed, the 30-day period for payment or denial of a claim does not begin to run until the insurer has received "proof of claim which . . . include[s] verification of all of the relevant information requested . . . ." 11 N.Y.C.R.R. 65-3.8(a)(1). "[W]hen an insurer believes that intoxication may have been a contributing cause of an accident, the insurer is entitled to all available information regarding the

insured's condition at the time of the accident." Presbyterian Hosp. in City of New York v. Maryland Cas. Co., 90 N.Y.2d 274, 279, (1997) citing 11 N.Y.C.R.R. former 65.15(g)(7). However, 11 N.Y.C.R.R. 65-3.8(g) provides that an "insurer must have **'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 (emphasis added)" to be entitled to additional information relating to applicant's condition at the time of the accident.

The police report indicates that "alcohol involvement" was an "apparent contributing factor" to the subject motor vehicle accident While technically not admissible here, the uncertified Police Report may be considered in opposition to the plaintiff's motion. Pelkey v. Viger, 289 A.D.2d 899 (3rd Dept. 2001), citing Murray v. North Country Ins. Co., 277 AD2d 847 (3rd Dept. 2001), app den., 98 NY2d 707 (2002). As the subject policy specifically excludes coverage to a person injured "as a result of operating a motor vehicle while in an intoxicated condition as defined by Vehicle and Traffic Law §1192." *see* Insurance Law Section 5103(b); Fafinski v. Reliance Insurance Company, 65 NY2d 990 (1985), the Defendant has established an issue of fact regarding the propriety of its requests for information. Similarly, while the admissibility of the blood alcohol report has not been established, it may be considered here in opposition to the motion of the Plaintiff. Westchester Medical Center v. State Farm Mut. Auto. Ins. Co., *supra* at p. 753.

The Plaintiff maintains that the omission of the last dates on which verification was requested and received by the Defendant on its denial is fatal. *See* St. Barnabas Hosp. v. Allstate Ins. Co., 66 AD3d 996 (2nd Dept. 2009). In addition, the Plaintiff notes that the Defendant received its records relating to the Assignor SEAN LANDIS on August 19, 2009, and that submitted laboratory results *via* facsimile on September 30, 2009. As for the verifications that had remained outstanding which

sought blood alcohol levels, the Plaintiff maintains that the Defendant did not seek verification in a timely fashion as it has failed to establish the date upon which it received the police report. It further maintains that because the Defendant had no evidence of alcohol involvement prior to receiving the police report, the time to pay or deny its claim was not suspended since that time period cannot be tolled based upon speculation or suspicion. The Medical Center also maintains that the report from hospital providing emergency room treatment is inadmissible. Matter of Nyack v Government Employees Insurance Co., 139 A.D.2d 515 (2nd Dept. 1988), app. dism., 72 N.Y.2d 841 (1998), app. dism., 73 N.Y.2d 786 (1989).

Under the circumstances, the absence of the date that Progressive requested final verification and received it does not entitle the Plaintiff to recover on its claim. The NF-10 Denial Form generated by the Defendant adequately advised the Plaintiff that the injured person was excluded under policy conditions or other exclusion, to wit:

> All No-Fault benefits are denied pursuant to our policy and NYS Regulation 68 excluding coverage to any person as a result of operating a motor vehicle while in an intoxicated condition or while the ability to operate such vehicle is impaired by the use of a drug [and] the Medical Payment coverage on this policy has reached its maximum benefit. All further medical bills should be submitted to your health insurance carrier for consideration.

Nevertheless, having failed to establish when it received the police report, the Defendant has not established that it had "reason to believe" that SEAN LANDIS was operating the motor vehicle while intoxicated when it issued its requests for information to SEAN LANDIS, the Town of Newburgh, and St. Luke's Cornwall Hospital/Newburgh or that its requests were timely, thereby extending the 30-day limit in which it was required to pay or deny the claim presented. Similarly, it has not established that SEAN LANDIS was intoxicated and that his intoxication caused the accident.

Accordingly, issues of fact exist concerning the cause(s) of and/or the contributing factor(s) to the underlying motor vehicle accident (*i.e.* the possible intoxication or impairment of SEAN LANDIS as alleged in the police report and raised by the twentieth affirmative defense contained in the Answer), and whether the Defendant based its requests of additional verification on pure conjecture or supposition. Clearly, such issues cannot be ascertained by the Court based upon the limited record presented. Therefore, the denial of the pending summary judgment motions is appropriate as material triable issues of fact have been raised by each litigant.

The Court finds that the remaining contentions of the parties are without merit.

Accordingly, after due deliberation, it is

ORDERED, that the motion by the Plaintiff for an Order pursuant to C.P.L.R. 3212 granting summary judgment relief as against the Defendant is **denied,** and the motion by the Defendant for an Order pursuant to C.P.L.R. 3212 granting summary judgment relief as against the Plaintiff is **denied**; and it is further

ORDERED, that counsel for the Plaintiff(s) and counsel for the Defendant shall appear for a Preliminary Conference **on February 3, 2011 at 9:30 a.m.** at the Differentiated Case Management (D.C.M.) Part of the Nassau County Supreme Court to schedule all discovery proceedings in connection herewith.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
January 7, 2011

ENTER:

JOEL K. ASARCH, J.S.C.

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ENTERED
JAN 10 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Copies mailed to:

Law Offices of Joseph Henig, P.C.
Attorneys for Plaintiff

Carman, Callahan & Ingham, LLP
Attorneys for Defendant