

Hernandez v Merchant Mut. Ins. Co.

2017 NY Slip Op 33358(U)

October 26, 2017

Supreme Court, Westchester County

Docket Number: Index No. 68054/2013

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
MARIO HERNANDEZ

Plaintiff,

-against-

Index No.: 68054/2013
Motion Sequence # 2
**AMENDED
DECISION & ORDER**

MERCHANT MUTUAL INSURANCE COMPANY,

Defendant.
-----X

The following papers were considered on plaintiff's motion seeking an Order granting him summary judgment and other relief:

Notice of Motion/Affirmation/Affidavit/Exhibits 1-19	1-24
Affirmation in Opposition/Exhibit 1-65	25-90
Reply Affirmation/Exhibit 1	91-92

In this action, plaintiff seeks to recover first-party no-fault insurance benefits related to a car accident that occurred on December 28, 2008. The accident occurred while plaintiff was stopped at a red light and was rear ended by a truck owned by the City of White Plains. At the time of the accident, plaintiff was 30 years old and had no prior problems or injuries to his neck or back. As a result of the accident, plaintiff sustained injuries to his back and neck and required medical treatment from the White Plains Hospital, National Neurolabs and orthopedic surgeon, Dr. Richard Peress and required back surgery on June 8, 2010.

It is undisputed that defendant is the no-fault carrier responsible to pay plaintiff his basic economic losses related to the accident; that plaintiff timely submitted a NF-2 claim form; that plaintiff complied with a policy provisions related to his claim for medical care and loss of earnings; that the subject policy has available \$75,000.00 to pay plaintiff's basic economic loss; and that defendant has paid only \$30,426.14 of the available \$75,000.00 benefit. The dispute here surrounds defendant's obligation to pay the remaining \$44,573.86

Plaintiff submitted claims relating to back surgery performed on June 8, 2010 at Phelps Memorial Hospital. Defendant contested the necessity of the surgery and denied plaintiff's claim. In its denial, defendant states that "...no medical documentation has been provided to support this treatment is related to 12/9/08 MVA." In rejecting plaintiff's claim, defendant annexed a report from Dr. Weiss-Citrome, a psychiatrist who plaintiff argues does not have the necessary foundation to give an opinion as to the necessity of orthopedic surgery. In addition, plaintiff argues that her report does not state the facts upon which her conclusion, that plaintiff's disability in lifting more than 40 lbs. is attributable to "pre-accident pathology", is based.

As to defendant's statement that no medical documentation was provided to support that the treatment is related to 12/29/08 MVA, in the denial of Phelps Memorial claim, plaintiff states that defendant never made a request for verification of treatment or sent Phelps Memorial a NF-4 and defendant's claim adjuster admitted that no claim was denied because a provider did not provide verification of the claim. In fact, defendant did admit to receiving Dr. Peress' claim forms to which a copy of the

operative report was attached and also specifically stated that the condition treated with the surgery was related to the accident.

A jury trial in a third-party companion case filed by plaintiff in Supreme Court, Westchester County, against the City of White Plains and Alexander Howard was held. In that case plaintiff sought money damages for medical expenses related to the surgery in this case as well as his loss of earnings. Both Dr. Peress and Dr. Weiss-Citrome testified at that trial. To succeed, plaintiff had to establish that the injuries were caused by the accident and that the surgery and loss of earnings were medically necessary. This case resulted in a jury award to plaintiff of \$747,583.50. The jury awarded plaintiff \$155,990.52 against Dr. Peress' billing; \$47,000.00 for past loss of earnings; and \$175,602.00 for future loss of earnings.

As a result of the collateral source rule, plaintiff was required to reduce the verdict against the City of White Plains by \$75,000.00 in recognition of the availability of no-fault benefits from the defendant. As stated above, defendant has paid \$30,426.14 of the \$75,000.00 and the defendant refuses to pay the remaining \$44,573.86. Plaintiff believes that he is entitled to summary judgment based upon the doctrine of collateral estoppel, and that the denials issued by defendant were not supported by medical proof establishing that the surgery was not medically necessary.

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v*

Prospect Hosp., 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact (see e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In other words, the burden shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position.

Section 5103 of the Insurance Law, part of the “Comprehensive Motor Vehicle Insurance Reparations Act,” which pertains to the entitlement to first-party benefits, provides, in relevant part, that a person is entitled to first-party benefits from the insurer of a vehicle “for loss arising out of the use or operation ... of such motor vehicle” (Insurance Law § 5103[a][1]). To establish a prima facie case, a plaintiff is required to submit proof that it timely sent its claim for no-fault benefits to the defendant, that the defendant received the claim and that the defendant failed to pay or deny the claim within thirty days. (*Amaze Medical Supply Inc. v Allstate Insurance Company*, 3 Misc.3d 133(A), 2004 WL 1197345 [App. Term, 2nd & 11th Jud. Dists. 2004]; *King's Medical Supply Inc. v Country-Wide Ins. Co.*, 5 Misc3d 767, 783 N.Y.S.2d 448 [N.Y. City Civ. Ct. 2004]). A plaintiff must also establish that the loss arose from the automobile accident and that the loss was medically necessary as a result of the accident.

Once a plaintiff has established its prima facie case, the burden shifts to the defendant to come forward with admissible evidence demonstrating the existence of a material issue of fact. (*Amaze Medical Supply Inc. v Allstate Insurance Company*, 3 Misc3d at 133).

Here, it is undisputed through defendant's admission, that all of the statutory prerequisites of the instant no-fault claim have been met. Plaintiff provided a copy of the NF-2 which defendant admitted to receiving within 30 days of the accident as well as the affidavits of Mario Hernandez, affirmations of Dr. Peress and of Christian Taylor. These submissions along with the annexed claim form support the plaintiff's position that the medical and hospital treatment was provided to plaintiff, and that the treatment was medically necessary as a result of the injuries plaintiff sustained from the accident. The only basis defendant has asserted for denying plaintiff's claim is that the treatment was medically unnecessary.

The law is well established that the burden is on the insurer to prove that the medical treatment was medically unnecessary (*A.B. Medical Services PLLC v Geico Insurance*, 2 Misc3d 26, 773 N.Y.S.2d 773 [App. Term, 2nd & 11th Jud. Dists. 2003]; *King's Medical Supply Inc. v Country-Wide Insurance Company*, 783 NYS.2d at 448). A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim (*Amaze Medical Supply Inc. v Eagle Insurance Company*, 2 Misc3d 128(A), 2003 WL 23310886 [App. Term, 2nd and 11th Jud. Dists. 2003]; *King's Medical Supply Inc. v Country-Wide Ins. Co.*, 783 NYS.2d at 452).

In establishing that the surgery was unnecessary, plaintiff relies upon a report submitted by Dr. Weiss-Citrome. Plaintiff contends that this report does not raise a question of fact because Dr. Weiss-Citrome is a physiatrist, not an orthopedist, and her report does not state the necessary foundation to give an opinion as to the necessity of

orthopedic surgery, (*DeGiorgio v Racanelli*, 136 AD3d 734, 737 [2d Dept 2016]). “While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field ... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*Behar v. Coren*, 21 AD3d 1045, 1046–1047, quoting *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895). Thus, where a physician opines outside of his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered. (*Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841; *Bjorke v Rubenstein*, 53 AD3d 519, 520; *Glazer v Lee*, 51 AD3d 970, 971; *Mustello v Berg*, 44 AD3d 1018, 1019). Dr. Weiss-Citrome’s report does not address the issue as to whether plaintiff’s surgery was medically necessary and therefore, has no probative or evidentiary value. An expert’s opinion must be supported by an objective basis to be of evidentiary value. *Toure v Avis Rent a Car Sys.*, 98 NY2d 350, 351 [2002]). Defendant has failed to establish that plaintiff surgery was unnecessary.

Plaintiff also argues that defendant is collaterally estopped from challenging the finding made by the jury in the companion case which awarded plaintiff \$155,990.52 against Dr. Peress’ billing; \$47,000.00 for pass loss of earnings; and \$175,602.00 for future loss of earnings. The party seeking to invoke the benefits of the principle of collateral estoppel must prove two necessary elements. First, it must be shown that the party against whom collateral estoppel is sought to be invoked had been afforded a full and fair opportunity to contest the decision said to be dispositive of the present controversy. Additionally, there must be proof that the issue in the prior action is

identical, and thus decisive, of that in issue in the current action. (*Schwartz v. Public Administrator of County of Bronx*, 24 NY2d 65, 71). Although the party sought to be collaterally estopped in the current action need not have been the one for or against whom judgment was rendered in the previous action, the relationship does bear a critical significance. For example, collateral estoppel bars not only parties from a previous action from litigating an issue decided therein, but those in privity with them as well, (*Downey v Seib*, 185 N.Y. 427, 433).

Privity denotes a mutually successive relationship of the same rights to the same property. (*Downey v Seib*, supra; *Bigelow v Old Dominion Copper Co.*, 225 US 111, 129), and permits utilization of collateral estoppel for the benefit of or against persons who were not parties to the previous action but who were connected with it to such an extent that they are treated as if they were parties. "The crucial inquiry focuses upon the juncture at which the relationship between the party to the first action and the person claimed to be his or her privy is established" (*Gramatan Home Investment Corp v Lopez*, 46 NY2d 481).

The City of White Plains' interest in the third-party companion action was to defeat plaintiff's claim of medical necessity of the subject surgery and loss earning. If the City of White Plains was successful, plaintiff could not have sought to collect the no-fault amounts from the defendant, which the City of White Plains would be required to reimburse. Therefore, by virtue of the relationship between the City of White Plains and defendant, the City of White Plains would have had to reimburse defendant the amount paid to plaintiff in no-fault benefits. This clearly establishes the type of privity between defendant and the City of White Plains to support invoking the doctrine of collateral

estoppel. Defendant is, therefore, precluded from relitigating the issue of whether the surgery was medically necessary as a result of the accident.

Plaintiff has made out a prima facie case entitling him to judgment as a matter of law. In opposing plaintiff's motion, defendant failed to produce evidentiary proof, in admissible form, sufficient to raise a triable issue of fact as to its defenses (*Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d at 833; *US Bank Trust N.A. Trustee v Butti*, 16 AD3d 408 [2d Dept 2005]).

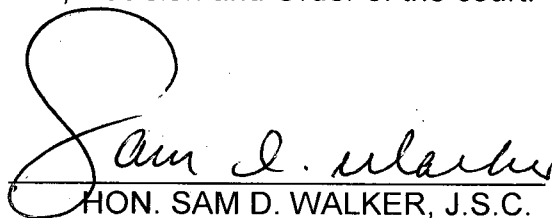
Plaintiff is, therefore entitled to a judgment for the remaining policy benefit in the amount of \$44,573.86 together with interest at 2% from October 25, 2013, the date the action was commenced. Pursuant to Insurance Law § 5106(a) and 11 NYCRR 65.15(h)(1), interest accrues on overdue no-fault insurance claims at a rate of 2% per month. (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451; *Smithtown Gen. Hosp. v State Farm Mut. Auto. Ins. Co.*, 207 AD2d 338). A claim is overdue when it is not paid within 30 days after a proper demand is made for its payment (Insurance Law § 5106[a]; 11 NYCRR 65.15[g]).

Once an action to recover no-fault insurance benefits has been commenced, 11 NYCRR 65.17(b)(6)(v) grants attorney's fees of 20% of the amount of the first-party benefits awarded, plus interest, with a ceiling of \$850 per claim (*Smithtown Gen. Hosp. v State Farm Mut. Auto. Ins. Co.*, supra; cf., *Hempstead Gen. Hosp. v Allstate Ins. Co.*, 106 AD2d 429, affd. 64 NY2d 958). 11 NYCRR 65.17(b)(6)(v) applies here (see, 11 NYCRR 65.17[b][1][iv]). Here, plaintiff concedes that attorney's fees are capped at \$1,360.00 and the Court will grant that amount.

Accordingly, plaintiff's motion for summary judgment is GRANTED. Plaintiff is directed to submit a judgment to the Westchester County Clerk in the amount of \$44,573.86 together with interest at 2% per month from October 25, 2013, the date the action was commenced, plus attorneys' fees of \$1,360, together with costs and disbursements.

The foregoing constitutes the Opinion, Decision and Order of the court.

Dated: White Plains, New York
October 26, 2017



HON. SAM D. WALKER, J.S.C.