

**Allstate Ins. Co. v North Shore Univ. Hosp. (NSUH)**

2019 NY Slip Op 31842(U)

June 26, 2019

Supreme Court, New York County

Docket Number: 651628/2017

Judge: Anthony Cannataro

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK NEW  
YORK COUNTY**

**PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM**

*Justice*

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ALLSTATE INSURANCE COMPANY

Plaintiff,

- v -

NORTH SHORE UNIVERSITY HOSPITAL  
(NSUH) A/A/O YOLANDA FONTANEZ,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff Allstate Insurance Company (Allstate) commenced this action for a trial *de novo* pursuant to Insurance Law 5106(c) after defendant North Shore University Hospital (NSUH), as assignee of Yolanda Fontanez, prevailed at an arbitration proceeding on its claim for no-fault benefits in the sum of \$31,769.92. Allstate now moves for summary judgment on the declaratory relief sought in the complaint, arguing that the services provided by NSUH were not medically necessary, and that Ms. Fontanez breached a condition precedent to coverage by failing to appear for scheduled independent medical examinations (IMEs). NSUH opposes Allstate's motion for summary judgment and cross-moves for summary judgment, or in the alternative, for partial summary judgment on its *prima facie* case.

This matter arose out of a motor vehicle accident which occurred on June 19, 2010. As part of her post-accident treatment, Ms. Fontanez had pre-surgical testing at NSUH on August 27, 2010, and then underwent surgery to her cervical spine on August 31, 2010 during an inpatient admission at NSUH from August 31, 2010 through September 1, 2010. On September 9, 2010, NSUH submitted bills to Allstate which included hospital facility fees related to Ms. Fontanez's pre-operative testing, surgery, and inpatient stay, totaling \$31,769.92. On October 8, 2010, Allstate denied each of NSUH's bills for "lack of medical necessity," based upon a peer review conducted by Marvin Winell, M.D. Approximately one year later, on October 5, 2011, Allstate issued a subsequent "general denial," stating that all claims for Ms. Fontanez were to be denied "effective 8/18/11," as a result of Ms. Fontanez's failure to appear for scheduled IMEs on August 18, 2011 and September 8, 2011.

An insurer may deny a claim for medical services provided to a person injured in a motor vehicle accident under the no-fault law without reaching the issue of the medical necessity of the treatment if the injured party fails to appear for a properly and timely scheduled IME (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [2011]; *see also American Transit Ins. Co. v Lucas*, 111 AD3d 423 [2013]; *Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721–22 [2006]; 11 NYCRR § 65–3.8 [c]). However, in order to deny benefits, an insurer must establish that the notices of the scheduled IMEs were properly mailed, that the claimant did not appear, and that the scheduling of the IMEs complied with Insurance Department Regulation 11 NYCRR § 65–3.5(d), which prescribes a 30–calendar–day time frame for the holding of IMEs (*American Tr. Ins. Co. v Clark*, 131 AD3d 840, 840–41 [2015]).

In this case, within 30 days of receiving NSUH's claim, Allstate denied NSUH's bills, contending that the procedures performed by NSUH were "not medically necessary." By all accounts, Allstate's denial appears to have been based solely upon

the peer review by Dr. Winell, as there has been no evidence to suggest that any IMEs took place before the denial. It was not until a year after that denial that Allstate requested and scheduled two IMEs for Ms. Fontanez.

Allstate's reliance on *Unitrin, supra*, for the proposition that a no-fault claimant's failure to appear for an IME at any time justifies denying the claim in question in its entirety is misplaced here. Two different provisions of the Insurance Department Regulations are at issue in this case and in the pertinent caselaw. The first is 11 NYCRR § 65-1.1, which was at issue in *Unitrin*, and which requires the claimant to submit to medical examination by physicians selected by, or acceptable to, the insurer when, and as often as, the insurer may reasonably require. The second is 11 NYCRR § 65-3.5(d), which requires an insurer to schedule requested IMEs within 30 calendar days from the date of receipt of the prescribed verification forms. Contrary to plaintiff's argument, *American Tr. Ins. Co. v Clark* makes clear that in order to deny benefits, in addition to the other preliminary requirements, an insurer must establish that the scheduling of the IMEs complied with 11 NYCRR § 65-3.5(d). Taken together, *Unitrin* and *American Tr. Ins. Co. v Clark* mandate that the rule expressed in *Unitrin*, which allows denial of a claim based on a claimant's failure to attend reasonable IMEs, only apply when the insurance company treats the IMEs as necessary at the outset, and makes an initial request for them, in accordance with 11 NYCRR § 65-3.5(d).

The requirements of 11 NYCRR § 65-3.5(d) were not met on these facts. Here, Allstate's first request for an IME was not made until a year after NSUH submitted its claim. In denying NSUH's claim for lack of medical necessity within 30 days of receiving the forms, *without* requesting or conducting an IME, Allstate chose its path and effectively deemed IMEs unnecessary to its determination that NSUH's claim should be denied. In now seeking to deny NSUH's claim based upon Ms. Fontanez's failure to appear at the IMEs, after already having determined a year earlier, without

ever having requested or conducted IME, that the procedures were not medically necessary, Allstate stretches the rule of *Unitrin* to unreasonable lengths. At a minimum, Allstate has failed to meet its *prima facie* burden on summary judgment, as it may not rely upon Ms. Fontanez's alleged noncompliance with an IME that was not scheduled in compliance with applicable rules (*see American Transit Ins. Co. v Jorge*, 2014 NY Slip Op 30720(U) [Sup Ct, NY County 2014] citing *Fair Price Med. Supply Corp. v Travelers Indem., Co.*, 10 NY3d 556, 562-63, [2008]; *Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 317-18[2007]; *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [2011]).

Since the issue of Ms. Fontanez's failure to appear at the IMEs is not dispositive in this case, the Court must next address the question of medical necessity. Both sides argue that they are entitled to summary judgment on this issue. However, the conflicting evidence presented by the parties, including the peer review by Dr. Winell and the response letter written by the surgeon who treated Ms. Fontanez's, makes it impossible to determine the issue of medical necessity at this juncture. Also, contrary to NSUH's contention, the necessity of the pre-surgical testing is also at issue as the peer review can be read to have deemed such testing unnecessary as well.

Both plaintiff's and defendant's motions for summary judgment are denied. Nevertheless, NSUH has established *prima facie* medical necessity by submitting proof that it properly submitted its bills and that Allstate received them (*see Damadian MRI In Elmhurst, P.C. v Liberty Mutual Ins. Co.*, 2 Misc.3d 128(A) [App Term 2d & 11th Jud. Dists. 2003]). As such, that portion of defendant's motion which seeks partial summary judgment on this question is granted.

Accordingly, it is

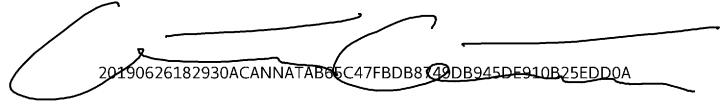
**ORDERED** that plaintiff's motion and the branch of defendant's motion

which seek summary judgment are both denied, and it is further

ORDERED that the branch of defendant's motion for partial summary judgment on its prima facie case, namely that the bills were properly submitted, is granted.

6/26/2019

DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: