

**Burke 2 Physical Therapy PC v
State Farm Mut. Auto. Ins. Co. PIP/BI Claims**

2021 NY Slip Op 34287(U)

October 7, 2021

Civil Court of the City of New York, Kings County

Docket Number: Index No. CV-752736-19/KI

Judge: Ellen E. Edwards

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This opinion is uncorrected and not selected for official publication.



HON. ELLEN E. EDWARDS

BURKE 2 PHYSICAL THERAPY PC AAO
HAUGHTON, BRIAN

Plaintiff(s),

Index No. CV-752736-19/KI

EDDS No. _____

Motion Cal. # 51/52 Motion Seq. # ____.

DECISION AND ORDER

Recitation, as required by CPLR §2219(a) of the papers considered in review of this Motion:

Papers

Notice of Motion and Affidavits Annexed BKMNXG
Def. X motion.....RJY71G
Plaintiff AIO.....HUGKRM
Exhibits.....
Reply.....AC0SD

S

-against-

STATE FARM MUTUAL AUTOMOBILE INS.

CO. PIP/BI CLAIMS

Defendant(s).

In this action seeking to recover assigned first-party no-fault benefits, plaintiff moves for an order pursuant to 3211(b) dismissing with prejudice the defendant’s Affirmative defenses set forth in the Verified Answer. Defendant opposes plaintiff’s motion and cross-moves for Summary Judgment in favor of defendant pursuant to CPLR 3212. Plaintiff stated no requests for verification were made.

Upon the foregoing cited papers and after oral argument, the Decision/Order on Plaintiff’s Motion to Dismiss and Defendant’s Cross Motion is as follows:

“When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is ‘without merit as a matter of law’ ” (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797, (Sup Ct App Div 2d Dept 2015), quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559, (Sup Ct App Div 2d Dept 2006)). “In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference’ from the pleading” (*Bank of N.Y. v Penalver*, 125 AD3d at 797, quoting *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, [Sup Ct App Div 2d Dept 2008])). “ ‘[I]f there is any doubt as to the availability of a defense, it should not be dismissed’ ” (*Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1255, (Sup Ct App

Div 2d Dept. 2012), quoting *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d at 723; (*Gonzalez v Wingate at Beacon*, 137 AD3d 747, 747 (Sup Ct App Div 2d 2016)).

Here, the defendant asserts numerous affirmative defenses. The Plaintiff contends all twenty-nine affirmative defenses are without merit. The defendant argues, the *Mallela* defense (*State Farm Insurance Co v Mallela*, 4 NY3d 313, 321 (2005)). In *Mallela*, the Court of Appeals held that insurers may withhold payment for medical services provided by fraudulently licensed corporations to whom patients, who are covered by no-fault insurance, have assigned their claims (*Id.*). The defense of fraudulent incorporation is a defense to a claim for no-fault benefits because whether “a plaintiff is fraudulently incorporated are material and necessary” (*Lexington Acupuncture, PC v State Farm Ins. Co.*, 12 Misc 3d 90, 92 (Sup Ct App Term 2nd & 11th Jud Dists 2006)). The defendant provides the court with documentary evidence in the form of Verification Requests, on why the insurer has failed to pay the instant claims to the provider under the defense of fraudulent incorporation. The court disagrees with the position that the Plaintiff cannot possibly be fraudulently incorporated. Providing every reasonable inference, the plaintiff’s motion to dismiss defendant’s affirmative defenses is denied. Plaintiff bears the burden of demonstrating that the affirmative defenses is “without merit of law” (*Id.*). Here, plaintiff failed to prove the affirmative defenses lacked merit.

The movant of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985)). In order to prevail on a motion based on an outstanding additional verification request, the proponent of a summary judgment motion must establish that the opposing party failed to comply with its additional verification requests (*see TAM Medical Supply Corp. v Tri State Consumers Ins. Co.*, 57 Misc 3d 133[A] (App Term, 2d Dept., 11th & 13th Jud. Dists. 2017); *see also Mount Sinai Hosp. v Auto One Ins. Co.*, 121 Ad3d 869 (2d Dept. 2014) (the Second Department has found that outstanding verification request requires the movant to demonstrate a prima facie entitlement to summary judgment).

Here, the defendant contends, (1) the below Bills (Bill Numbers 1-5) were properly denied, and (2) the action should be dismissed because the plaintiff failed to provide the defendant with additional verification pursuant to 11 NYCRR § 65.3.5.

Bill No.	Amount	Date of Service	Date Received	Date 1 st Verification	Date 2 nd Verification	Date NF-10 Issued
1	\$475.00	8/30/18	10/2/18	10/16/18	11/17/18	2/18/19
2	\$475.00	10/9/18	11/16/18	12/4/18	1/9/19	4/8/19
3	\$475.00	11/7/18	12/17/18	12/28/19	2/4/19	5/1/19
4	\$208.30	11/20/18	12/26/18	1/14/19	2/18/19	5/20/19
5	\$198.65	11/20/18	12/26/18	1/14/19	2/18/19	5/20/19

The no-fault regulations generally require an insurer to either pay or deny a claim for no-fault benefits within 30 calendar days from the date of receipt of the claim (Insurance Law § 5106(a); 11 NYCRR 65-3.8 (a)). An insurer may toll the 30-day period to pay or deny a claim by properly requesting verification within 15 business days from its receipt of the proof of claim form or bill (11 NYCRR § 65.15-(d)). If any additional verification has not been provided to the insurer within 30 calendar days after the original request, the insurer shall, within 10 calendar days "follow ... up" with the non-compliant party via telephone or mail (11 NYCRR 65-3.6 (b)). The insurer's 30-day period to pay or deny a claim may be tolled until it has received proper verification of all relevant information requested (see 11 NYCRR 65-3.8(a)). An insurer that demonstrates a proper request for verification and said demand for verification remains unanswered for more than 120 days said claim may be denied (see 11 NYCRR 65-3.5(o)). The "insurer shall advise the applicant in the verification request that the insurer may deny the claim if the applicant does not provide within 120 calendar days from the date of the initial request either all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply" (*Id.*).

In the instant matter, the defendant confirms receipt of the above bills (*Defendant's Cross Motion – Affirmation P. 12 & Exhibit A*). On October 16, 2018, the defendant sent the Plaintiff a letter to confirm receipt of said bills and requested the Plaintiff to submit additional documents to evaluate proof of plaintiff's claim. The defendant requested said documents due to the Examination Under Oath (EUO) held on September 14, 2018. The assignor, Brian Haughton, was not included in the EUO, as the bills were received after the scheduled EUO. On September 14, 2018, Plaintiff's Owner, John Nasrinpay, of Burke Physical Therapy, P.C. appeared for the EUO. Defendant states the EUO was sought to verify: "(i) that the billed services were medically necessary; (ii) to conform the appropriateness of the billing codes and corresponding charges submitted by Burke; and (iii) to verify that Burke's services were provided pursuant to arrangement with others that comply with New York State licensing laws" (*Defendant's Cross Motion – Affirmation P. 9*). Defendant contends the testimony given by John Nasrinpay did not resolve the above issues but instead raised additional questions as to Plaintiff's bills, NYS licensing requirements and other verification requests. Furthermore, defendant contends because John Nasrinpay declined to permit State Farm to make any copies of the requested documents during the EUO, then State Farm was not "provided" said documents to satisfy the verification requests.

The defendant requested the following additional verification:

1. Burke's federal and state tax returns for 2017 to the present, including any schedule K-1s, W-2s, 1099s, and quarterly payroll tax returns.
2. Burke's bank records for the period December 1, 2017 to the present, including any statements, deposits slips and cancelled checks.
3. Burke's general ledgers for the period December 1, 2017 to the present, or such other documents as reflects its financial condition, payments made and payments received.
4. Any documents relating to or reflecting any agreement, contract, lease, deal, arrangement or understanding with any person or entity providing management, billing, collection, consulting, or administrative services to Burke during the period December 1, 2017 to the present, including Expert Billing Solutions and Streamline Services.
5. Any documents relating to or reflecting any payment to or received from any person or entity providing management, billing, collection, consulting, or administrative services to

- Burke during the period December 1, 2017 to the present, including Expert Billing Solutions and Streamline Services.
6. All contracts, leases, subleases and agreements concerning Burke's operations at 941 Burke Avenue, Bronx, New York, including written agreement with Seo Han Medical, P.C.
 7. All contracts, leases, subleases and agreements concerning Burke's operations at 764 Elmont Road, Elmont, New York, including the written agreement with Starmed Group, Inc.
 8. All contracts, leases, subleases and agreements concerning Burke's operations at 2625 Atlantic Avenue, Brooklyn, New York, including the written agreement with 2625 Group, Inc.
 9. All contracts, leases, subleases, and agreements concerning Burke's operations at 152-80 Rockaway Boulevard, Jamaica, New York.
 10. All contracts, leases, subleases, and agreements concerning Burke's operations at 80-12 Jamaica Avenue, Woodhaven, New York, including the written agreement with Healthwise Medical Services, P.C.
 11. All contracts, leases, subleases, and agreements concerning Burke's operations at 424 East 147th Street, Bronx, New York, including the written agreement with 19413 Northern Boulevard, Inc.
 12. All contracts, leases, subleases, and agreements concerning Burke's operations at 5037 Broadway, New York, New York, including the written agreement with 19413 Northern Boulevard, Inc.
 13. All contracts, leases, subleases, and agreements concerning Burke's operations at 2510 Westchester Avenue, Bronx, New York, including any written agreement with Life Health Care Medical, P.C.
 14. All contracts, leases, subleases, and agreements concerning Burke's operations at 90-04 Merrick Road, Merrick, New York, including any written agreement with Life Health Care Medical, P.C,
 15. All contracts, leases, subleases, and agreements concerning Burke's operations at 2025 Davidson Avenue, Bronx, New York, including any written agreement with Seasoned Chiropractic, P.C.
 16. All contracts, leases, subleases, and agreements concerning Burke's operations at 550 Remsen Avenue, Brooklyn, New York.
 17. All contracts, leases, subleases, and agreements concerning Burke's operations at 1122A Coney Island Avenue, Brooklyn, New York, including the written agreement with Marina Gadaborshev/MG Chiropractic, P.C.

Defendant stated in their letters dated, October 16, 2018, December 4, 2018, December 28, 2018 and January 14, 2019,

“Please be advised that pursuant to 11 NYCRR 65-3.5(o), State Farm may deny the claims referenced in the attached rider if Burke does not provide within 120 calendar days from the date of this initial verification request all of the documents/information identified above under Burke's control or possession, or written proof providing reasonable justification for the failure to comply. “

Defendant's Cross Motion – Exhibit A-B.

Thus, pursuant to 11 NYCRR 65-3.5(o), defendant properly notified plaintiff of the additional verification request. Now the burden shifts to whether the plaintiff had control or possession of the requested documents or if they have provided written proof of a reasonable justification for their failure to comply. Plaintiff fails to properly refute defendant's Cross-Motion for Summary Judgment. The reply papers do not address the relief requested. Plaintiff's Reply/Opposition argues, plaintiff's support for a Summary Judgment Motion not the instant Motion to Dismiss the Affirmative Defenses. The court notes the Plaintiff did not file a Motion for Summary Judgment. Nevertheless, the defendant annexed Plaintiff's objection letters dated February 26, 2019; and April 16, 2019, to their Reply; therein plaintiff objects to defendant's request for additional verification. Plaintiff argues, said request is improper and defective and merely a discovery request.

In the instant matter, there is a triable issue of fact regarding the outstanding verification requests to determine the "propriety" of the records sought and who possessed said records (*see Mount Sinai Hosp. v Auto One Ins. Co.*, 121 Ad3d 869 (2d Dept. 2014)). The objection letters raise an issue of fact regarding plaintiff's compliance with 11 NYCRR 65-3.5(o).

Based on the foregoing, Defendant's motion for summary judgment is granted solely to the extent of establishing timely mailing of its verification requests. Thus, the defendant has established timely mailing of its verification request pursuant to 11 NYCRR 65-3.5(b) but not proper denial of the above Bills.

The remaining triable issues of fact are defendant's outstanding verification request defense and proper denial of the above Bills.

This constitutes the decision and order of this court.

Date: October 7, 2021

Brooklyn, New York

Ellen E. Edwards

Hon. Ellen E. Edwards
Judge, Civil Court