

**State Farm Mut. Auto. Ins. Co. v
EDCAS Acupuncture, P.C.**

2022 NY Slip Op 33455(U)

September 28, 2022

Supreme Court, Bronx County

Docket Number: Index No. 25197/2020E

Judge: Paul L. Alpert

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

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STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY and STATE FARM FIRE AND
CASUALTY COMPANY,

Index:25197/2020E

Plaintiff,

-against-

DECISION/ORDER

EDCAS ACUPUNCTURE, P.C.

Defendant,

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the order to show cause as indicated below:

Papers	Numbered
Notice of Motion & Affirmation in Support & Exhibits.....	1
Affirmation in Opposition & Exhibits.....	2
Affirmation in Reply & Exhibits.....	3

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action for declaratory judgment pursuant to CPLR § 3001 seeking a determination that they are not legally obligated to pay the defendant for claims it submitted seeking reimbursement for healthcare services. The plaintiffs now move for summary judgment based on the defendant’s failure to provide additional verification that was requested pursuant to 11 NYCRR §65-3.5. The defendant opposes the motion.

The plaintiffs investigated the defendant for improper treatment and billing practices. Their investigation raised questions regarding the defendant’s eligibility to collect no-fault benefits. This investigation led to the request for the defendant’s purported owner to attend an Examination Under Oath (EUO). The purported owner of EDCAS Acupuncture (hereinafter

“EDCAS”), Edwin Castillo, gave testimony at the Examination Under Oath (EUO) on December 10, 2019. This prompted the plaintiffs to request additional documentation to verify Mr. Castillo’s testimony and resolve any questions that he was not able to answer with sufficient detail.

Under Insurance Law § 5106 (a), an insurer is required to pay or deny a claim for no fault automobile insurance benefits within 30 days from the date an applicant supplies proof of the claim. Failure to pay or deny the claim in whole or in part within 30 calendar days, renders the claim overdue (see *Presbyterian Hosp. In City of NY v. Maryland Cas. Co.*, 90 NY2d 27 [1997]). An insurer may toll the 30-day period by properly requesting verification within 15 days from the receipt of the bill (see *Psych. & Massage Therapy Assoc., PLLC v. Progressive Casualty Ins. Co.*, 5 Misc3d 723 [Civ Ct, Queens County 2004]; 11 NYCRR 65-3.5 [b]).

11 NYCRR 65-3.5(o) provides that “an applicant from whom verification is requested, shall, within 120 calendar days from the date of the initial request for verification, submit all such verification under the applicant’s control or possession or written proof providing reasonable justification for the failure to comply. 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 or written proof providing reasonable justification for the failure to comply” (11 NYCRR § 65-3.5 [o]).

11 NYCRR 65-3.5 (a) states that once the insurer receives the NF-2 application for benefits, the insurer “shall forward to the parties those prescribed verification forms it will require prior to payment of the initial claim” (11 NYCRR § 65-3.5 [a]). “The insurer has the burden to present an affidavit of an employee who personally mailed the verification/denial or an

affidavit of an employee with personal knowledge of the office's mailing practices and procedures. Such individual must describe those practices or procedures in detail, explicitly denoting the manner in which she/he acquired the knowledge of such procedures or practices, and how a personal review of the file indicates that those procedures or practices were adhered to with respect to the processing of that particular claim" (*Quality Psychological Services, P.C. v. Hartford Ins. Co.*, 38 Misc3d 1210 [A][2013]). The presumption of receipt may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (*American Transit Ins. Co. v. Lucas*, 111 AD3d 423, 424 [1st Dept 2013], citing *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 AD2d 679 [2nd Dept. 2001]); *Global Liberty Ins. Co. of NY v. Otero*, 60 Misc3d 1208(A) [1st Dept 2018]).

The proponent of a motion for summary judgment must tender sufficient evidence to show absence of any material, triable issues of fact and the right to entitlement to judgment as a matter of law (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Summary Judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (see *Assaf v. Ropog Cab Corp.*, 153 Ad2d 520 [1st Dept 1989]). It is well settled that issue finding, not issue determination, is the key to summary judgment (see *Rose v. Da Ecib USA*, 259 Ad 258 [1st Dept 1999]). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

The plaintiffs contend that they made timely post-euo verification requests to the defendant and the defendant failed to provide the additional verification to verify the claim at issue under 11 NYCRR §§ 65-1.1 and 65-3.5. The plaintiffs annex the affidavit of Doug Babin, an employee in the State Farm's Special Investigations Unit (SIU) who has worked for the plaintiff since 1992. He states that he is responsible for conducting investigations of healthcare providers that are suspected of being ineligible for reimbursement and engaging in improper treatment and billing practices. He claims that State Farm's investigation raised concerns that the defendant was providing services on a non individualized basis designed to maximize profits as opposed to efficiently and adequately treat patients regardless of their individual condition.

The plaintiff also provides an affidavit by Timothy Dacey. Mr. Dacey is employed as a claim specialist with State Farm Mutual Automobile Insurance since 2000. He states that he is personally and familiar with the standard business practices of State Farm in connection with the intake process, the receipt of mail related to claims, denials, explanation of review, verification requests and payments. He states that he reviewed the documents involved with this lawsuit and that they were created, maintained, and/or received by State Farm in the regular course of business. He avers that verification requests were necessary because Mr. Castillo's testimony raised further concerns regarding the eligibility of the defendant to collect no-fault reimbursement benefits. Mr. Dacey refers to the chart in Exhibit "1" annexed to the complaint and states that it indicates the claim numbers, the respective dates of the first verification request letters, the dates of the second/follow-up letters, and the dates that the claims were denied.

Mr. Dacey claims that the verification requests that were mailed to EDCAS advised the defendant of its obligations under 11 NYCRR § 65-3.5 (o) to provide all requested verification.

He claims that the defendant refused to provide all of the written verification since December 2019. The plaintiffs issued a denial on the NF-10 form stating that EDCAS failed to comply with the additional verification requests within 120 days of the first request. The NF-10 form was created in duplicate and mailed to the appropriate parties. The basis for the denial is printed on the form.

The plaintiffs also submit an affidavit by Josh Mai attesting to the printing and mailing of the additional verification requests. Mr. Mai is a Supervisor-Claims Support in State Farm's Lincoln Operations Center located in Lincoln, Nebraska. He is personally and fully familiar with the practices and procedures used by State Farm in the printing and mailing of the requests for additional verification, examinations under oath, explanations of review and denials of no-fault benefit forms (NF-10's). The additional verification requests were created by State Farm employees, specifically Associates Claims Support (ACS) staff. The ACS staff electronically release the letters and direct them to print throughout the course of the day. The letters are retrieved from the printer and then the ACS sorts the letters and enters the required information into a certificate of mailing log. The ACS places the letters into window envelopes and seals them. The letters are then bundled and placed in a bin for the mailroom employee to pick up along with the certificate of mailing log.

Mr. Mai also attests to the creation and mailing of the denials. All NF-10's are created by State Farm employees using the ECS System which automatically dates the forms with the date that they are generated. The NF-10's are printed to an ACS printer with an accompanying Explanation of Review (EOR) form. The date of creation is on the NF-10. The ACS matches the NF-10s with the EORs and places them in duplicate in a windowed envelope with the

medical provider's and/or attorney's address visible. The envelopes containing the NF-10s are bundled and placed in a bin accompanied with a certificate of mailing log in the mailroom for an employee to pick it up and take it to the mail center.

The plaintiffs' motion lacks proof that post-EUO verification requests were sent to the defendant. Timothy Dacey relied on the chart in Exhibit "1" annexed to the complaint and stated that the chart shows the claim numbers, the date the post-euo verification requests and follow-up requests were sent and the dates the claims were denied. This is incorrect. The chart in Exhibit "1" includes claims for dates of service from 6/3/2019 through 10/30/2019. It shows the dates of when the letters requesting the EUO were sent and the dates of the denial letters. The chart does not indicate that any post-EUO verification letters were sent after the December 10, 2019 EUO. There are 911 pages annexed to Mr. Dacey's affidavit and he states that the pages consist of copies of the claims, the verification requests and the denials. However, there are no post-EUO verification letters included in the 911 pages and the denials are for the defendant's alleged failure to attend the EUO. It is unclear why the plaintiffs contend that they denied the defendants' claims based on the defendant's failure to provide post-EUO verification. The chart in exhibit "1" and the 911 pages annexed to Mr. Dacey's affidavit demonstrate that the plaintiffs denied the claims for non appearance at an EUO, not for failure to provide post-euo verification.

The plaintiffs motion for summary judgment is denied. They did not prove that they mailed post-EUO verification requests to the defendant and that the defendant did not comply with the additional verification requests. Moreover, the subject claims annexed to the exhibit "1" spreadsheet and the 911 pages annexed to Mr. Dacey's affidavit demonstrate that the defendant's claims were already denied prior to the EUO date of December 10, 2019. The plaintiffs did not

meet their prima facie burden, and the burden never shifts to the defendants (see *Karounos v. Doulalas*, 153 AD3d 1166 [1st Dept. 2017].

Based on the foregoing, it is hereby;

ORDERED AND ADJUDGED, that the plaintiffs' motion for summary judgment is denied, and it is further,

ORDERED AND ADJUDGED, that the plaintiffs shall serve a copy of this decision and order upon the defendant within twenty (20) days of notice of entry.

This constitutes the Decision and Order of the court.

Dated: September 28, 2022



Hon. Paul L. Alpert, J.S.C.