State Farm Fire & Cas. Co. v Dixon
2022 NY Slip Op 35082(U)
June 6, 2022
Supreme Court, Bronx County
Docket Number: Index No. 27680/2020E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

----------X Index:27680/2020E

STATE FARM FIRE AND CASUALTY COMPANY

Plaintiff,

-against- **DECISION/ORDER**

SEAN DIXON,

Defendant,

AXIS PT, P.C., JAMAICA SUPPLIES CORP., ET. AL.

Provider Defendants.

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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**
Cross Motion & Affirmation in Support	**2**
Affirmation in Opposition to Cross-Motion	**3**

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

This is an action for declaratory judgment in which the plaintiff seeks a determination that it is not obligated to pay any monies, damages, awards or benefits to any of the defendants due to the failure of the defendant, Sean Dixon, to provide written verification in contravention of 11 NYCRR § 65-3.5(o). The defendant, Big Apple Med Equipment, Inc. (hereinafter "Big Apple") cross-moves for (a) an order dismissing the action based on the plaintiff failing to toll the claims; (2) an order granting the defendant summary judgment in the amount of $ 1,346.76 with interest, attorney fees, costs and disbursements; (3) an order for attorney's fees pursuant to

11 NYCRR § 65-4.6 (d) in the amount of $70.00 per hour for each claim up to the maximum amount of $1,400.00 per claim; (4) an order awarding attorney's fees pursuant to 11 NYCRR § 65-4.6 (d)(2) in the amount of $80.00 per hour for each appearance. The defendant, Thomasina Striano, D.C. also cross-moves for summary judgment directing payment of medical bills in the amount of $3,569.01; statutory interest, statutory attorney's fees and costs; an award of attorney's fees pursuant to 11 NYCRR section 65-4.6(d) for $70.00 per hour for each claim and attorneys' fees pursuant to 11 NYCRR section 65-4.6 (d)(2) for $80.00 per hour for each appearance.

The court will first address Big Apple's cross-motion to dismiss the complaint based on the plaintiff's alleged failure to toll the claims. Big Apple submitted a claim for services in the amount of $ 1,346.76 and argues that the plaintiff's delay letters were insufficient to toll Big Apple's claims. It argues that an insurer's delay letters which request no verification, are insufficient to toll the 30-day statutory time period within which a claim must be paid or denied (see *Nyack Hosp. v. Encompass Ins. Co.*, 23 AD3d 535 [2nd Dept 2005]). The defendant claims that the letters informed it that the claim is "delayed" pending its investigation and seeks statements from its "client" and passengers in the assignor, Mr. Dixon's vehicle.

The plaintiff opposes the motion and argues that the defendant did not demonstrate its prima facie entitlement to summary judgment. It also failed to demonstrate that the plaintiff failed to pay or deny the disputed claim within the requisite period, or that it had issued timely denials that were conclusory, vague or without merit as a matter of law (see *Westchester Med. Ctr. v. Allstate Ins. Co.*, 45 AD3d 579 [2nd Dept 2007]).

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]). If the request for additional verification was made beyond the 15-day period it does not render the request invalid. Instead the amount of days over the 15-day period reduces the 30 calendar days the insurer is allowed to deny the claim (see *Nyack Hosp. v. General Motors Acceptance Corp.* 27 AD3d 96 [2nd Dept 2005]). 11 NYCRR 65-3.5(a) states that "verification requests shall be issued to the parties required to complete them".

11 NYCRR 65-3.6 (b) also provides that "if any requested verification has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reasons why the claim is delayed by identifying in writing the missing verification and the party from whom it is requested."

The plaintiff received a bill in the amount of $1,346.76 from Big Apple on June 24, 2019. In a letter dated June 28, 2019 the plaintiff notified Big Apple that it received the bill and that State Farm was requesting an Examination Under Oath (EUO) of the insured, defendant Sean

Dixon. In this letter it clearly states that "we will be unable to consider your bill until we receive the requested verification". Plaintiff's attorney scheduled the EUO of Sean Dixon for August 15, 2019 at their offices. The EUO was rescheduled pursuant to Dixon's attorney's request to August 21, 2019 in the Bronx.

Subsequent to the EUO, the plaintiff sent a letter dated August 22, 2019 requesting documentation from Mr. Dixon to verify his claim that he resides in Albany, NY. The plaintiff then sent another verification request to Mr. Dixon and his attorney in a letter dated September 26, 2019. The plaintiff denied the claim with an NF-10 denial dated January 20, 2020 after Mr. Dixon failed to provide the documentation requested in the verification request.

The defendant is incorrect in arguing that the plaintiff's delay letters do not toll Big Apple's claims. The plaintiff's verification requests to the insured toll the 30 day period for the insurer to pay or deny the claim . The EUO requested in a letter dated July 19, 2019 is the first verification request sent by the plaintiff's law firm. This request tolled the 30 day period to pay or deny the claim. The plaintiff sent out additional verification request after the EUO was held on August 21, 2019. When an insurer acquires new information from an EUO which gives it a reason to request additional verification, the decision to request verification based upon the new information constitutes "a new verification request, as opposed to a follow-up request upon a party who has not responded or did not respond in full to the initial request for information" (*Sure Way, NY, v. Travelers Ins. Co.*, 56 Misc3d 289 [Civil Ct. Kings County, 2016]). Here, the plaintiff acquired new information as a result of the EUO regarding the location where the insured garaged his vehicle and requested more information from Mr. Dixon to verify his claim

that he lived in Albany, NY. The plaintiff properly sent additional verification requests to Mr. Dixon and his attorney on August 21, 2019 and September 26, 2019.

Elizabeth Adels, a member of the plaintiff's law firm, provides an affirmation that she conducted the EUO and following the EUO, created the verification requests dated August 22, 2019 and September 26, 2019 which were mailed out. She affirms that the verification requests were sent to Mr. Dixon and his attorney, Goldin & Rivin, PLLC. She affirms that based on her personal knowledge and review of the records the requested documentary verification was never provided.

The affidavit by Susan Donovan, the secretary employed at the plaintiff's law firm since 2004, explains that the verification letters were prepared and maintained in the ordinary course of business. She states that she is personally familiar with the office's mailing practices and procedures. The letters were prepared and stored in a file she maintains in the office. She states that she received the August 22, 2019 and September 26, 2019 verification letters from Elizabeth Adels, Esq. Mrs. Donovan claims that she mailed the letters on the day that the letters are dated.

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. See Regulation 68, § 65-3 (o). The plaintiff demonstrated that it tolled the claim with the EUO request to Mr. Dixon. It did not receive a response to its verification requests for documentation that he resided in Albany, NY and properly denied the claim after 120 days of it's initial verification request for documents from Mr. Dixon. The affidavits of Elizabeth Adels

and Susan Donovan establish the creation and mailing of the EUO and verification requests. Big Apple's motion for summary judgment and to dismiss the complaint is denied in its entirety.

The defendant, Thomasina Striano DC, also moves for summary judgment in the amount of $3,569.01. She claims that she submitted bills in the amount of $3,569.01 and alleges that the plaintiff's delay letters are insufficient to toll the 30-day statutory period. She also claims that Timothy Dacey lacks personal knowledge regarding the creation of the verification requests. The bills at issue are for dates of service 5/9/-5/21/19; 5/22-6/19/19; 6/21-7/08/19; 7/09-7/24/19; 7/26-7/30/19; 8/5-8/07/19; 8/09-8/22/19; 8/26-9/05/19; 9/09-9/16-19; 9/23/19 and 10/16/19.

The plaintiff advised Striano that it was requesting an EUO of the insured, Sean Dixon to verify the circumstances, facts and injury sustained and treatment he received in a letter dated July 29, 2019. The plaintiff's request for an EUO tolled the 30 day period for the plaintiff to pay or deny the claim. The affirmation of Elizabeth Adels and the affidavit of Susan Donovan established the creation and mailing of the EUO request.

Striano also argues that Mr. Dacey does not have personal knowledge about the verification requests and fails to inform the court who originally created the verification requests. State Farm did not create or mail the verification requests. The verification requests were created and mailed by State Farm's attorney on behalf of State Farm. This was established through the affirmation of Elizabeth Adels and the affidavit of Susan Donovan.

Striano also argues that the plaintiff failed to communicate with the applicant and such person's attorney. The affidavit of Mr. Dacey explains that the plaintiff did notify Striano that State Farm was unable to consider the bills until they receive the requested verification. Copies

of the letters notifying Striano that an EUO of the insured was requested and the bills won't be considered until the plaintiff receives the requested verification are annexed to the plaintiff's motion.

Striano contends that the plaintiff failed to establish that it did not receive a response from Mr. Dixon. The plaintiff established that it did not receive a response to it's verification requests through the affirmation of Elizabeth Adels. Striano also claims that the plaintiff failed to pay or deny the claim after Mr. Dixon appeared for the EUO. However, when an insurer acquires new information from an EUO which gives it a reason to request additional verification, the decision to request verification based upon the new information constitutes "a new verification request, as opposed to a follow-up request upon a party who has not responded or did not respond in full to the initial request for information" (*Sure Way, NY, v. Travelers Ins. Co.*, 56 Misc3d 289 [Civil Ct. Kings Cnty, 2016]. Subsequent to the EUO with Mr. Dixon the plaintiff learned that Mr. Dixon was keeping his car in a garage in the Bronx and this prompted them to request verification that Mr. Dixon resides in Albany, NY. Therefore, the plaintiff was entitled to make a new verification request based on this new information and properly denied the bills from Striano as a result of Mr. Dixon's failure to provide the requested verification.

Mr. Dacey is employed as the Claim Specialist by State Farm Automobile Insurance Company and State Farm Fire and Casualty Company is a subsidiary. He has been employed with the company since 2000. He is personally familiar with the business practices of the company in connection to the intake process with mail related to claims as well as the creation of documents associated with claims including verification requests, payments and denials. He

avers that he reviewed the documents associated with the matter and states that the documents were created, and maintained by State Farm in the regular course of its business. Mr. Dacey explains that when a bill is denied an NF-10 is created in duplicate for mailing to the appropriate parties.

The affidavits of Josh Mai, the supervisor-Claims Support in Lincoln, Nebraska explains process of the printing and mailing of denials. He is personally familiar with the practices and procedures and states that these procedures have been in place since April 24, 2019. Forms are generated and transmitted to an ACS printer in the mail center. The ACS staff at the Lincoln Operations Center electronically release the forms and direct them to print. He states that the NF-10 denial in this matter was printed and mailed from the Lincoln Operations Center. An ACS worker picks up the document from the printer and inserts it into an envelope and places it into a USPS tub in their work area. A mailroom employee then takes the USPS tubs and brings it to the mail center.

The affidavit of Cathy Shandera provides the practice and procedure in the mail center in Lincoln, Nebraska. The practices and procedures in connection with mailing the documents have been in place since July 18, 2006. She explains how the mail is transferred from the USPS tray to the Print Room where the mail vendor picks up their designated mail.

The affidavit of Steve Smith, who appears to be the manager of Pitney Bowes Presort Services, Inc., indicates that he is personally familiar with the practices and procedures of PBPS picking up the mail from the State Farm location in Lincoln, Nebraska. His affidavit is sufficient to show that State Farm mailed the denial in conformity with the practices and

procedures.

The defendant, Striano, claims that the plaintiff failed to show it properly denied the claim. The affidavits of Mr. Dacey, Mr. Mai, Mrs. Shandera and Mr. Smith all establish the practice and procedures of creating and mailing of the denials. The plaintiff demonstrated that it properly denied the Striano bills at issue. Striano's motion for summary judgment is denied in its entirety.

The plaintiff moves for summary judgment on the bill from Big Apple for $1,346.76 and the bills from Striano for $3,569.01. An insurer may establish the timely mailing of verification requests and denials by producing proof of actual mailing or proof of standard office practice and procedures (see *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 AD2d 679 [2nd Dept 2001]; *Eagle Surgical Supply, Inc. v. Progressive Cas. Ins. Co.*, 21 Misc3d 49 [App Term 2008]).

The affirmation from Elizabeth Adels and the affidavit from Susan Donovan established that the plaintiff's firm created and mailed the EUO letter and other verification requests. The plaintiff demonstrated through the affirmation of Elizabeth Adels that Mr. Dixon failed to provide the written verification it requested. The affidavits of Timothy Dacey, Josh Mai, Cathy Shandera and Steve Smith all establish the practice and procedures of creating and mailing the follow-up letters and denials. The plaintiff proved that it properly mailed the denials for the claims for Big Apple Med and Thomasina Striano. The court notes that Striano did not oppose the plaintiff's motion for summary judgment for bill number 11 for date of service 5/9-5/21/19. The plaintiff demonstrated that it paid this bill pursuant to the New York State Workers'

Compensation Fee Schedule and the motion is granted for this bill as it is unopposed.

The plaintiff's motion for summary judgment is granted and the plaintiff shall have no obligation to pay any No-Fault claims submitted to it by or on behalf of provider defendants Thomasina Striano D.C. and Big Apple Med Equipment, Inc., as assignees of defendant Sean Dixon in connection with the incident of May 7, 2019, due to Dixon's failure to provide written verification duly requested from him by State Farm pursuant to 11 NYCRR §65-3.5(o) and due to State Farm's payment of the Striano bill for dates of service 5/09-5/21/19 in accordance with the New York State Worker's Compensation Fee Schedule.

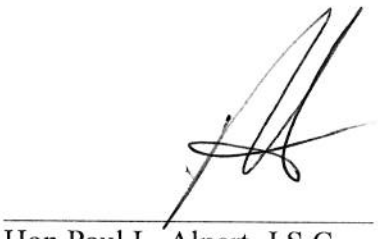
Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the plaintiff's motion for summary judgment is granted, and it is further,

ORDERED AND ADJUDGED, that the defendant Big Apple Med Equipment, Inc's cross-motion for summary judgment is denied, and it is further,

ORDERED AND ADJUDGED, that the defendant Thomasina Striano, D.C.'s cross-motion for summary judgment is denied.

This constitutes the decision and order of the court.



Dated: June 6, 2022

Hon Paul L. Alpert, J.S.C