American Tr. Ins. Co. v McCulloch Orthopaedic Surgical Servs., PLLC

2025 NY Slip Op 34907(U)

December 15, 2025

Supreme Court, Kings County

Docket Number: Index No. 523650/2022

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At the IAS, **Part 84**, of the Supreme Court of the State of New York, held in and for the County of Kings, located at 360 Adams Street, Brooklyn, New York on the 15th day of December, 2025

PRESENT: HON. CAROLYN E. WADE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
--X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Against

MCCULLOCH ORTHOPAEDIC SURGICAL SERVICES, PLLC d/b/a NYSJ ORTHOPAEDIC SPECIALISTS, A/A/O ROSA JARA,

Defendants,
--X

Index No. 523650/2022

DECISION AND ORDER
MOTION SEQS. 12 & 16

Defendants' Motion, Seq. 12, seeks an Order (1) pursuant to New York Civil Procedure Law and Rules ("CPLR") § 3212(b) granting Defendants Summary Judgment, (2) confirming the master arbitrator's award of $7,260.55, including interest and fees, and (3) awarding Defendants attorneys' fee following an evidentiary hearing; and (4) costs and disbursements. Plaintiff's Cross-Motion, Seq. 16, seeks an Order (1) pursuant to CPLR § 3212 granting Plaintiff Summary Judgment.

Upon a reading of the foregoing papers, and all other papers and proceedings in this action, and after oral argument, Defendants' Motion (Seq. 12) and Plaintiff's Cross-Motion (Seq. 16) are decided as follows:

At the outset, Defendants failed to attach an Affidavit of Merit to the Motion. As such, Defendants' Motion fails to comply with the basic requirements of CPLR § 3212 (b), which provides that:

> "A motion for Summary Judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit."

Defendants' counsel merely relies on his own verification of the pleadings and statement of facts in support of Defendants' Motion. It is well settled that "an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance." *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455 (2nd Dept. 2006).

Although CPLR § 105 states that a "verified pleading" may be used as an affidavit when an affidavit is required, a pleading verified by counsel under CPLR § 3020 (d)(3) — and *not* verified by someone with personal knowledge of the facts — is insufficient to establish a claim's merits. *Juseinoski v. Bd. of Educ.*, 15 A.D.3d 353 (2nd Dept. 2005). Such affirmations by counsel alone are without evidentiary value and thus unavailing. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980).

Additionally, Defendants filed the Note of Issue and Certificate of Readiness prematurely. On March 15, 2025, at the time of the filing of the Note of Issue, Defendants still owed Plaintiff significant discovery related to medical necessity and causal relation. It is well settled that "party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for Summary Judgment." *Salameh v. Yarkovski,* 156 A.D.3d 659 (2nd Dept. 2017); see also *Okula v. City of New York*, 147 A.D.3d 967 (2nd Dept. 2017). "A party opposing Summary Judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." *Brea v. Salvatore*, 130 A.D.3d 956 (2d Dept. 2015); see CPLR 3212(f); *Salameh*, 156 A.D.3d at 660; *Okula*, 147 A.D.3d at 968.

Collateral estoppel and res judicata are inapplicable to de novo actions. *In Am. Transit Ins. Co. v. Safe Anesthesia and Pain Servs., LLC* (Sup. Ct. NY County 2023), American Transit brought a de novo action to adjudicate a no-fault dispute pursuant to Insurance Law § 5106. Therein, Defendant, medical provider, moved to dismiss based upon, among other things, res judicata and collateral estoppel. The trial Court denied the motion and agreed with American Transit that "once a de novo action is commenced there is no longer an award entitled to collateral estoppel. A de novo action means that the issues are litigated from the beginning and the prior ruling no longer exists. There is nothing to give collateral estoppel to." *Id.* at 4.

Currently, there are triable issues of fact with respect to the issue of medical necessity. Upon submitting its claim forms for payment, a provider creates a presumption that the services rendered were medically necessary. *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 7 Misc.3d 18 (App. Term 2nd Dept. 2004). An insurer can rebut the presumption of medical necessity by submitting a copy of the IME report or peer review report within which its findings are clearly stated. *Vitality Chiropractic, P.C. v. Kemper Ins. Co.*, 14 Misc.3d 94 (App. Term 2nd Dept. 2006).

Herein, the peer review report of Matthew D. Skolnick, M.D., dated March 27, 2020, establishes, prima facie, that the services rendered lacked medical necessity. Dr. Skolnick concluded that, based on his review of Assignor's medical records, "the surgery of the left shoulder with associated services including prescription medication and post-operative supplies on 01/07/20-2/06/20 were not medically necessary or causally related to the accident of record."

In addition, the MRI film review of Dr. George Cavaliere, dated May 24, 2019, revealed that the "slap tear," that was allegedly treated by the underlying surgery, was simply not present on the MRI film. Dr. George Cavaliere stated in the report that "[t]here is no evidence of post

traumatic change in this evaluation. The diffuse rotator cuff tendinosis and SLAP teat described by Dr. Lerer are not appreciated on this review." The peer review, MRI film review, intraoperative photo review and orthopedic IME all establish, prima facie, that the treatment was not medically necessary.

Accordingly, Plaintiff has established that triable issues of fact exist with respect to the medical necessity of the services provided and, as such, Summary Judgment must be denied. *Allstate Ins. Co. v DHD Med., P.C.* (Sup. Ct. N.Y. Cnty. Jan. 8, 2021) (denying motion for Summary Judgment where there is "conflicting medical evidence [that] creates an obvious question of fact about whether [provider] provided [injured party] necessary medical treatment").

Summary Judgment must also be denied because triable issues of fact exist as to whether the alleged injuries are causally related to the motor vehicle accident. A defense based on lack of causal relationship cannot be waived. *Ocean Diagnostic Imaging P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 7 Misc. 3d 132(A) (App. Term 2nd Dept. 2005) ("defendant was not precluded from asserting the defense that the alleged injuries were causally unrelated to the accident, despite the untimely denial of the claim"); *Exec. MRI Imaging, P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 13 Misc. 3d 140(A) (App. Term 2nd Dept. 2006) ("[t]he untimely denial, however, did not preclude defendant from interposing the defense that the assignor's injuries were not causally related to the accident").

Plaintiff need only establish a "founded belief" that the alleged injuries are not causally related to the motor vehicle accident. *Nationwide Gen. Ins. Co. v. South*, 223 A.D.3d 411 (1st Dept. 2024). Plaintiff clearly has a "founded belief" that the alleged injuries were preexisting and not related to the motor vehicle accident based on the peer review, MRI film review, intraoperative photo review, and orthopedic IME discussed above. These reports also all establish, prima facie, that the treatment was not causally related to the motor vehicle accident.

Any questions regarding the credibility of Plaintiff's expert's opinion that the injuries are not causally related to the accident are not resolvable on Summary Judgment. *Wagner*, 208 A.D.2d at 1089 (reversing order partially granting patient's motion for Summary Judgment against insurer).

Moreover, Defendants' arguments— which are identical or substantially similar to those considered in Index No. 537432/2022—are rejected. Granting Summary Judgment in favor of Defendants in this matter would run counter to this Court's established precedent.

Accordingly, Defendants' Motion for Summary Judgment (Seq. 12) is **DENIED** and Plaintiff's Cross-Motion for Summary Judgment is **DENIED** (Seq. 12).

This constitutes the Decision and Order of the Court.

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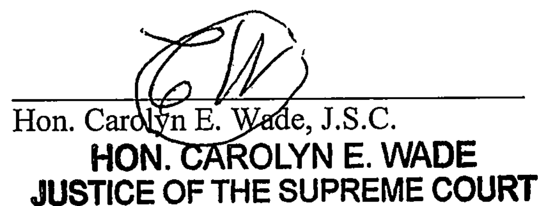

Hon. Carolyn E. Wade, J.S.C.
HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT