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| **A.B. Med. Servs. PLLC v GEICO Cas. Ins. Co.** |
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| 2006 NYSlipOp 26133 |
| Decided on April 6, 2006 |
| Appellate Term, Second Department |
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Decided on April 6, 2006

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

*APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS*

PRESENT: : PESCE, P.J., GOLIA and
RIOS, JJ  2005-568 K C.

A.B. Medical Services PLLC, a/a/o IAN WILSON, Respondent,

against

GEICO Casualty Insurance Co., Appellant.

Appeal from an order of the Civil Court of the City of New York, Kings County

(Robin S. Garson, J.), entered on March 20, 2004. The order granted plaintiff's motion for summary judgment in the principal sum of $4,061.96.

Order modified by providing that plaintiff's motion for summary judgment is granted to the extent of awarding plaintiff partial summary judgment in the sum of $3,971.20 and matter remanded to the court below for the calculation of statutory interest and assessment of attorney's fees thereon and for all further proceedings on the remaining claim; as so modified, affirmed without costs.

In this action to recover first-party no-fault benefits, plaintiff A.B. Medical Services PLLC (A.B. Medical) established a prima facie entitlement to partial summary judgment in the sum of $3,971.20, by proof that it submitted claims, setting forth the fact and the amounts of the losses sustained, and that payment of no-fault benefits was overdue (*see* Insurance Law § 5106 [a]; *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 AD3d 742 [2004]; *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc 3d 128[A], 2003 NY Slip Op 51701[U] [App Term, 2d & 11th Jud Dists]). While the court below awarded plaintiff summary judgment in the sum of $4,061.96, in his affirmation in support of plaintiff's motion, David Safir, plaintiff's "practice and medical billing manager," specifically requested summary judgment in the sum of $3,971.20. Plaintiff has failed to make out a prima facie entitlement to a claim for the additional sum of $90.76. [*2]

It is uncontroverted on the record that defendant timely denied A.B. Medical's claims in the respective sums of $1,972.08, and $1,999.12. However, a timely denial alone does not avoid preclusion where said denial is factually insufficient, conclusory or vague (*Amaze Med. Supply v Allstate Ins. Co.*, 3 Misc 3d 43 [App Term, 2d & 11th Jud Dists 2004]; *see also Nyack Hosp. v Metropolitan Prop. & Cas. Ins. Co.*, 16 AD3d 564 [2005]; *Nyack Hosp. v State Farm Mut. Auto. Ins. Co.*, 11 AD3d 664 [2004]). The claims were essentially denied for failure to establish medical necessity. Although defendant was not required to attach to its denial of claim forms the peer reviews upon which the denials were purportedly based (*see* 11 NYCRR 65-3.8 [b] [4]; *A.B. Med. Servs. PLLC v Nationwide Mut. Ins. Co.*, 7 Misc 3d 132[A], 2005 NY Slip Op 50605[U] [App Term, 2d & 11th Jud Dists]), defendant's denial of claim forms fail to set forth with sufficient particularity the factual basis and medical rationale for its denial based on lack of medical necessity, and it is therefore precluded from asserting said defense (*see Amaze Med. Supply v Allstate Ins. Co.*, 3 Misc 3d 43, *supra*). Moreover, the peer reviews submitted by defendant in opposition to plaintiff's motion were unsworn, and therefore in inadmissable form (*see A.B. Med. Servs. PLLC v Motor Veh. Acc. Indem. Corp.*, 6 Misc 3d 131[A], 2005 NY Slip Op 50088[U] [App Term, 2d & 11th Jud Dists]; *A.B. Medical Servs. PLLC v Lumbermens Mut. Cas. Co.*, 4 Misc 3d 86 [App Term, 2d & 11th Jud Dists 2004]). In any event, even assuming

said reports' admissibility and that they set forth a sufficient factual basis and medical rationale for denial of the claims, they cannot remedy the factual insufficiency of defendant's denials (*see Nyack Hosp. v State Farm Mut. Auto. Ins. Co.*, 11 AD3d 664, *supra*).

Pesce, P.J., and Rios, J., concur.

Golia, J., dissents in a separate memorandum.

Golia, J., dissents and votes to reverse the order and deny plaintiff's motion for summary judgment in the following memorandum.

As set forth in the majority opinion, it is "uncontroverted on the record that defendant timely denied A.B. Medical's claims in the respective sums of $1,972.08 and $1,999.12". The majority also acknowledges that the regulations do not require defendants to attach a copy of the peer review report to an NF-10 denial of claim form. Nevertheless, my colleagues assert that the denial of claim form failed to state, with the requisite specificity, the reasons the claims were being denied.

What they fail to recognize is that the specific reason for the denial was the "negative" peer review report (*see* 11 NYCRR 65-3.8 [b] [4]). That is all the specificity that is required under that regulation which states: "If the *specific reason for a denial* of a no-fault claim...is a...peer review report..." (emphasis added).

To follow the reasoning of the majority would be to require a non-physician claims examiner to interpret a physician's peer review report, and then list, with specificity, the medical reasons for the claim's denial. It seems a tad incongruous for the regulations to permit the NF-10 denial of claim form to be sent without attaching the doctor's peer review report and then to require a "lay" person to interpret that report and state with "specificity" the doctor's reasons for finding the treatment medically unnecessary.

In the case at bar, the claimant submits an affidavit stating that it requested a copy of that report but never received same. The defendant submits an affidavit by a person in charge of the file stating that no such request is present in the file. For the

purpose of the issues before this Court, it doesn't matter if the request was sent, if the mail was lost, or if the defendant's affidavit is inaccurate, inasmuch as the regulations do not provide for any draconian remedy for defendant's failure to provide the report in a timely manner. The claim denials were mailed on the 20th and 27th of January 2003, and the request for the peer review was not mailed until July 18, 2003. The underlying action was "commenced" two months later, on September 17, 2003. Apparently, the claimant waited six months to request the reports but waited less than two months to decide to bring this action.

Finally, a question arises as to whether the failure of the defendant to submit a "sworn" copy of the peer review report, in opposition to a claimant's motion for summary judgment, mandates that the motion be granted. I do not find such a failure to be fatal when opposing a motion for summary judgment, for the reasons stated in my dissent in *Ocean Diagnostic Imaging, P.C. v Lancer Ins. Co.* (6 Misc 3d 62 [App Term, 2d & 11th Jud Dists]). Decision Date: April 6, 2006