Decided on March 29, 2006

Civil Court of the City of New York, Kings County

New York Craniofacial Care, P.C. a/a/o Maria Vega, Christopher A. Mendez, Daniel Rodriguez, Marsha Rasin, and Julio Suazo, Plaintiff,

against

Allstate Insurance Company, Defendant.

36916/03

Arlene P. Bluth, J.

Plaintiff's instant motion for summary judgment calls upon this Court to clarify what facts a first-party No-Fault plaintiff must set forth in order to establish that its claim is "overdue."

Plaintiff argues that "overdue" means "not paid," and so the affidavit in support of the motion must only state that the bills have not been paid. Defendant urges that a bill is "overdue" only if it has not been paid or properly denied, and so the affidavit in support of plaintiff's motion must so state. [*2]For the following reasons, this Court agrees with defendant, and since plaintiff's motion did not address the denials, plaintiff has failed to fulfill its burden and the motion is denied.

In this action, plaintiff New York Craniofacial Care, P.C. seeks to recover first-party No-Fault benefits in the amount of $12,253.28, plus statutory interest, costs, and attorneys fees, for healthcare services allegedly rendered to its assignors, Maria Vega, Christopher A. Mendez, Daniel Rodriguez, Marsha Rasin, and Julio Suazo. According to the attorney's affirmation in support of this motion, plaintiff seeks summary judgment only on the claims pertaining to Ms. Vega, Ms. Rasin, and Mr. Suazo, for the sum of $6,122.75. Plaintiff argues that its claims were submitted to defendant, have not been paid, and are now overdue. Defendant opposes the motion on the grounds that plaintiff has not made out its prima facie

case, and that, in any event, defendant timely denied the claims pertaining to Ms. Rasin and Mr. Suazo and settled the claims pertaining to Ms. Vega.

A healthcare provider in a No-Fault case for first-party benefits establishes its prima facie entitlement to summary judgment as a matter of law by submitting proof in admissible form demonstrating that the prescribed statutory claim form, setting forth the fact and amount of the loss sustained, was submitted to the defendant, and that payment of no-fault benefits is overdue. *See* 11 NYCRR § 65-3.8(a)(1),(c); *Careplus Med. Supply, Inc. v Allstate Ins. Co.*, 9 Misc 3d 128(A), 2005 NY Slip Op 51525(U), [App Term, 2nd & 11th Jud Dists]; *Contemp. Med. Diag. & Treatment, P.C. v GEICO*, 6 Misc 3d 137(A), 800 NYS2d 344 [App Term, 2d and 11th Jud Dists 2005]. Specifically, subsection 65-3.8(a)(1) of the regulations provides that "No-Fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim . . ." 11 NYCRR § 65-3.8(a)(1). Subsection 65-3.8 (c) then states: "Within 30 calendar days after proof of claim is received the insurer shall either pay or deny the claim in whole or in part." *Id.* at § 65-3.8(c).

The provider must make out its case in its own moving papers by setting forth the facts entitling the movant to summary judgment. Only if the plaintiff makes out its prima facie case does the burden shift to the defendant to raise a triable issue of fact. *See Cugini v System Lumber Co., Inc.*, 111 AD2d 114, 489 NYS2d 492 [1st Dept 1985]; *Victor Gribenko, M.D., P.C. et al. v Allstate Ins. Co.*, 10 Misc 3d 139(A) [App Term, 2nd & 11th Jud Dists 2005]; *A.B. Med. Servs., P.L.L.C. et al. v State Farm Mut. Auto. Ins. Co.*, 7 Misc 3d 127(A), 801 NYS2d 229 [App Term, 2nd & 11th Jud Dists 2005].

In support of this motion, plaintiff submits two affidavits. In the first, Fenelly Olivares states that he is the person responsible for submitting plaintiff's No-Fault claims and that he personally mailed the subject claims to defendant on April 3, May 15, and May 23 of 2002. Thus, his affidavit establishes that the claims were submitted to defendant. *See Comprehensive Mental v. Lumbermans Mut. Ins. Co.*, 4 Misc 3d 133(A) [App Term, 9th & 10th Jud Dists 2004]; *Amaze Medical Supply Inc. v. Allstate Ins. Co.*, 3 Misc 3d 133(A) [App Term, 2nd & 11th Jud Dists 2004].

The second affidavit is from Rachael Newton, the person responsible for handling and tracking whatever response is forthcoming from the insurers on the claims. Ms. Newton

states that "[d]efendant did not pay plaintiff's claims that are the subject of this lawsuit within thirty (30) days. [*3]Accordingly, plaintiff's claims are now overdue and owing." Although Ms. Newton would know, her affidavit is absolutely silent as to whether plaintiff received any denials, and if so, on which of the claims. These are material omissions because if defendant timely issued a valid denial of plaintiff's claims, plaintiff would not be entitled to summary judgment simply because the claims remained unpaid. A claim that has been timely (and validly) denied is not due. Of course, if it is not due, it cannot be overdue. If, on the other hand, plaintiff had shown in its moving affidavit that there were no denials, or that the denials were late or otherwise invalid and thus a nullity, plaintiff's claims would be overdue, and plaintiff would be prima facie entitled to judgment. None of those facts, however, may be gleaned from Ms. Newton's affidavit.

At oral argument, plaintiff's counsel urged that plaintiff need not mention anything about denials at all. Rather, counsel argued, all that is necessary is for plaintiff to state that the claims have not been paid and thus are overdue. In support of her argument, counsel relied upon the language of subsection 65-3.8 (a)(1), quoted above, which defines an overdue claim as one that has not been paid within 30 days of submission. *See* 11 NYCRR § 65-3.8(a)(1). This Court, however, believes that 11 NYCRR § 65-3.8(a)(1) cannot be read in a vacuum. Subsection 65-3.8(c) makes clear that the 30-day rule entails a failure to pay *or deny* the claim within 30 days. To wit, "[w]ithin 30 calendar days after proof of claim is received the insurer shall either pay or deny the claim in whole or in part." 11 NYCRR § 65-3.8(c). The problem with plaintiff's counsel's approach is that it invites providers to bring disingenuous summary judgment motions alleging that their claims are overdue even when they are well aware that they received valid, timely denials.

Plaintiff's counsel correctly noted that the Appellate Term routinely uses the phrase "that payment of no-fault benefits is overdue" when enumerating the elements of plaintiff's prima facie case. *See, e.g., PDG Psychological, P.C. v Utica Mut. Ins. Co.*, 2006 NY Slip Op 50246(U) [App Term, 2nd & 11th Jud Dists]; *Ocean Diagnostic Imaging, P.C. v Allstate Ins. Co.*, 10 Misc 3d 145(A) [App Term, 2nd & 11th Jud Dists 2006]; *Ocean Diagnostic Imaging, P.C. v AIU Ins. Co.*, 10 Misc 3d 139(A) [App Term, 9th & 10th Jud Dists 2005]. In the Court's view, however, that phrase is merely a shorthand for "that the claim has not been paid or denied within 30 days." Indeed, some Appellate Division cases make that connection clearer. For example, in *Mt. Sinai Hospital v Allstate Insurance Co.*, the Second Department

opined that "sufficient evidentiary proof was submitted to establish, prima facie, that the defendant, Allstate Insurance Company . . . did not pay or deny Mount Sinai's claim for no-fault medical payments within 30 days as required by 11 NYCRR 65-3.8(c)." *Mt. Sinai Hosp. v Allstate Ins. Co.*, 2006 NY Slip Op 00490, —- NYS2d —- [2nd Dept]. Similarly, in *Nyack Hospital v General Motors Acceptance Corp.*, the Second Department found that the plaintiff had "established its prima facie entitlement to summary judgment by demonstrating that the defendants received the subject billing forms, and failed to either pay or deny the claim within the requisite statutory time frame." *Nyack Hosp. v Gen. Motors Acceptance Corp.*, 2005 NY Slip Op 10107, 808 NYS2d 399, 402 [2nd Dept]. Since a claim is overdue only if it has been neither paid nor properly denied, and plaintiff states only that its claims were not paid, plaintiff has not made out its prima facie case.

By its holding, this Court is not increasing the burden of a plaintiff healthcare provider moving for summary judgment in a No-Fault case. Indeed, once the plaintiff sets forth that its claim has not been paid or timely denied, the defendant must still come forward with competent [*4]proof to rebut that assertion in order to defeat the motion. All this Court is requiring is that the plaintiff make clear in its moving papers that it is entitled to judgment on its claims. The fact that the plaintiff's claims have not been paid does not, in and of itself, entitle the plaintiff to summary judgment as a matter of law.

The Court recognizes that a statement that "the claim has not been paid or timely denied" is boilerplate, and the absence of such a statement may seem like a mere technicality. But it is not. Every statement in an affidavit is sworn to under the penalties of perjury. If the affiant knows that there was a timely denial of the unpaid claim, then it would be perjurious to state that "the claim has not been . . . timely denied." Indeed, under that circumstance, it would be improper for the provider to seek summary judgment based on untimeliness of the denial, although it would be free to move based upon some other ground.

By requiring plaintiff to set forth the basis of its entitlement to summary judgment, the Court is merely holding plaintiff to the requirements of CPLR Section 3212. Although amended and recodified over the years, the essence of the moving plaintiff's burden has not changed since the enactment of Rule 113 of the Rules of Civil Practice, Section 3212's predecessor, over 85 years ago: Someone with personal knowledge must swear or affirm both to the material facts which entitle plaintiff to judgment and must also address the

known defenses. Under Rule 113, the plaintiff had to affirmatively "stat[e] . . . his belief that there is no defense to the action." [FN1] Under CPLR Section 3212(b), the affidavit in support "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." CPLR § 3212(b). What the difference may be between "stating" (Rule 113) and "showing" (3212(b)) is an interesting question (*see Farrell v Shelby Mut. Ins. Co.*, 18 Misc 2d 459, 461,189 NYS2d 66 [Sup Ct, Erie County 1959]), but the Court need not determine it here because this plaintiff neglected any mention of a defense at all. Ms. Newton's affidavit neither states nor shows that there is no defense or that the defenses have no merit. Indeed, since proper denials would constitute a defense to the action, plaintiff's failure to address whether the claims were denied makes the moving affidavit not only insufficient but disingenuous as well.

Ms. Newton's affidavit is deficient in several other respects as well. First, according to plaintiff's counsel's affirmation, the instant motion relates only to the claims for three of the five assignors in this case, yet the affidavit fails to set forth this material fact. Second, the affidavit fails to specifically reference which of the seven claims from the three assignors it addresses, or the amounts thereof. Third, the affidavit does not make clear whether the ground for the motion is the same, or different, for each of the seven claims from the three assignors. When a suit combines [*5]multiple claims and/or assignors, it is incumbent upon the moving party to identify in the affidavit each claim and/or assignor to which the motion is directed, and the reason the movant is entitled to judgment upon each one. *See Smith v City of New York*, 288 AD2d 369, 370, 733 NYS2d 474 [2d Dept 2001] (denying summary judgment motion where proponents "fail[ed] to specifically address each separate claim" with appropriate proof). Rather than do so here, plaintiff submitted an affidavit that could have been attached to any motion for summary judgment between these parties.[FN2]

Based on all of the foregoing, the Court finds that plaintiff has not made out its prima facie case for entitlement to summary judgment as a matter of law. Therefore, the Court need not reach the sufficiency of defendant's opposition.

Accordingly, plaintiff's motion is denied.

This is the Decision and Order of the Court.

Dated:

ARLENE P. BLUTH

Judge, Civil Court

ASN by_____ on _____

Footnotes

Footnote 1: Rule 113, which first came into effect in 1921, provided as follows: "Summary Judgment. When an answer is served in an action to recover a debt or liquidated demand arising, 1. On a contract, express or implied. . . the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defense to the action; unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

Footnote 2: The affidavit states: "This Affidavit is being submitted in support of NEW YORK CRANIOFACIAL PC's application for a judgment against ALLSTATE INS. CO." (emphasis in original).