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Montgomery Med., P.C. v State Farm Ins. Co.
2006 NY Slip Op 51003(U)
Decided on May 31, 2006
Nassau Dist Ct
Marber, J.
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Decided on May 31, 2006

Nassau Dist Ct

Montgomery Medical, P.C. a/a/o SHANI MYLES, Plaintiff(s)

against

State Farm Insurance Company, Defendant(s)

28582/04

Randy Sue Marber, J.

Plaintiff moves for an order pursuant to CPLR §3212 awarding the plaintiff summary judgment for $7,951.28, the amount demanded in the complaint on the

grounds that defendant failed to pay or deny its claims within thirty days, and that defendant is precluded from offering any evidence at time of trial in accordance with an April 21, 2005 stipulation. Defendant opposes the motion and cross-moves for summary judgment on the ground that plaintiff failed to rebut defendant's proof that services were not medically necessary, plaintiff's failure to cooperate and where the services rendered constitute concurrent care, which cross-motion plaintiff opposes. Defendant also raises the issue of fraud.

Plaintiffs' assignor, Shani Myles, allegedly was involved in a motor vehicle accident on January 2, 2004. On multiple dates from January 5, 2004 through April 28, 2004 plaintiff rendered acupuncture "health services" to its assignor in the total amount of $7,951.28. All of said claims were timely submitted and defendant has acknowledged receipt of same. Delay letters were sent to plaintiff upon defendant's receipt of each bill, claiming that it was investigating the circumstances of the accident, as well as plaintiff's patient's eligibility for No-Fault benefits under its policy of insurance. Subsequent letters sent on April 21, 28 and May 6, 2004 indicate that payment was delayed "pending receipt of additional documents and/or testimony recently requested of you in a certified letter from defendant's Special Investigative Unit." (copies of the request for additional documents and/or testimony requested [*2]are not included). An Examination Under Oath of Dr. Ahmed Halima, the owner of plaintiff was conducted on July 23, 2004. An unsigned but certified copy of his transcript is included with defendant's cross-motion papers. . The Court of Appeals has determined that an unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion (Newell Co. v Rice, 236 AD2d 843, 844, lv denied 90 NY2d 807).

Plaintiff instituted the within law suit by service of a summons and complaint upon defendant on November 17, 2004. Defendant interposed its Answer on December 16, 2004. Plaintiff annexed to its moving papers, an affidavit of service by mail which states that on January 31, 2005, plaintiff served defendant with its Demand for a Verified Bill of Particulars as to the Affirmative Defenses, plaintiff's Demand for Experts and Notice for Discovery and Inspection.

Plaintiff asserts that on April 21, 2005, the parties entered into a stipulation, which was not "so ordered" wherein it was agreed that defendant would respond to plaintiff's written interrogatories and Demand for Discovery and Inspection within 60 days of the date of the stipulation, and in the event of defendant's failure to respond to plaintiff's demands, Judgment will be entered against defendant upon the filing of an affidavit of noncompliance. The stipulation likewise states: "Furthermore, Plaintiff agrees to fully respond to defendant's discovery demands or same' will be precluded." Defendant failed to so respond within said 60 days and plaintiff brought on the within motion. Copies of plaintiff's Demands are annexed to its moving papers. No affidavit of service of, or copy of purported written interrogatories is annexed. Said stipulation of service also includes that it served plaintiff's Response to Defendant's Demand for Bill of Particulars, Response to Notice for Discovery & Inspection, Response to Demand for Expert Discovery and Response to Demand for Proof of Filing, Index Number. Copies of said Responses are not included. Defendant, however, has raised no objection with regard to its receipt of same.

As stated by the Court of Appeals in *In re Petition of New York L.& W.R.Co.*, 98 NY 447, 453 (1885), which case is still cited today:

> Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced.

(*See also, Morse v. Morse Dry Dock & Repair Co.*, 249 AD 764, 291 NYS 995 [2nd Dept 1936]; *Tepper v. Tannenbaum*, 83 AD2d 541, 441 NYS2d 470 [1st Dept 1981]; *Celtic Medical P.C. v. Liberty Mutual Insurance Co.* 11 Misc 3d 1092[A], 2006 NY Slip Op [*3] 50825U, [Nassau Dist Ct, 2006]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence to

demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]) and even in the absence of opposing papers. A motion for summary judgment shall be supported by an "affidavit by a person having personal knowledge of the facts", shall recite all the material facts and it shall show that there is no defense to the cause of action or that the defenses have no merit (CPLR §3212[b]). Once the moving party meets his burden, the burden then shifts to the non-moving party to allege such evidentiary facts that raise a genuine and material controversy as to the issue(s) before the Court. Where the opposing party fails to meet his burden and the Court finds no triable issues, the motion will be granted (*Iandoli v. Lange*, 35 AD2d 793 [1st Dept 1970]). Where the Court determines that a triable issue of fact exists, denial of the motion is the proper course of action (*Moskowitz v. Garlock*, 23 AD2d 943 [3d Dept 1965])

Plaintiff bases its lawsuit on the ground that it timely submitted its claim forms to defendant which neither paid nor denied them within thirty days in accordance with the Rules and Regulations governing the payment of no-fault benefits (see Insurance Law §5106 [a]; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD3d 742, 774 NYS2d 564 [2004]; *A.B. Med. Servs. PLLC v. Lumbermens Mut. Cas. Co.*, 4 Misc 3d 86, 781 NYS2d 818 [App Term, 2d & 11th Jud Dists 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]). The Court finds that plaintiff has established its *prima facie* case.

Defendant claims that it extended its time to pay or deny plaintiff's claims by issuing its delay letters. It has been held that letters from the insurance company to the a claimant, stating that payment was delayed pending completion of the insurance company's investigation, did not toll the 30-day statutory period for paying or denying the claim (see *Mount Sinai Hosp. v. Triboro Coach*, 263 AD2d 11, 699 NYS2d 77; *Ocean Diagnostic Imaging, P.C. v. Citiwide Auto Leasing Inc.*, 8 Misc 3d 138[A], 806 NYS2d 446 {8 Misc 3d 1026(A)} ; *Melbourne Med., P.C. v. Utica Mut. Ins. Co.*, 4 Misc 3d 92, 781 NYS2d 819). Therefore, there was no tolling of defendant's

obligation to pay or deny plaintiff's claims within thirty days of receipt and its subsequent denial of claim forms were untimely.

By its failure to timely issue its Denial of Claim forms, defendant is precluded from proving lack of medical necessity of the services, as well as concurrent care, the reasons given in its November 30, 2004 Denials. While concurrent care is not permitted under the Workers Compensation Law, contrary to defendant's contention, case law has considered it under the No Fault Law (see, *Universal Acupuncture Pain Servs PC v. Lumbermens Mut. Cas. Co.*, 195 Misc 2d 352, 195 Misc 2d 352, 758 NYS2d 795 [Civ Ct Queens County].

In addition to the reasons for denial set forth in its Denial of Claim forms as indicated [*4]above, in its opposition papers, defendant raises for the first time that the proof of claim forms submitted by plaintiff are improper. Having failed to include this reason in a timely denial of the claim, however, defendant is precluded from raising this defense (see *Presbyterian Hosp. in City of NY v. Maryland Cas. Co.*, 90 NY2d 274, 282, 683 NE2d 1, 660 NYS2d 536 [1997]).

Lastly, defendant also raises questions as to whether plaintiff is fraudulently incorporated in violation of Business Corporation Law §1507 and whether the actual profits from the practice are channeled to the non-physician management company to which it pays a set fee of $40,000 to $43,000 a month. Defendant bases its fraud defense upon the unsigned but duly certified deposition of the plaintiff's owner, Dr. Ahmed Halima. *An* unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion (*Newell Co. v Rice*, 236 AD2d 843, 844, lv denied 90 NY2d 807). Dr. Halima testified that the management company provides two administrative support persons as well as a receptionist, a technician and two billing persons; it owns the EMG and NCV testing machine as well as CPT testing equipment. His testimony indicates that he does not know who prepares the bills or what form is used for billing, and that he knew little about what is actually being performed at his facility. It is well settled that despite an untimely denial, an insurer is not precluded from raising the issue of

coverage such as a breach of a condition precedent of the terms of the insurance contract (*Presbyterian Hosp. in the City of New York v. Maryland Cas. Co.*, 90 NY2d 274, 683 NE2d 1, 660 NYS2d 536.

In addition, the Court notes that proper licensing of a medical provider is a condition precedent to payment (*Valley Physical Med. and Rehab v. NY Central Mutual Ins.*, 193 Misc 2d 675, 753 NYS2d 289 (App.Term 2nd Dept 2002). The Court of Appeals has ruled that under New York State's No-Fault Insurance Laws, insurance carriers may withhold payment for medical services provided by fraudulently incorporated enterprises (*State Farm Automobile Ins. Co. v. Robert Mallela*, 4 NY3d 313, 827 NE2d 758, 794 NYS2d 700). The *Mallela III* Court followed the Superintendent of Insurance's promulgation prohibiting the reimbursement of benefits on behalf of unlicensed or fraudulently licensed providers (11 NYCRR 65-3.16(a)(12) (effective April 4, 2002). Accordingly, *Mallela III* ruled that medical providers fraudulently incorporated are therefore not entitled to reimbursement. While defendant has failed to provide sufficient proof of fraudulent incorporation to award it summary judgment, the question of the fraudulent incorporation raises questions of fact which would preclude summary judgment to the plaintiff.

Accordingly, both plaintiff's motion and defendant's cross-motion for summary judgment are denied.

So Ordered:

DISTRICT COURT JUDGE Dated: June 1, 2006 [*5]

CC: Belesi & Conroy, P.C.

Melli, Guerin & Wall, P.C.