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Rigid Med. of Flatbush, P.C. v New York Cent. Mut. Fire Ins. Co.
2006 NYSlipOp 50582(U)
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., WESTON PATTERSON and
RIOS, JJ 2005-859 K C.

Rigid Medical of Flatbush, P.C., as Assignee of Lotoya Scott,

Respondent,

against

New York Central Mutual Fire Insurance Company, Appellant.

Appeal from an order of the Civil Court of the City of New York, Kings County (Delores J. Thomas, J.), entered April 12, 2005, deemed (see CPLR 5501 [c]) an appeal from a judgment entered pursuant thereto on May 6, 2005. The judgment awarded plaintiff the sum of $1,091. The appeal brings up for review the order, entered April 12, 2005, which granted plaintiff's motion for summary judgment.

Judgment affirmed without costs.

In this action to recover first-party no-fault benefits for medical services rendered to its assignor, plaintiff health care provider established a prima facie entitlement to summary judgment by proof that it submitted the statutory claim form, setting forth the fact and the amount of the loss 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]). The defendant's denial of claim form indicates that the claim was denied beyond 30 days of its receipt by defendant (11 NYCRR 65-3.8 [c]).

In opposition to plaintiff's motion, defendant argued, inter alia, that it issued a proper and timely denial based on the assignor's failure to attend examinations under oath (EUOs). The revised insurance regulations, effective on April 5, 2002, which are applicable herein, include EUOs in the Mandatory Personal Injury Protection Endorsement, providing that an eligible injured person submit to EUOs "as may reasonably be required" (11 NYCRR 65-1.1 [d]). However, in order to assert the defense of failure to appear, "the insurer must include the revised prescribed endorsement with new or renewal policies issued on or after April 5, 2002, and the [*2]claim rules are to be governed by the policy endorsement in effect" (*S & M Supply v State Farm Mut. Auto. Ins. Co.*, 4 Misc 3d 130[A], 2004 NY Slip Op 50693[U] [App [*3] Term, 9th & 10th Jud Dists]; *see also Star Med. Servs. P.C. v Eagle Ins. Co.*, 6 Misc 3d 56 [App Term, 2d & 11th Jud Dists 2004]; *Capio Med., P.C. v Progressive Cas. Ins. Co.*, 7 Misc 3d 129[A], 2005 NY Slip Op 50526[U] [App Term, 2d & 11th Jud Dists]). In the instant case, defendant's submissions failed to establish that the insurance policy contained an endorsement authorizing EUOs. Accordingly, any post-claim EUO request by defendant cannot toll the 30-day period within which it was required to pay or deny the claim (*see Capio Med., P.C. v Progressive Cas. Ins. Co.*, 7 Misc 3d 129[A], 2005 NY Slip Op 50526 [U], *supra*; *S&M Supply Inc. v Lancer Ins. Co.*, 4 Misc 3d 131[A], 2004 NY Slip Op 50695 [U] [App Term, 9th & 10th Jud Dists]). In any event, defendant has failed to prove

mailing of the EUO notices, since there was no allegation by one with personal knowledge that the EUO notices were mailed, no description of standard office mailing procedure so as to give rise to the presumption of mailing (*see Nyack Hosp. v Metropolitan Prop. & Cas. Ins. Co.*, 16 AD3d 564 [2005]; *Hospital for Joint Diseases v Nationwide Mut. Ins. Co.*, 284 AD2d 374 [2001]), and no sufficient allegation that it complied with the follow-up requirements with regard to any post-claim EUO notice (see 11 NYCRR 65-3.6 [b]). Further, the purported post-claim EUO notice dated July 15, 2002, for which there was no admissible proof of mailing, does not [*4] constitute proper notice of EUOs, as it merely indicates a delay in the processing of the claim (*see Melbourne Med., P.C. v Utica Mut. Ins. Co.*, 4 Misc 3d 92 [App Term, 2d & 11th Jud Dists 2004]).

Having failed to establish a timely denial of the claim, defendant is precluded from raising most defenses (*see Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 282 [1997]), including its defenses of nonconformity with the Worker's Compensation fee schedules (*see New York Hosp. Med. Ctr. of Queens v Country-Wide Ins. Co.*, 295 AD2d 583, 586 [2002]; *Capio Med., P.C. v Progressive Cas. Ins. Co.*, 7 Misc 3d 129[A], 2005 NY Slip Op 50526[U], *supra*; *Triboro Chiropractic & Acupuncture v New York Cent. Mut. Fire Ins. Co.*, 6 Misc 3d 132[A], 2005 NY Slip Op 50110[U] [App Term, 2d & 11th Jud Dists]) and lack of medical necessity (*see Amaze Med. Supply v Allstate Ins. Co.*, 2 Misc 3d 134[A], 2004 NY Slip Op 50211[U] [App Term, 2d & 11th Jud Dists]). The court below properly determined that defendant's failure to seek verification of the assignment and to allege any deficiency in the assignment in a timely denial of claim form, in any event, constitutes a waiver of any defenses with respect thereto (*see New York Hosp. Med. Ctr. of Queens v New York Cent. Mut. Fire Ins. Co.*, 8 AD3d 640 [2004]; *Presbyterian Hosp. in City of N. Y. v Aetna [*5] Cas. & Sur. Co.*, 233 AD2d 433 [1996]; *Park Health Ctr. v Eveready Ins. Co.*, 2001 NY Slip Op 40665[U] [App Term, 2d & 11th Jud Dists]). Accordingly, plaintiff's motion for summary judgment was properly granted.

Defendant has failed to preserve its remaining contention for appellate review,

and its submissions in support thereof involve matters dehors the record which are not reviewable for the first time on appeal.

Pesce, P.J., Weston Patterson and Rios, JJ., concur. Decision Date: April 6, 2006