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Vinings Spinal Diagnostic v Travelers Prop. Cas. Ins. Co.
2006 NY Slip Op 50999(U)
Decided on May 30, 2006
Nassau District Court
Marber, J.
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Decided on May 30, 2006

Nassau District Court

Vinings Spinal Diagnostic, as Assignee of Yvette Jenkins, Plaintiff,

against

Travelers Property Casualty Insurance Company, Defendant.

13569/05

Randy Sue Marber, J.

Plaintiff moves, pursuant to CPLR §3212, for an order granting it summary

judgment in the amount of $1,934.10 demanded in its complaint on the ground of defendant's willful failure to comply with a discovery stipulation. Non-responsive opposition is submitted by defendant.

A review of the moving papers shows that this action was commenced by a summons and complaint on May 26, 2005 for unpaid bills for medical services rendered to its assignor on December 8, 2004 and submitted to defendant no-fault carrier in the amount of $1,934.10. Defendant acknowledged receipt of plaintiff's bill on December 30, 2004 and issued its denial dated January 10, 2005 for the stated reason, "NoFault (sic) benefits for the above named provider are denied because the provider failed to substantiate the necessity for the medical services rendered. Please see attached report on[*sic*] Edward Weiland on 1/5/05 of[*sic*] which this denial is based." An Answer was interposed on July 21, 2005, together with various discovery demands. Plaintiff responded to defendant's demands on August 16, 2005, and on that date served its Notice for Discovery and Inspection on defendant.

On October 31, 2005, the parties entered into a stipulation, which was not "so ordered" wherein it was agreed that defendant would produce all outstanding discovery on or before 60 days of the date of the stipulation, which states: "Failure by defendant to do so will result in defendant being precluded from offering such' evidence at the time of trial." The Court interprets "such" evidence as meaning that requested in the outstanding discovery. Plaintiff's attorney identifies in her affirmation, the discovery demanded to be "plaintiff's Notice for Discovery and Inspection". Defendant failed to so respond within said 60 days and plaintiff [*2]brought on the within motion.

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 50825U, [Nassau Dist Ct, 2006]).

The stipulation in this case is not against good morals or sound public policy, and therefore, will be enforced by this Court.

Defendant has responded to the within motion, but has failed to provide any of the demanded discovery. Its opposition relates to timely denial of the claims based on a peer review. An affirmed copy of the peer review report of Edward Weiland, M.D. is provided with defendant's opposition, together with an affidavit of Phyllis Faraguna, a claims representative for defendant and a person with personal knowledge of the preparation and mailing of the denial of claims. Plaintiff's attorney, in her Reply affirmation, asserts that Ms. Faraguna's affidavit is improper and insufficient as she is not the individual handling this claim and does not state the source of her "personal knowledge" with regard to this claim. The Court has reviewed the affidavit and concludes that it contains sufficient factual information describing how defendant's regular office practices and procedures for mailing denials are geared as to ensure the likelihood that the denial of claim is always properly addressed and mailed. Further, there is no sworn statement from plaintiff that the denial of claim was never received, and in fact, annexes to its moving papers a copy of Dr. Weiland's report which was attached to defendant's denial of claim form.

As stated in *AVA Acupuncture P.C. v. Elco Administrative Services Co.*, 10 Misc 3d 1079(A), Slip Copy, 2006 WL 286854 (NY City Civ. Ct.,2006):

> "It is also worthy of note that, although the Second Department in *Hospital for Joint Diseases v. Nationwide Mutual Ins. Co.* (284 AD2d 374) found the defendant's proof of mailing to be inadequate (id., at 374), it reversed the lower court's granting of the defendant's motion for summary judgment, but let stand the lower court's denial of the plaintiff's motion for summary judgment. One might suspect, therefore, that a showing on mailing insufficient to support granting a party's motion for summary judgment might, nonetheless, be sufficient
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> to warrant denial of the other party's summary judgment motion (See *Hospital for*
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> *Joint Diseases v. New York City Transit Authority*, 16 AD3d 376, 376-77 [2d Dept 2005].)"

While plaintiff has established by proof that it submitted to defendant claim forms, setting [*3]forth the fact and the amount of the loss sustained, it has failed to prove that payment of no-fault benefits was overdue, and therefore, has not established a *prima facie* case, sufficient to grant it summary judgment.

A review of the documents exchanged between the parties as indicated in the moving papers before the Court reveal that there is sufficient documentation already in the parties' possession to enable a trial to go forward without the precluded evidence covered in plaintiff's Notice for Discovery and Inspection.

Accordingly, that portion of plaintiff's motion seeking an order precluding defendant from offering any evidence is granted only with regard to information demanded in its discovery notices not previously by defendant, or already in plaintiff's possession.

So Ordered:

Dated: May 30, 2006 DISTRICT COURT JUDGE

cc: Robert E. Dash, Esq.

Law Office of Karen C. Dodson