Decided on March 27, 2006

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS

PRESENT: : PESCE, P.J., GOLIA and
RIOS, JJ 2005-389 K C.

A.B. Medical Services PLLC, D.A.V. CHIROPRACTIC P.C. LVOV ACUPUNCTURE P.C. a/a/o Mark Udoka, Appellants,

against

Allstate Insurance Company, Respondent.

Appeal from an order of the Civil Court of the City of New York, Kings County (Ellen M. Spodek, J.), entered January 3, 2005. The order, insofar as appealed from as limited by plaintiffs' brief, denied plaintiffs' motion for summary judgment.

Order, insofar as appealed from, reversed without costs, plaintiffs' motion for summary judgment granted and matter remanded to the court below for the calculation of statutory interest and an assessment of attorney's fees.

In this action to recover first-party no-fault benefits for medical services rendered to their assignor, plaintiff health care providers established a prima facie entitlement to summary judgment by proof that they submitted the statutory claim forms, 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]). Consequently, the burden shifted to defendant to raise a triable issue of fact.

Defendant argued that it properly denied the claims based on the failure of

plaintiffs' assignor to appear for 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 for scheduled EUOs, the "insurer must include the revised prescribed endorsement with new or renewal policies issued on or after April 5, 2002, and the 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 Term, 9th & 10th Jud Dists]; *see also 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]; *Star Med. Servs. P.C. v Eagle Ins. Co.*, 6 Misc 3d 56 [App Term, 2d & 11th Jud Dists 2004]). In the instant case, defendant's submissions failed to establish in the first instance that the insurance policy contained an endorsement authorizing EUOs. Therefore, the failure of plaintiffs' assignor to appear for EUOs cannot constitute grounds for denial of no-fault benefits (*see Star Med. Servs. P.C. v Eagle Ins. Co.*, 6 Misc 3d 56, *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]). An insurer's defense that the collision was in furtherance of an insurance fraud scheme is not subject to the 30-day preclusion rule (*see Matter of Metro Med. Diagnostics v Eagle Ins. Co.*, 293 AD2d 751 [2002]), and is non-waivable. In support of its defense of fraud, defendant submitted the affirmation of its attorney who alleged that the matter was referred to the Special Investigative Unit because plaintiffs' assignor was purportedly not in the insured vehicle at the time of the accident and was seen by the adverse driver arriving at the scene following the accident. However, the defendant's attorney lacked personal knowledge of the investigation and the circumstances giving

rise to the investigation (*see Melbourne Med., P.C. v Utica Mut. Ins. Co.*, 4 Misc 3d 92 [App Term, 2d & 11th Jud Dists 2004]). Moreover, the unsworn letter by the adverse driver, attached to the attorney's affirmation, did not constitute competent proof in admissible form (*Ultra Diagnostics Imaging v Liberty Mut. Ins. Co.*, 9 Misc 3d 97 [App Term, 9th & 10th Jud Dists 2005]; *S & M Supply v State Farm Mut. Auto. Ins. Co.*, 4 Misc 3d 130[A], 2004 NY Slip Op 50693[U], *supra*), and defendant failed to proffer an acceptable excuse for failure to tender such proof in admissible form (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1068 [1979]; *Allstate Ins. Co. v Keil*, 268 AD2d 545 [2000]). The affidavit of defendant's claims representative merely set forth conclusory allegations of fraud. Thus, defendant's submissions are insufficient to raise triable issues of fact pertaining to its defense of fraud.

Accordingly, plaintiffs' motion for summary judgment is granted and the matter is remanded to the court below for the calculation of statutory interest and an assessment of attorney's fees pursuant to Insurance Law § 5106 (a) and the regulations promulgated thereunder.

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

Golia, J., dissents and votes to affirm the order denying plaintiff's motion for summary judgment.

I agree that the defendant failed to submit sufficient proof to establish that the demands for an examination under oath (EUO) of the assignor were properly mailed. However, I strongly disagree with the majority in requiring the defendant to produce a copy of the underlying contract to establish the existence of the endorsement requiring the "assignor" to submit to an EUO.

The regulations do not require such production and neither the plaintiff nor the assignor raised the issue by denying the existence of such endorsement. I do not believe this Court should create an additional burden for the defendant that is not

required by the statute or the regulation and I would therefore adhere to my earlier dissent in *A.B. Med. Servs. PLLC v Allstate Ins. Co.* (No. 2004-830 K C [App Term 2d & 11th Jud Dists, July 7, 2005]).

My dissent in this case is, however, much more direct.

It is abundantly clear to me that defendant has presented a "founded belief that the alleged injur[ies] do[] not arise out of an insured incident" (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]). The belief is founded upon a detailed statement taken of the driver of the "offending" vehicle who stated that although he was involved in the accident and remained at the scene for 2 hours, he "did not observe any passengers inside the vehicle."

Inasmuch as the underlying eligibility for this claim is predicated upon the assignor being a passenger in the insured vehicle, the statement by the other driver, if true, would establish that the alleged injuries do not arise out of this incident.

The only real issue concerning the sufficiency of this statement is the fact that it is unsworn and which my colleagues hold inadmissable as evidence. However, there is a long line of cases that stand for the proposition that even though a statement may be inadmissable and subject to objection, it may be used for the purpose of defeating a summary judgment motion (*see Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Narvaez v NYRAC*, 290 AD2d 400 [2003]).

This is especially true when the witness in question is presumably available to testify (*Levbarg v City of New York*, 282 AD2d 239 [2001]).

Decision Date: March 27, 2006