

Ocean Diagnostic Imaging, P.C. v Nationwide Mut. Ins. Co. (2006 NY Slip Op 50477(U))

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

2005-586 K C. NO. 2005-586 K C

Ocean Diagnostic Imaging, P.C. a/a/o Dennis Sandiford, Appellant,

against

Nationwide Mutual Insurance Company, Respondent.

Appeal from an order of the Civil Court of the City of New York, Kings County (Eileen Nadelson, J.), entered March 15, 2005. The order, insofar as appealed from, denied plaintiff's motion for summary judgment.

Order, insofar as appealed from, affirmed without costs and, upon searching the record, defendant's cross motion is granted dismissing the complaint.

In this action to recover first-party no-fault benefits for medical services provided to its assignor, plaintiff established a prima facie entitlement to summary judgment by proof that it submitted the claims, 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]). Accordingly, the burden shifted to defendant to show a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendant, in opposition to plaintiff's motion and in support of its cross motion for summary judgment, contended that it was not obligated to pay or deny a claim until requested verification had been provided (*see* 11 NYCRR 65-3.8 [b] [3]), and that plaintiff and its assignor had failed to respond to its timely requests for verification in the form of an examination under oath. Inasmuch as plaintiff and its assignor did not respond to its verification requests, the period within which it was required to respond to plaintiff's claims did not begin to run, and any claim for payment was premature (*see Hospital for Joint Diseases v State Farm Mut. Auto. Ins. Co.*, 8 AD3d 533 [2004]). Accordingly, plaintiff's motion for summary judgment was properly denied.

While defendant did not cross-appeal from so much of the order as denied its cross motion, we note that an appellate court may search the record and grant summary judgment in favor of a party even in the absence of an appeal by that party with respect to a cause of action or issue that is the subject of the motion before the court (CPLR 3212 [b]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425 [1996]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 [1984]; *Urias v Orange County Agric. Socy.*, 7 AD3d 515 [2004]; *Novoselov v Rizzo*, 6 Misc 3d 132[A], 2005 NY Slip Op 50104[U] [App Term, 2d & 11th Jud Dists]).

In searching the record, and in view of our determination herein that plaintiff did not respond to defendant's requests for verification, it is our opinion that defendant's cross motion for summary judgment should be granted and the complaint dismissed (*Central Suffolk Hosp. v New York Cent. Mut. Fire Ins. Co.*, 24 AD3d 492 [2005]; *Nyack Hosp. v State Farm Mut. Auto. Ins. Co.*, 19 AD3d 569 [2005]; *Elite Chiropractic Servs., P.C. v Travelers Ins. Co.*, 9 Misc 3d 137[A], 2005 NY Slip Op 51735[U] [App Term, 1st Dept]).

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

Golia, J., concurs with the result only, in the following memorandum:

While I agree with the ultimate disposition in the decision reached by the majority, I wish to emphasize that I disagree with certain propositions of law set forth in cases cited therein which are inconsistent with my prior expressed positions and generally contrary to my views. Decision Date: March 27, 2006