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SK Med. Servs., P.C. v New York Cent. Mut. Fire Ins. Co.
2006 NY Slip Op 50721(U)
Decided on April 5, 2006
Civil Court Of The City Of New York, Richmond County
Sweeney, J.
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Decided on April 5, 2006

Civil Court of the City of New York, Richmond County

SK Medical Services, P.C., A/A/O CLAUDIA HERNANDEZ, Plaintiff.

against

New York Central Mutual Fire Insurance Company, Defendant.

6195/2005

Peter P. Sweeney, J.

Upon the foregoing papers the within motion and cross-motion are decided as

follows:

Plaintiff commenced this action pursuant to Insurance Law § 5101 *et seq.* to recover $3,673.07 in assigned first-party no-fault benefits, as well as statutory interest and attorney's fees, for medical services provided to its assignor. Defendant now moves for an order *inter alia* striking plaintiff 's complaint due to its failure to provide discovery. Plaintiff cross-moves for summary judgment.

In support of its motion to strike plaintiff's complaint, defendant demonstrated that the plaintiff has not complied with various discovery demands which were served on June 22, 2005. The demands included interrogatories, a notice of examination before trial, a request for expert disclosure, a demand for party statements and a notice for discovery and inspection. Several of the demands sought information regarding plaintiff's corporate structure and licensing status, and others sought information concerning whether the physicians who treated plaintiff's assignor were plaintiff's employees or independent contractors.

Plaintiff opposed the motion and cross-moved for summary judgment. The papers [*2] submitted by the plaintiff established 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. Plaintiff correctly asserts that its submissions established its prima facie entitlement to summary judgment (*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]). Plaintiff maintains that to withstand the cross-motion, it was incumbent upon the defendant to submit competent proof raising a triable issue of fact (*Alvarez v. Prospect Park Hospital,* 68 NY2d 320 [1986]) and that pending a determination of the cross-motion, defendant's motion to strike the complaint should be stayed pursuant to CPLR 3212, which in pertinent part, provides: "Service of a notice of motion under CPLR 3211, 3212, or section 3213 stays disclosure until a determination of the motion unless the court orders otherwise." Significantly, there is no indication in either defendant's or plaintiff's papers that plaintiff raised timely objections to

defendant's interrogatories in accordance with CPLR 3133 or timely objections to defendant's other various demands pursuant to CPLR 3122.

In opposition to plaintiff's cross-motion for summary judgment, defendant maintained that there are triable issue of fact as to whether the injuries for which plaintiff's assignor received treatment were causally related to the motor vehicle accident underlying the claims. Defendant asserted this defense in its denial of claim dated August 6, 2003 wherein defendant acknowledged having received the claims on May 5, 2005. Defendant's denial was therefore untimely as a matter of law. Although defendant's untimely denial did not preclude the defendant from raising this defense (*see, Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]; *Mount Sinai Hosp. v. Triboro Coach*, 263 AD2d 11, 18-19 [1999]), for the reasons set forth below, the court need not address whether defendant's submissions raised a triable issue of fact.

Discussion:

In *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 NY3d 313, 319 [2005], the Court of Appeals held that an insurer may withhold payment of a first-party no-fault claim "for medical services provided by fraudulently incorporated enterprises to which patients have assigned their claims." In so holding the Court noted that Business Corporation Law § 1507 provides, "A professional service corporation may issue shares only to individuals who are authorized by law to practice in this state a profession which such corporation is authorized to practice. . ." (*id.* at 319 n. 1) and that pursuant to 11 NYCRR 65-3.16(a)(12), "A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement. . ." (*id.* at n. 2). The Court concluded that a medical corporation that is owned or controlled by non-physicians violates these provisions and therefore can not recover assigned first-party no-fault benefits (*id*. at 320).

Although the *Mallela* court did not squarely address the issue of whether an insurer 's untimely denial of a claim precludes it from asserting the defense that a

plaintiff medical corporation was a fraudulently incorporated, in *A.B. Medical Services PLLC v. Utica Mut. Ins. Co.*, 2006 NY Slip Op. 26068[App. Term, 2nd & 11th Jud. Dists.] the court held that an insurer may assert the defense even though it was not asserted in a timely denial of claim. The court in *A.B. Medical Services PLLC v. Utica Mut. Ins. Co., supra.*, further held that where an insured [*3]served demands for discovery seeking information concerning whether the plaintiff medical corporation was a fraudulently licensed (i.e. - information regarding corporate structure and licensing status), which were not palpably improper or privileged and which were not objected to in accordance with CPLR 3122, the insurer was entitled to the discovery (*id.*) and that until such discovery was provided, a motion for summary judgment made by the plaintiff should be denied as premature pursuant to CPLR 3212(f) (*id.*). Finally, the court held that the insurer's discovery demands, to the extent they seek information regarding defenses that the insurer was precluded from raising due to its failure to timely deny the claim, were palpably improper, and that the plaintiff did not have to comply with such demands regardless of whether they were timely objected to (*id.*).

In accordance with *A.B. Medical Services PLLC v. Utica Mut. Ins. Co., supra.*, this Court finds that defendant is entitled to compliance with its various discovery demands to the extent they seek information regarding plaintiff's corporate structure and licensing status, and that until such discovery is provided, plaintiff's cross-motion for summary must be denied as premature.The court further finds that the holding in *A.B. Medical Services PLLC v. Utica Mut. Ins. Co.* necessarily requires that plaintiff provide responses to defendant's discovery demands to the extent they seek information regarding other defenses that the defendant is not precluded from raising due to the untimely denial of the claim. These defenses include the defense that a billing provider is ineligible to recover assigned first-party benefits for treatment performed by an independent contractor (*see Rockaway Blvd. Medical P.C. v. Progressive Ins.*, 9 Misc 3d 52 [App. Term, 2d & 11th Jud. Dists. 2005]; *A.B. Medical Services PLLC v. New York Cent. Mut. Fire Ins. Co.*, 8 Misc 3d 132(A), 801 N.Y.S.2d 776 [App. Term, 2d & 11th Jud. Dists. 2005]) and any defense to coverage, including but not limited to the defense that the injuries for which treatment was provided were

not causally related to the accident (*see Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997]; *Mount Sinai Hosp. v. Triboro Coach*, 263 AD2d 11, 18-19 [1999]) and the defense that the collision underlying the claim was a staged event in furtherance of an insurance fraud scheme (*see Central Gen. Hosp.*, 90 NY2d at 199; *Matter of Metro Med. Diagnostics v. Eagle Ins. Co.*, 293 AD2d 751 [2002]; *A .B. Med. Servs. v. CNA Ins. Co.*, 2 Misc 3d 138[A], 2004 NY Slip Op 50265[U] [App Term, 2d & 11th Jud. Dists.]. There is no logical reason to distinguish an insurer's entitlement to discovery regarding these non-waivable defenses and the type of defenses recognized in *Mallela.*

Finally, defendant's interrogatories and other demands, to the extent that they seek information regarding the defenses defendant is now precluded from raising due to its untimely denial of claim, must be stricken.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion for summary judgment is **DENIED** without prejudice to renewal upon completion of discovery; it is further

ORDERED that defendant's motion to strike plaintiff's complaint is granted unless within 60 days of service of this order with notice of entry, plaintiff complies with defendant's discovery demands to the extent they seek information regarding those defenses that defendant is not precluded from raising due to its untimely denial of claim; it is further

ORDERED defendant's discovery demands to the extent they seek information regarding defenses defendant is precluded from raising due to its untimely denial of the claim are hereby [*4]stricken; and it is further

ORDERED that if within 15 days of the date of this order, the parties do not agree in writing as to what discovery must be provided pursuant to this order, the parties are directed to contact the undersigned at (718) 390-5429 to arrange for a discovery conference.

This constitutes the decision and order of the court.

Dated: April 5, 2006 _____

PETER P. SWEENEY

Civil Court Judge