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Montgomery Med., P.C. v State Farm Ins. Co.
2006 NY Slip Op 51116(U)
Decided on June 13, 2006
Nassau District Court
Marber, J.
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Decided on June 13, 2006

Nassau District Court

Montgomery Medical, P.C., a/a/o Dian Pringle, Plaintiff,

against

State Farm Insurance Company, Defendant.

28583/04

Randy Sue Marber, J.

Plaintiff moves for an order pursuant to CPLR §3212 awarding the plaintiff summary judgment for $7,567.55, the amount demanded in the complaint, on the grounds that defendant failed to pay or deny its claims within thirty days, and that

defendant is precluded from offering any evidence at time of trial in accordance with an April 21, 2005 stipulation. Defendant opposes the motion and cross-moves for summary judgment on the ground that plaintiff failed to rebut defendant's proof that services were not medically necessary, plaintiff's failure to cooperate and where the services rendered constitute concurrent care, which cross-motion plaintiff opposes. Defendant also raises the issue of fraud.

Plaintiffs' assignor, Dian Pringle, allegedly was involved in a motor vehicle accident on March 8, 2004. On multiple dates from March 9, 2004 through July 30, 2004 plaintiff rendered acupuncture "health services" to its assignor in the total amount of $7,567.55. All of said claims were timely submitted and defendant has acknowledged receipt of same. By certified letters dated March 26, 2003[sic] and April 26, 2004, defendant requested that Ahmed Erfan Halima, M.D. as owner of plaintiff, submit to an examination under oath with regard to the submitted claims. An Examination Under Oath of Dr. Ahmed Halima was eventually conducted on July 23, 2004. Plaintiff's claims were subsequently all denied on September 16, 2004 for the stated reasons:

> Your records and testimony indicate that you consistently provide (a) physical therapy and chiropractic services to patients who are receiving services for the [*2]same conditions during the same periods at the same location, without regard to the medical necessity of the services; and (b) diagnostic tests such as electrodiagnostic tests, range of motion test and Current Perception Threshold tests that are of no diagnostic value and/or are not medically necessary. Therefore, your claims are denied for two reasons. First you have materially misrepresented that your services were rendered because they were medically necessary, when in fact they were not. Second your services constitute concurrent care, and you have failed to establish which specialty is most relevant to any patient's diagnosis.

While concurrent care is not permitted under the Workers Compensation Law, contrary to defendant's contention listed in its Denial of Claim form, case law has considered it under the No-Fault Law (see, *Universal Acupuncture Pain Servs PC v. Lumbermens Mut. Cas. Co.*, 195 Misc 2d 352, 195 Misc 2d 352, 758 NYS2d 795 [Civ Ct Queens County].

The Court has reviewed defendant's forty-two (42) Denial of Claim forms, all dated September 14, 2004 containing the above reason for denial, and ascertain that each form contains March 26, 2004 as the "date final verification requested" and July 23, 2004 as the "date final verification received". It does not appear that defendant renewed its request for an EUO as "additional verification" on receipt of each of the 42 claims from plaintiff. Further, to be timely, the Denial of Claim form had to have been issued within 30 days of the holding of the EUO. As stated by the Appellate Term, 9th and 10th Districts in the case of *S&M Supply Inc. v. State Farm*, 4 Misc 3d 130A, 791 NYS2d 873,

> EUOs are also subject to the same 30-day scheduling period required of independent medical examinations (11 NYCRR 65-3.5[d]), and to virtuallyidentical scheduling and reimbursement conditions imposed on medical examinations (11 NYCRR 65-3.5[e]). Similarly, where an EUO, as a medical examination, has been requested as verification, it is deemed to have been received by the insurer on the day the examination was performed (11 NYCRR 65-3.8[a][1]).

Therefore, defendant's denials of plaintiff's claims on September 14, 2004, 53 days after the EUO was conducted on July 23, 2004, were not timely. By its failure to timely issue its Denial of Claim forms, defendant is precluded from proving lack of medical necessity of the services, as well as concurrent care, the reasons given in its Denials.

Plaintiff instituted the within lawsuit by service of a summons and complaint upon defendant on November 17, 2004. Defendant interposed its Answer on December 16, 2004. Plaintiff annexed to its moving papers, an affidavit of service by mail which states that on January 31, 2005, plaintiff served defendant with its Demand for a Verified Bill of Particulars as to the Affirmative Defenses, plaintiff's Demand for Experts and Notice for Discovery and Inspection.

Plaintiff asserts that on April 21, 2005, the parties entered into a stipulation, which was [*3]not "so ordered" wherein it was agreed that defendant would respond to plaintiff's written interrogatories and Demand for Discovery and Inspection within

60 days of the date of the stipulation, and in the event of defendant's failure to respond to plaintiff's demands, Judgment will be entered against defendant upon the filing of an affidavit of noncompliance. The stipulation likewise states: "Furthermore, plaintiff agrees to fully respond to defendant's discovery demands or **same**' will be precluded."(emphasis added) Defendant failed to so respond within said 60 days and plaintiff brought the within motion. Copies of plaintiff's Demands are annexed to its moving papers. No affidavit of service of, or copy of purported written interrogatories is annexed. Said affidavit of service also includes that it served plaintiff's Response to Defendant's Demand for Bill of Particulars, Response to Notice for Discovery & Inspection, Response to Demand for Expert Discovery and Response to Demand for Proof of Filing, Index Number. Copies of said Responses are not included. Defendant, however, has raised no objection with regard to its receipt of same.

As stated by the Court of Appeals in *In re Petition of New York L.& W.R.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 an unreasonable one. Nothing contained therein contravenes good morals or sound public policy. 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 provided by defendant, or already in plaintiff's possession.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]) and even in the absence of opposing papers. A motion for summary judgment shall be supported by an "affidavit [*4]by a person having personal knowledge of the facts", shall recite all the material facts and it shall show that there is no defense to the cause of action or that the defenses have no merit (CPLR §3212[b]). Once the moving party meets his burden, the burden then shifts to the non-moving party to allege such evidentiary facts that raise a genuine and material controversy as to the issue(s) before the Court. Where the opposing party fails to meet his burden and the Court finds no triable issues, the motion will be granted (*Iandoli v. Lange*, 35 AD2d 793 [1st Dept 1970]). Where the Court determines that a triable issue of fact exists, denial of the motion is the proper course of action (*Moskowitz v. Garlock*, 23 AD2d 943 [3d Dept 1965])

Plaintiff bases its lawsuit on the ground that it timely submitted its claim forms to defendant which neither paid nor denied them within thirty days in accordance with the Rules and Regulations governing the payment of no-fault benefits (see Insurance Law §5106 [a]; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD3d 742, 774 NYS2d 564 [2004]; *A.B. Med. Servs. PLLC v. Lumbermens Mut. Cas. Co.*, 4 Misc 3d 86, 781 NYS2d 818 [App Term, 2d & 11th Jud Dists 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 Court finds that plaintiff has established its *prima facie* case.

In addition to the reasons for denial set forth in its Denial of Claim forms as indicated above, in its opposition papers, defendant raises for the first time that the proof of claim forms submitted by plaintiff are improper. Having failed to include this reason in a timely denial of the claim, however, defendant is precluded from raising this defense (see *Presbyterian Hosp. in City of NY v. Maryland Cas. Co.*, 90 NY2d 274, 282, 683 NE2d 1, 660 NYS2d 536 [1997]).

Lastly, defendant also raises questions as to whether plaintiff is fraudulently incorporated in violation of Business Corporation Law §1507 and whether the actual profits from the practice are channeled to the non-physician management company to which it pays a set fee of $40,000 to $43,000 a month. Defendant bases its fraud defense upon the unsigned but duly certified deposition of the plaintiff's owner, Dr. Ahmed Halima. An unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion (*Newell Co. v Rice*, 236 AD2d 843, 844, lv denied 90 NY2d 807). Dr. Halima testified that the management company provides two administrative support persons as well as a receptionist, a technician and two billing persons; it owns the EMG and NCV testing machine as well as CPT testing equipment. The management company is also on the lease for the premises. His testimony indicates that he does not know who prepares the bills or what form is used for billing, and that he knew little about what is actually being performed at his facility. It is well settled that despite an untimely denial, an insurer is not precluded from raising the issue of coverage such as a breach of a condition precedent of the terms of the insurance contract (*Presbyterian Hosp. in the City of New York v. Maryland Cas. Co.*, 90 NY2d 274, 683 NE2d 1, 660 NYS2d 536. [*5]

In addition, the Court notes that proper licensing of a medical provider is a condition precedent to payment (*Valley Physical Med. and Rehab v. NY Central Mutual Ins.*, 193 Misc 2d 675, 753 NYS2d 289 (App. Term 2nd Dept 2002). The Court of Appeals has ruled that under New York State's No-Fault Insurance Laws, insurance carriers may withhold payment for medical services provided by fraudulently incorporated enterprises (*State Farm Automobile Ins. Co. v. Robert Mallela*, 4 NY3d 313, 827 NE2d 758, 794 NYS2d 700). The *Mallela III* Court followed the Superintendent of Insurance's promulgation prohibiting the reimbursement of benefits on behalf of unlicensed or fraudulently licensed providers (11 NYCRR 65-3.16[a][12]) (effective April 4, 2002). Accordingly, *Mallela III* ruled that medical providers fraudulently incorporated are therefore not entitled to reimbursement. While defendant has failed to provide sufficient proof of fraudulent incorporation to award it summary judgment, the question of the fraudulent

incorporation raises questions of fact which would preclude summary judgment to the plaintiff.

Accordingly, both plaintiff's motion and defendant's cross-motion for summary judgment are denied and 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 provided by defendant, or already in plaintiff's possession.

So Ordered:

DISTRICT COURT JUDGE

Dated:June 13, 2006

CC: Belesi & Conroy, P.C.

Melli, Guerin & Wall, P.C.