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Tsai Chao v Country-Wide Ins. Co.
2006 NY Slip Op 50794(U)
Decided on May 3, 2006
Nassau Dist Ct
Paradiso, J.
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Decided on May 3, 2006

Nassau Dist Ct

Tsai Chao, M.D., a/a/o ANDREW CHEN, Plaintiffs,

against

Country-Wide Insurance Company, Defendant.

34030/02

Anthony W. Paradiso, J.

Plaintiff moves for summary judgment to recover no-fault benefits. The defendant opposes the motion. For the reasons that follow, the motion is granted.

The plaintiff rendered medical services to the defendant's insured from August

15, 1997 through December 20, 1997, allegedly relating to an automobile accident that occurred on July 8, 1997. The plaintiff submitted three claims to the defendant for payment of first-party no-fault benefits. Each claim was timely denied. Defendant denied payment for all services rendered prior to September 17, 1997 on the basis that it conducted a medical audit and "there is no support for the medical necessity of this equipment or test/service." Defendant denied payment for all services rendered after September 17, 1997 based on the insured's failure to appear for a physical examination originally scheduled for that date.

"While the timely denials defendant submitted in the claim stage constituted sufficient denials based on the defense of lack of medical necessity, defendant must, nevertheless, submit proof in admissible form to rebut plaintiff's prima facie showing to oppose a motion for summary judgment" (*A.B. Medical Services PLLC v Lumbermens Mutual Casualty Co.*, 4 Misc 3d 86, 87 [App Term, 2d Dept 2004]). Inasmuch as defendant solely submitted the affirmation of its [*2]attorney in opposition to plaintiff's motion for summary judgment and did not submit a sworn peer review report to support its allegation of lack of medical necessity for the services rendered, it failed to oppose the motion by proof in admissible form and cannot defeat plaintiff's entitlement to summary judgment on that basis (*see id.*).

Likewise, the defendant offered no admissible proof that its denials based upon the insured's failure to comply with a request for a physical examination were predicated upon a properly mailed verification notice (*see Summit Psychological, P.C. v General Assurance Company*, 9 Misc 3d 8, 9-10 [App Term, 2d Dept 2005]). The affidavit of Saneela Khan did not establish how or when the IME notice was mailed, and therefore no presumption of mailing can be attributed to her averments (*see id.*).

While the plaintiff is clearly entitled to judgment in the amount of $924.38 for the medical services provided, the court must determine when interest began to accrue on this amount. The accrual date often urged by medical providers seeking no-fault payments is 30 days after an insurer receives a proper proof of claim. In contrast, insurers often point to 11 NYCRR 65-3.9(c) (and its predecessor, 11 NYCRR

65.15[h][3]) to support the argument that interest should not accrue until the no-fault claimant requests arbitration or institutes a lawsuit when that claimant has not done so within 30 days after receipt of the denial. Here, the plaintiff submitted claims on November 5, 1997, December 8, 1997 and January 14, 1998 which were timely denied on November 12, 1997, December 12, 1997 and January 22, 1998, respectively. However, the plaintiff did not commence suit for the recovery of these payments until September 6, 2002, well over four years later.

Judge Milagros A. Matos of the Civil Court, Kings County, grappled with this very issue in *East Acupuncture, P.C. v Allstate Ins. Co.*, 8 Misc 3d 849 (2005). Judge Matos compared the language of 11 NYCRR 65.15(h)(1) (now 11 NYCRR 65-3.9[a]), dealing with the interest rate to be applied to overdue payments due "*an applicant or an assignee*," with the language of 11 NYCRR 65.15(h)(3) (now 11 NYCRR 65-3.9[c]), which limits the interest accrual date on such payments where "*an applicant*" does not request arbitration or institute a lawsuit within 30 days after receipt of the denial of claim. Judge Matos accepted the argument of the plaintiff therein that the Superintendent of Insurance, when promulgating the regulations at issue, specifically and intentionally distinguished between "an applicant" and "an assignee." According to Judge Matos, "[u]nder a strict interpretation of the regulation at issue, 11 NYCRR 65.15(h)(3) does not apply to assignees" (*East Acupuncture* at 852). The court found the omission of the word "assignee" to be "a clear indication that the Superintendent intended to exclude assignees from this section's application" (*id*.).

Deferring to the Superintendent's supposed interpretation, the *East Acupuncture* court would not, by implication, read into the regulation "a limitation for which no sound reason can be found" (*id*. at 853). As such, Judge Matos concluded that unlike an insured/assignor, a medical provider/assignee was not limited to interest from the date it commenced a belated suit for the recovery of no-fault benefits, but rather could avail itself of the earliest possible interest accrual date.

This court respectfully disagrees with Judge Matos' conclusion. Although courts

will defer to an agency's interpretation of a statute it is charged with administering where the [*3]application of the statute involves knowledge and understanding of underlying practices or entails an evaluation of factual data and inferences to be drawn therefrom (*see Kurcsics v Merchants Mutual Ins. Co.*, 49 NY2d 451, 459 [1980]), a court must not blindly accept a statutory interpretation that has no reasonable basis in the law (*see id.* at 458-59*; O'Brien v Spitzer*, 24 AD3d 9, 14 [2d Dept 2005]). Here, the interpretation accepted by the court in *East Acupuncture* runs counter to the stated objectives of the statutory no-fault scheme, i.e., prompt compensation for losses incurred by accident victims, reduced burdens on the courts, and lower premiums for motorists (*see Medical Society of the State of NY v Serio*, 100 NY2d 854, 860 [2003]). As the Court of Appeals observed in *Walton v Lumbermens Mutual Casualty Co.*, 88 NY2d 211, 214 (1996), the no-fault law's purposes "were to remove the vast majority of claims arising from vehicular accidents from the sphere of common-law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation for economic loss suffered as a result of such accidents." The interpretation attributed to the Superintendent in *East Acupuncture* encourages delayed suits and thrusts an unjustified financial burden on insurance companies who are forced to pay years worth of punitive interest payments that are eventually reflected in higher insurance premiums (*see Kuscsics*, 49 NY2d at 457). Since this interpretation frustrates a core and essential objective of the regulations, "that is, to provide a tightly timed process of claim, disputation and payment" (*Presbyterian Hospital v Maryland Casualty Co.*, 90 NY2d 274, 281 [1997]), it should not be accepted (*see id.*; *Kuscsics* at 458; *see e.g. Crump v Unigard Ins. Co.*, 100 NY2d 12, 17 [2003]).

Moreover, the Superintendent's purported distinction between an insured/assignor and a medical provider/assignee with regard to the interest accrual date on a belated suit constitutes an unwarranted abrogation of the common law. It is settled law that an assignee stands in the shoes of the assignor and acquires no greater rights than those possessed by the assignor (*see International Ribbon Mills, Ltd. v Arjan Ribbons, Inc.*, 36 NY2d 121, 126 [1975]). This general principle "remains alive and well today in [n]o-[f]ault actions" (*CPT Medical Service, P.C. v Utica Mutual*

Ins., 2006 NY Slip Op 26098 [Civ Ct, Queens County 2006]; *see e.g. A.B. Medical Services PLLC v Commercial Mutual Ins. Co.*, 2006 NY Slip Op 26118 [App Term, 2d Dept 2006] [health care provider deals with an assignor-insured at its own peril in accepting an assignment of no-fault benefits and acquires no greater rights than an assignor-insured whose recovery is precluded due to fraud]). As the Court of Appeals remarked in *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 464 [1993]: "The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely requires" (*see* Statutes §301[a]). It simply cannot be said that Insurance Law § 5106(a), which expresses the legislature's mandate regarding the fair settlement of no-fault claims, "absolutely requires" the irrational interpretation that would reward a dilatory assignee such as the plaintiff herein with an interest windfall permitted under the *East Acupuncture* rationale. This is especially so in light of the Superintendent's duty to promulgate rules intended to "better effectuate the legislative purpose of providing prompt compensation as the loss is incurred"' (*Medical Society of the State of NY v Serio*, 100 NY2d at 862, quoting Ins. Law § 5106[a]).

Accordingly, the plaintiff shall have judgment in the amount of $924.38 with interest at two percent per month from September 6, 2002 (*see* 11 NYCRR 65-3.9[a], [c]), as well as [*4]attorneys' fees calculated in accordance with 11 NYCRR 65-4.6.

So Ordered: District Court Judge

Dated: May 3, 2006

cc:Sanders, Grossman, Fass & Muhlstock, P.C.

Jaffe & Nohavicka