SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17

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NYU- HOSPITAL FOR JOINT DISEASES a/a/o Raymond Laursen, WESTCHESTER MEDICAL CENTER a/a/o John Allen, MT. VERNON HOSPITAL a/a/o Kasine Brown,

Plaintiffs,

- against -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

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DECISION AND ORDER

Index No. 7866/2010

Orig. Return Dates: 08/11/10 and 12/20/10
Motion Seq. Nos.: 001 and 3

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 11 were submitted on this Motion and Cross-Motion on January 10, 2011:

	Papers numbered:
Notice of Motion, Affirmation and Affidavit	1-3
Amended Notice of Cross-Motion, Affirmations (2) And Affidavits (3)	4-9
Affirmation in Opposition to Cross-Motion	10
Reply Affirmation	11

The motion by plaintiff, NYU- Hospital For Joint Diseases a/a/o Raymond Laursen ("NYU"), for an Order of this Court, pursuant to CPLR 3212, granting it summary judgment and directing the defendant State Farm Mutual Automobile Insurance Company ("State Farm") to make certain payments under the no-fault policy of the patient/assignor, Raymond Laursen, is denied.

The cross-motion by defendant, State Farm, for an Order of this Court, pursuant to CPLR 3212, granting it summary judgment is also denied.

Plaintiffs bring this action pursuant to Insurance Law §5106(a) for the failure of the

defendant to pay three separate no-fault billings. It is noted at the outset that the second and third causes of action, brought by the Westchester Medical Center as assignee of John Allen and Mt. Vernon Hospital as assignee of Kasine Brown, respectively, have been withdrawn.

Plaintiff, NYU, contends that the defendant has failed to act in accordance with Insurance Law §5106 which requires timely payment or denial of the requests for no-fault benefits.

This action arises out of an automobile accident that occurred on June 10, 2009. As a result of the accident, Raymond Laursen was hospitalized at NYU-Hospital For Joint Diseases from February 10, 2010 through February 11, 2010. Specifically, on February 10, 2010, Laursen underwent left shoulder arthroscopic surgery at NYU. On February 24, 2010, the hospital submitted forms N-F 5 and UB-04 to defendant, State Farm, for payment of no-fault benefits in the amount of $9,736.69. Relying upon the Certified Mail Return Receipt Requested documentation, NYU submits that the application for no-fault benefits was received by State Farm on February 27, 2010 and that State Farm neither paid nor denied the claim within 30 days of receipt.

In opposition (and in support of it's own cross motion for summary judgment), counsel for State Farm asserts that plaintiff has failed to make a prima facie case warranting summary judgment. There is no merit to this argument.

A claimant establishes a prima facie case for no-fault benefits upon the submission of statutory proof of claim form and the amount of the loss (Ins. Law § 5106[a]; 11 NYCRR 65-3.8[c]; *A.B. Medical Services, v. Liberty Mutual Ins. Co.*, 39 AD3d 779, 780 [2nd Dept. 2007]; *Nyack Hospital v. Metropolitan Property & Cas. Co.*, 16 AD3d 564 [2nd Dept. 2005]).

Here, plaintiff provides proof in the form of an affidavit by Peter Kattis, a biller and an account representative for the plaintiff hospital, that payment was demanded on February 24, 2010

in the amount of $9,736.69. In his affirmation in support, plaintiff's counsel provides copies of the claim forms and proof of mailing via certified mail and its receipt by State Farm on February 27, 2010. As such plaintiff has satisfied its prima facie burden (*see also Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD3d 742 [2nd Dept. 2004])

In opposition, and in support of its own motion for summary judgment, defendant, State Farm, asserts the following arguments. First, plaintiff NYU's motion for summary judgment must be denied as it is devoid of evidence in admissible form demonstrating that the alleged services sought for no-fault reimbursement were performed by the plaintiff herein, were properly assigned to the plaintiff, that the bills were forwarded to the defendant, that the documents annexed to the plaintiff's motion are business records, that an assignment of benefits was forwarded to it (State Farm), that the no-fault claims have not been paid or denied within the statutorily prescribed time frame and that said treatment/testing was causally related to a "covered" motor vehicle accident.

This argument is entirely meritless. The documentary evidence submitted by the plaintiff in support of its motion plainly dispels defendant's simply frivolous argument in its entirety.

Defendant also argues that it issued a timely and proper denial of the claim based on the independent examination report of Dr. Marvin Winell, M.D.

The law is well established that after receipt of a completed claim, an insurer is statutorily required to pay or deny the claim, in whole or in part, within 30 days (11 NYCRR 65.15[g]). The insurer may extend its time to pay if it makes a timely demand for additional verification within 10 days of receipt of the completed claim (11 NYCRR 65.15[d][1]). If the demanded verification is not received within 30 days, the insurance company must issue a follow-up letter within 10 days of the claimant's failure to respond (11 NYCRR 65.15[e][2]). A claim need not be paid or denied until all

demanded verification is provided (11 NYCRR 65.15[g][1][I]). Specifically, under 11 NYCRR 65.15(d)(1), a "timely" demand for additional verification is one made within 10 days from receipt of a completed application. The caselaw acknowledges that a demand for verification must be timely and, further, that a claim may be dismissed for failure to respond to a timely request. (*St. Vincent's Hosp. of Richmond v. American Tr. Ins. Co.*, 299 AD2d 338 [2nd Dept. 2002]; *Mount Sinai Hosp. v. Chubb Group of Ins. Companies*, 43 AD3d 889 [2nd Dept. 2007]).

The defense of lack of medical necessity may be asserted on the basis either of a peer review report or a medical examination, as implicitly provided by Insurance Regulation 11 NYCRR 65-3.8(b)(4):

> "If the specific reason for a denial of a no-fault claim, or any element thereof, is a medical examination or peer review report requested by the insurer, the insurer shall release a copy of that report to the applicant for benefits, the applicant's attorney, or the applicant's treating physician, upon the written request of any of these parties."

However, to withstand a motion for summary judgment, a peer review report must set forth a factual basis sufficient to establish, prima facie, the absence of medical necessity (*cf. Liberty Queens Medical P.C. v. Liberty Mutual Ins. Co.*, NYLJ, Nov. 4, 2002 [App. Term, 2nd & 11th Jud. Dists]).

In this case, defendant submits documentary proof that, by letter dated March 5, 2010, it demanded from NYU additional verification of the claim. However, State Farm maintains that it never received the requested "operative report" from NYU. As a result, on April 10, 2010, it sent a "follow-up" additional verification request of said claim to NYU and to Laursen and his legal representative. The copy of the operative report was received by State Farm on May 13, 2010

(*Defendant's Cross Motion*, Ex. F).

Based upon the reports of the "independent orthopedic examinations" conducted by Dr. Marvin Winell on April 10, 2010, and a second examination on March 18, 2010, State Farm, on April 12, 2010 and again on June 11, 2010, issued a denial of the no-fault benefits for Raymond Laursen. In both reports, Dr. Winell concluded that the no fault claim was not causally related to the subject motor vehicle accident. Specifically, State Farm's denial of claim form stated as follows:

> In accordance with the results of the independent physical examination and reconsideration conducted by Dr. Marvin Winell, we reiterate our denial of all Orthopedic benefits related to the left shoulder surgery dated 4/12/2010...New York No Fault Orthopedic benefits related to the left shoulder are denied based upon the physical examination by Marvin Winell, MD on 3/18/2010 advising the left shoulder surgery is not casually related to the motor vehicle accident of 6/10/2009. In accordance with the independent medical examination performed by Marvin Winell, MD on 3/18/2010, the injured party is no longer in need of additional Orthopedic treatment including physical therapy and is able to return to work without restrictions. Therefore, all New York No Fault Orthopedic benefits including physical therapy and loss of earnings are denied effective 4/12/2010 and all bills received for treatment/testing rendered between 3/18/2010 and 4/12/2010 may be reviewed for medical necessity.

Once a plaintiff has proven its prima facie case, the defendant must prove that the treatment was not medically necessary (*Nir. v. Allstate Insurance Co.*, 7 Misc.3d 544, 546 [Civil Ct. Kings 2005]). A defendant may raise a triable issue of fact by submitting a denial of claim form stating that the claim is being denied based on a medical examination or peer review report requested by the insurer. The insurer need not set forth the medical rationale in its denial of claim form. Rather, the insurer need only submit a copy of that report to the applicant or its attorney upon written request (11 NYCRR 65-3.8[b][4]; *A.B. Medical Services, PLLC v. GEICO*, 39 AD3d 778, 779 [2nd Dept. 2007]).

Summary judgment is a drastic and harsh remedy and should be used sparingly (*Menekou v.*

Crean, 222 AD2d 418, 419-420 [2nd Dept. 1995]). Summary judgment cannot be resolved by conflicting affidavits. To grant summary judgment, it must clearly appear, on the papers alone, "that no material and triable issue of fact is presented" (*Zuckerman v, City of New York*, 49 NY2d 557 [1980]). The court's function on a motion for summary judgment is issue finding rather than issue determination (*Miller v Journal-News*, 211 AD2d 626 [2nd Dept. 1995]). Once such proof has been offered, in order for the opposing party to defeat the motion for summary judgment, it must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212(b); *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

To defeat a plaintiff's motion for summary judgment, the report must be in admissible form; i.e. signed and sworn to (*Radiology Today v. GEICO*, 20 Misc.3d 70 [App.Term, 2nd Dept. 2008]). In addition, the peer review report or medical examination must raise a triable issue of fact for lack of medical necessity by setting forth "a sufficiently detailed factual basis and medical rationale for the claim's rejection" (*Nir v. Allstate Insurance Co.*, supra at 546; *Delta Diagnostic v. Chubb Insurance Co.*, 17 Misc.3d 16 [App.Term, 2nd Dept. 2007]). The quantum of evidence presented in the peer review report need not rise to the level of evidence presented at trial through the peer review doctor to substantiate the peer review report's conclusion as to lack of medical necessity (*Nir v. Allstate Insurance Co.*, supra at 546-547).

In its reply, NYU argues that since the report of Dr. Winell is not based upon objective findings because Dr. Winell did not examine the patient until two months after the patient's hospitalization and operation and because the doctor relied upon reports and data from other physicians and other sources, it should be awarded summary judgment as against the insurer. This argument however does not entitle it to judgment.

Furthermore, Dr. Winell's examination reports are in admissible form and contain a sufficient rationale so as to create an issue of fact concerning medical necessity. While somewhat bare bones, the reports state that the "claimant's left shoulder injury did not arise from the motor vehicle accident itself but rather, is degenerative in nature and therefore unrelated to the motor vehicle accident."

Since the report does contain sufficient evidence to demonstrate the existence of material issues of fact, (*cf. Delta Diagnostic v. Chubb*, 17 Misc.3d 16, 18 [App. Term 2nd Dept. 2007]), this case will proceed to trial. Accordingly, it is

ORDERED, that plaintiff's motion granting it summary judgment as against defendant State Farm, and defendant's cross-motion granting it summary judgment dismissal of plaintiff's complaint are both **denied**; and it is further

ORDERED, that counsel for the plaintiffs and counsel for the defendant shall appear in the DCM Part of this Court at 100 Supreme Court Drive, Mineola, New York **on April 28, 2011** at 9:30 for a Preliminary Conference.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

JOEL K. ASARCH, J.S.C.

Dated: Mineola, New York
March 29, 2011

Copies mailed to:
Law Office of Joseph Henig, PC
Rossillo & Licata, P.C.