

**DISTRICT COURT OF NASSAU COUNTY  
FIRST DISTRICT: CIVIL PART 4**

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RICHMOND MEDICAL DIAGNOSTICS, PC  
a/a/o LEROY JOHNSON,

Plaintiff

-against-

Index No.037068/11

**Present:  
Hon. Andrea Phoenix**

TRI-STATE CONSUMER INSURANCE COMPANY,  
  
Defendant.

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Papers Considered:

Defendant’s Notice of Motion/Affirmation/Affidavits/Exhibits.....1  
Plaintiff’s Affirmation in Opposition .....2

The plaintiff, Richmond Medical Diagnostics, PC, commenced this action seeking to recover first party no-fault benefits for health services provided to its assignor, Leroy Johnson, following a motor vehicle accident. The defendant, Tri-State Consumer Insurance Company, moves for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant based on the fact that as per Medical Peer Review, services provided to the claimant were not medically necessary, fees charged were not in accordance with the New York Worker’s Compensation Fee Scheduled. The plaintiff opposes the defendant’s motion.

In order to succeed on a motion for summary judgment and before a defense based upon lack of medical necessity or fee schedule will be considered, the defendant must demonstrate, through the submission of evidentiary proof in admissible form, that it timely issued a proper NF-10 asserting a defense in response to the plaintiff’s claim. The defendant will be precluded from raising its defense where it fails to make such a demonstration (*see Presbyterian Hospital v. Maryland Casualty Co.*, 90 NY2d 274 [1997]; *Mt. Sinai Hospital v. Triboro Coach Incorporated*, 263 AD2d 11 [2d Dept 1999]; *Church Avenue Medical Care, P.C. v. Allstate Insurance Company*, 189 Misc 2d 340 [App Term 2d Dept 2001]; *Struhl v. Progressive Casualty Insurance Company*, 7 Misc 3d 138[A] [App Term, 2d Dept 2005]). A no-fault insurer can establish timely mailing of a denial of claim or a request for verification through the submission of an affidavit of a person with knowledge of the defendant’s standard office practices or procedures designed to ensure that the items were properly addressed and mailed (*see St. Vincent’s Hospital of Richmond v. GEICO*, 50 AD3d 1123

[2d Dept 2008]; *Eagle Surgical Supply, Inc. v. Progressive Casualty Ins. Co.*, 20 Misc 3d 137[A] [App Term, 2d Dept 2008]; *Dan Medical, P.C. v. New York Central Mutual Fire Ins. Co.*, 14 Misc 3d 44 [App Term, 2d Dept 2006]).

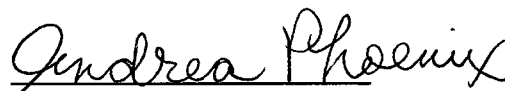
In support of its motion, the defendant submits affidavits from Jeanne Deaner and Shari Robins. Jeanne Deaner, a claim representative for Tri-State Consumer Insurance Company, purports to describe the defendant's standard office procedures with respect to the preparation and issuance of denial of claim forms. In her affidavit Ms. Robins, a medical clerk, describes the company's practices and procedures concerning the receipt of mail and claim processing procedures. Ms. Robins sufficiently establishes the defendant's standard practices and procedures upon the receipt of a no-fault claim and the issuance of an NF-10 denial form were followed.

With regard to the defense of medical necessity, the Court finds that the peer review report of Chandra M. Sharma, M.D. is sufficient to establish *prima facie* evidence that the services rendered by the plaintiff were not medically necessary (see *Crossbridge Diagnostic Radiology, P.C. v. Progressive Ins. Co.*, 20 Misc 3d 143[A] [App Term, 2d Dept 2008]; *Eden Medical, P.C. v. Progressive Casualty Ins. Co.*, 19 Misc 3d 143[A] [App Term, 2d Dept 2008]; *Delta Diagnostic Radiology, P.C. v. American Transit Ins. Co.*, 18 Misc 3d 128[A] [App Term, 2d Dept 2007]; *A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc 3d 131[A] [App Term, 2d Dept 2007]). Thus the burden shifts to the plaintiff.

In opposition, the plaintiff has failed to meaningfully oppose the peer review report relied on by the defendant (see *Ortho-Med Surgical Supply, Inc. v. Progressive Casualty Ins. Co.*, 34 Misc 3d 145[A] (App Term, 2d Dept 2012)). Moreover, the plaintiff's reliance on its counsel's affirmation alone, is insufficient to raise an issue of fact.

Accordingly, defendant's motion is granted as the plaintiff has not raised an issue of fact in opposition to the defendant's *prima facie* showing of entitlement to judgment as a matter of law.

This constitutes the Decision and Order of this court.

  
ANDREA PHOENIX  
J.D.C.

Dated: Hempstead, New York  
August 3, 2012

cc: Baker, Sanders, Barshay  
Law Office of Rhonda H. Barry