

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

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AMERICAN CHIROPRACTIC CARE, P.C.,  
a/o MIGDALIA MORALES,

Plaintiff(s)

**INDEX NO. CV-013832-11**

**Present:**

against

**Hon. ANDREA PHOENIX**

PRAETORIAN INSURANCE COMPANY,

Defendant(s)  
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**The following named papers numbered 1 to 4  
submitted on this motion on April 20, 2012**

	<b>papers numbered</b>
Notice of Motion and Affidavits Annexed	1-2
Answer Affidavits	3
Reply Affidavits	4

The plaintiff commenced this action seeking to recover no-fault first party benefits for medical services provided to its assignor, Migdalia Morales, following a motor vehicle accident which occurred on April 16, 2010.

The defendant moves for an order pursuant to CPLR §3212 granting summary judgment in its favor. The defendant alleges that it issued a proper and timely denial of the within claims on the grounds that the services were not medically necessary.

The plaintiff opposes the motion on the grounds that the independent medical examination conducted by Dr. Alex Khait contradicts the affidavit submitted by defendant regarding the defense of a lack of medical necessity. The defendant submits a reply.

In support of a motion for summary judgment, a proponent must tender sufficient evidence in admissible form to eliminate any triable issue of fact (see *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]). In order to succeed on a motion for summary judgment, the defendant must demonstrate, through the submission of evidentiary proof in admissible form, that it timely issued a proper NF-10 denial in response to the plaintiff's claim.

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To prove timely service, the defendant must demonstrate "either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that the items are properly addressed and mailed", or one "geared so as to ensure the likelihood that a notice ... is always properly addressed and mailed" (*Residential Holding Corp. v. Scottsdale Insurance Company*, 286 AD2d 679 [2d Dept 2001]; see also, *New York Presbyterian Hospital v. Allstate Insurance Company*, 29 AD3d 547 [2d Dept 2006]; *Nassau Insurance Company v. Murray*, 46 NY2d 828 [1978]).

The defendant has proven that it timely issued an NF-10 Denial of Claim Form (see *Affidavit of Mirka Dougert*, a claim's representative for the defendant; see also *Residential Holding Corp. v. Scottsdale Insurance Company*, 286 AD2d 679 [2d Dept 2001]; *New York Presbyterian Hospital v. Allstate Insurance Company*, 29 AD3d 547 [2d Dept 2006]).

Moreover, with respect to the defendant's lack of medical necessity defense, before an expert peer review doctor is permitted to offer an opinion, the witness must be qualified as an expert (*Price v. New York City Housing Auth.*, 92 NY2d 553 [1998]; *Caprara v. Chrysler Corp.*, 52 NY2d 114, rearg. dnd. 52 NY2d 1073 [1981]; *Meiselman v. Crown Heights Hospital*, 285 NY 389 [1941]; *Geffner v. North Shore University Hosp.*, 57 AD3d 839 [2d Dept 2008]).

To qualify as an expert, the witness must possess " ... the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable (citations omitted)" (*Matott v. Ward*, 48 NY2d 455, 460 [1979] and *de Hernandez v. Lutheran Medical Center*, 46 AD3d 517 [2d Dept 2007]; see also *Geffner v. North Shore University Hosp.*, *supra*).

Moreover, the peer review doctor must establish a familiarity with generally accepted practice, must establish what generally accepted practice is under the circumstances and must state the questioned treatment was not in accordance with those standards (*Williamsbridge Radiology & Open Imaging v. Travelers Indemnity Co.*, 14 Misc 3d 1231[A] [Civil Ct Kings Co 2007]).

The Court finds that the report of Dr. Cirino Cestro 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*

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*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]). Accordingly, the defendant has met its burden. Thus, the burden shifts to the plaintiff.

The Court finds that the report of plaintiff's doctor, Dr. Alex Khait sufficiently raises a triable issue of fact with regard to a lack of medical necessity defense. Thus, the defendant's motion for summary judgment is denied.

So Ordered:

  
DISTRICT COURT JUDGE

Dated: June 4, 2012

CC: Law Offices of Moira A. Doherty, P.C.  
Friedman, Harfenist, Kraut & Perlstein, LLP

AP:blm