

DISTRICT COURT OF NASSAU COUNTY  
FIRST DISTRICT : CIVIL PART 1

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**POWER CHIROPRACTIC, P.C.**  
Assignee of **FRANCES MUNRO RHONDA,**

Plaintiff,

**Index No. CV-15841/11**

-against-

**Present:**  
**Hon. Terence P. Murphy**

**KEMPER INDEPENDENCE INSURANCE COMPANY,**

Defendant.

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**The following named papers were submitted  
on this motion.**

**papers numbered**

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Notice of Motion w/annexed supporting papers.....	1
Affirmation in Opposition w/annexed supporting papers.....	2
Reply Affirmation w/annexed supporting papers.....	3

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Before the Court in this No-Fault case is the defendant’s motion seeking summary judgment against the plaintiff and the same is determined as provided herein.

The legal standard for summary judgment motions was articulated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.*, 207 AD2d 880, 616 NYS2d 650, 651 (1994):

“It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853, 487 NYS2d 316; *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 AD2d 607, 467 NYS2d 944), but once a *prima*

*facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923; *Zuckerman v. City of New York, supra*, 49 NY2d at 562, 427 NYS2d 595)".

The defendant supports its motion by challenging the necessity of the medical services rendered to the plaintiff's assignor with the peer review report of Dr. Martin J. Epstein, D.C. dated December 27, 2009. In said report Dr. Epstein recited the records and materials reviewed in preparation for his report and set forth that he also personally examined the patient in question.. He concludes that he questions the justification for the Voltage-actuated Sensory Nerve Conduction Threshold (V-sNCT) testing performed by Sophie Mohuchy, D.C. under fee schedule code 95904 as the test findings allegedly fail to indicate any latency/velocity values. Dr. Epstein also notes that Dr. Mohuchy provides no clinical documentation to show the chiropractic necessity of the testing performed. Lastly, Dr. Epstein notes that the plaintiff was not given the "gold standard" test to evaluate neuropathy/radiculopathy, and explains why the test actually given to the assignor is considered experimental and incomplete.

Once a defendant-insurer makes a showing that claims were timely denied for a lack of medical necessity, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact. (*I & B Surgical Supply v. New York Central Mutual Fire Insurance Company*, 16 Misc3d 4).

In opposition to the motion the plaintiff offers the rebuttal peer review report of Dr. Lloyd Kupferman, D.C. on the issue of medical necessity. Although the defendant criticizes Dr. Kupferman's report as providing an opinion without a factual basis and medical rationale, review of the subject report finds the opposite to be true. The defense arguments offered in reply papers, as they apply to Dr. Kupferman's report, are conclusory. One professional refuting the claims of another is one thing, however, without detail and example, it is baseless.

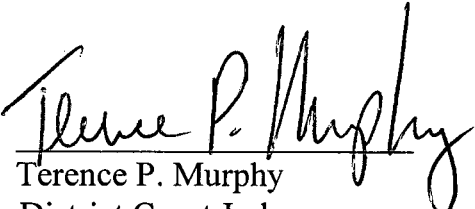
Based upon the foregoing, the Court finds that the opposition papers offered by the plaintiff create an issue of fact as to the medical necessity of the services provided by the plaintiff to its assignor. Accordingly, summary judgment is inappropriate and is DENIED.

However, the defendant correctly notes that the plaintiff failed to rebut the fact that the first bill in the amount of \$391.74, for medical services rendered from 10/9/09 through 10/30/09, is premature as there is an outstanding verification request relating to

the same and the plaintiff has not offered admissible evidence that the verification request was satisfied. Accordingly, plaintiff's claim for this bill is DISMISSED.

Lastly, the Court finds that the defendant has met its burden on the issue of timely denial and is, therefore, granted partial summary judgment as it concerns the same.

**So Ordered:**

  
Terence P. Murphy  
District Court Judge

Dated: May 17, 2012

cc: Friedman, Harfenist, Kraut & Perlstein, LLP, Attorneys for the Plaintiff  
Gullo & Associates, LLC, Attorneys for the Defendant