

SCAN

Present:

HON. JOSEPH COVELLO

Justice

THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, a/a/o JOSE VEGA, BENJAMIN CARRASQUILLO, JOSE LOPEZ, STEFAN MARKETOS; THE NYACK HOSPITAL, a/a/o FAITH ALEXANDRE; ST. VINCENT'S HOSPITAL & MEDICAL CENTER, a/a/o ISAAH FULTON; THE HOSPITAL FOR JOINT DISEASES, a/a/o JOSEPH HUNTER,

Plaintiff,

-against -

ALLSTATE INSURANCE COMPANY,  
Defendant.

TRIAL/IAS, PART 24  
NASSAU COUNTY

Index #: 016727/03

Motion Seq. #: 01 & 02

Motion Date: 04/12/04

the following paper read on the motions:

Notice of Motion .....	1
Notice of Cross Motion .....	2
Reply and Opposition to Cross Motion .....	3

Upon the foregoing papers, the motion by plaintiffs, for an order pursuant to CPLR §3212 awarding them summary judgment against defendant, Allstate Insurance Company, and the cross-motion by defendant, Allstate Insurance Company (Allstate), for an order granting it summary judgment dismissing the plaintiffs complaint, are determined as follows.

This is an action pursuant to Insurance Law §5106 (a) to recover no-fault benefits allegedly due under insurance contracts issued by defendant, Allstate. The complaint asserts seven separate causes of action seeking the recovery of no-fault insurance benefits, interest and counsel fees. These actions were joined pursuant to CPLR §1002(a) as the claims arise out of a uniform contract of insurance, and involve the interpretation of the same no-fault provisions of the Insurance Law.

The plaintiffs seek summary judgment in the amount of their bills pursuant to 11 NYCRR 65-3.8(a)(1), as well as interest and attorney's fees pursuant to 11 NYCRR 65-4.6(e). (See, **Presbyt. Hosp. v Maryland Casualty**, 90 NY2d 274).

Prior to submission the plaintiff withdrew the second, sixth and seventh causes of action.

As to the first cause of action, it is asserted on behalf of plaintiff, New York Hospital

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Medical Center of Queens, (Queens Hosp.) a/a/o Jose Vega, that it rendered health services to Vega from August 24, 2003 through September 4, 2003, arising out of a motor vehicle accident on August 24, 2003; that on September 15, 2003, it billed the defendant insurance company with a hospital facility form NF-5 and UB-92, for the payment of a hospital bill in the sum of \$7,996.12. The bill was sent via certified mail, return receipt requested, and was received by defendant, Allstate, on September 18, 2003; that the defendant, Allstate, failed to pay the hospital bill or issue a Denial of Claim Form within thirty (30) days, as required by 11 NYCRR 65-3.8(a)(1), and the bill remains unpaid.

On the third cause of action, it is asserted on behalf of plaintiff, Queens Hosp., a/a/o Jose Lopez, that it rendered health services to Lopez from September 6, 2003 through September 7, 2003, arising out of a motor vehicle accident on September 6, 2003; that on September 19, 2003, it billed the defendant insurance company with a hospital facility form NF-5 and UB-92, for the payment of a hospital bill in the sum of \$2,421.47. The bill was sent via certified mail, return receipt requested, and was received by defendant, Allstate, on September 22, 2003; that the defendant, Allstate, failed to pay the hospital bill or issue a Denial of Claim Form within thirty (30) days, as required by 11 NYCRR 65-3.8(a)(1). On December 3, 2003 the defendant paid the sum of \$2,461.83. However plaintiff asserts that since the bill was not paid or denied by defendant within thirty days of receipt that statutory attorney fees are due as a matter of law.

On the fourth cause of action, it is asserted on behalf of plaintiff, Queens Hosp., a/a/o Stefan Marketos that it rendered health services to Marketos from August 15, 2003 through August 20, 2003, arising out of a motor vehicle accident on August 15, 2003; that on September 10, 2003, it billed the defendant insurance company with a hospital facility form NF-5 and UB-

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92, for the payment of a hospital bill in the sum of \$7,063.06. The bill was sent via certified mail, return receipt requested, and was received by defendant, Allstate, on September 11, 2003; that defendant, Allstate, failed to pay the entire hospital bill or issue a Denial of Claim Form within thirty (30) days, as required by 11 NYCRR 65-3.8(a)(1). On September 30, 2003 (within the thirty days) defendant made a partial payment of the sum of \$4,602.51. Plaintiff asserts the balance remains unpaid and defendant still has not issued a Denial of Claim Form.

On the fifth cause of action, it is asserted on behalf of plaintiff, Nyack Hospital, a/a/o Faith Alexandre, that it rendered health services to Alexandre from January 16, 2003 through January 20, 2003, arising out of a motor vehicle accident on January 16, 2003; that on August 25, 2003, it billed the defendant insurance company with a hospital facility form NF-5 and UB-92, for the payment of a hospital bill in the sum of \$3,706.76. The bill was sent via certified mail, return receipt requested, and was received by defendant, Allstate on August 26, 2003; that defendant, Allstate, failed to pay, or deny the claim within thirty (30) days, as required by 11 NYCRR 65-3.8(a)(1), and the bill remains unpaid. On October 9, 2003, defendant issued a denial of claim form which plaintiff contends was defective and untimely.

The plaintiff has annexed copies of the NF-5 forms and UB-92 billing statements along with proof they were served on and received by defendant, Allstate for the claims in the first, third and fourth causes of action. The plaintiffs' no-fault billings for those claims were made on forms mandated by Insurance Department Regulations. (11 NYCRR 65.15[c][3]).

Accordingly, the plaintiffs have made a *prima facie* showing that they are entitled to summary judgment on the first, third and fourth causes of action. (See **Mount Sinai Hosp. v Triboro Coach, Inc.**, 263 AD2d 11, 16). Plaintiffs did not annex a UB-92 billing statement for the fifth cause of action accordingly plaintiff has not sustained its initial burden on the fifth cause of action.

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The defendant opposes and cross-moves for summary judgment to dismiss the plaintiffs' complaint on several grounds. Initially the defendant asserts that the plaintiffs' assignments of benefits are invalid and that the plaintiffs' bills are not signed by the treating physician. The defendant further asserts that the plaintiffs' motion is premature as discovery is outstanding and as plaintiff has not responded to verification requests.

As to the first cause of action, defendant asserts that it timely sent a verification request dated October 1, 2003 to plaintiff hospital and Vega. When the records were not provided it served a follow up verification request on January 14, 2004. Defendant has provided an Affidavit from Barbara Haughey an Allstate claims adjuster wherein she asserts that Allstate mailed a verification letter dated October 1, 2003 to the Hospital and Vega which sets forth "claim delayed pending receipt and review of complete hospital records".

Plaintiff in response asserts that it never received a verification request for this claim.

As to the third cause of action, defendant asserts that on December 3, 2003 it paid the claim with interest. Defendant concedes that as the payment was untimely and statutory attorneys fees are owed.

As to the fourth cause of action defendant asserts that it did receive the bill and that a partial payment was made. However, defendant contends that the payment of \$4,602.51 was made under the assignor's medical payment coverage and not for his assigned no-fault benefits. Defendant asserts that it denied no-fault benefits on this claim as New York State No-Fault coverage does not apply to an operator or passenger on a motorcycle. Barbara Haughey, the Allstate claims adjuster, sets forth in her affidavit that this no-fault claim was denied as the assignor was involved in a motorcycle accident. However, no documentation has been provided that defendant, Allstate, issued a denial to plaintiffs.

Plaintiff asserts that the description of the claim contained in the N-F-5 form sets forth,

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driver was injured in a motor vehicle accident. Plaintiff also contends that there is no indication the assignor's injuries were the result of a motorcycle accident and defendant has not provided any proof that the assignor was on a motorcycle.

As to the fifth cause of action defendant asserts that the billing for this claim is in violation of the latest No-Fault regulations, as it was not submitted within 45 days from the date of service as required by NYCRR 65-1.1. Allstate further asserts that it did not receive this bill on August 26, 2003 as plaintiff alleges but that its first notice of this bill was when it received it annexed to the Summons and Complaint in this action. Allstate also states that the cover letter indicates the bill was for \$3,706.76 however, the actual bill was only for \$706.76.

Plaintiff asserts that defendant, Allstate, waived this defense as it failed to issue a denial of claim form within 30 days of receipt of the billing on August 26, 2003 (see *St. Clare's Hosp. v. Allcity Ins. Co.*, 201 AD2d 438). Plaintiff further asserts the allegations by Allstate that its first receipt of the billing documents was when it received the summons and complaint is a patent falsehood as the certified receipt is conclusive proof of the mail delivery (see, **Public Service Mut. Ins. Co. V. Zucker**, 225 AD2d 308). Moreover, plaintiff asserts that Allstate (untimely) issued a denial letter dated October 9, 2003, wherein it claimed the treatment was not related to motor vehicle accident. Plaintiff in reply does not address the \$3,000.00 dispute in the amount it claims and the amount that Allstate asserts was actually billed. Moreover, as previously set forth plaintiff has not provided a UB-92 for this claim or any documentation of the actual bill.

It is well settled pursuant to Insurance Law §5106 (a) that no fault benefits "are overdue if not paid within thirty (30) days after the claimant supplies proof of the fact and amount of loss sustained", and that an "insurer which fails to properly deny a claim within thirty (30) days as required by these statutory provisions may be precluded from interposing a defense to the

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plaintiff's lawsuit" (**Mount Sinai Hosp. v. Triboro Coach**, 263 AD2d 11, 16).

However, "[s]trict compliance with the time requirements of both the statute and regulations may be obviated and the preclusion remedy rendered unavailable when denial of claims is premised on a lack of coverage" (**Central Gen. Hosp. v. Chubb Group of Ins. Cos.**, 90 NY2d 195, 199).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and is therefore, entitled to judgment as a matter of law (**Alvarez v Prospect Hosp.** 68 NY 2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (**Miller v Journal News**, 211 AD2d 626). Thus, the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (**Ayotte v Gervasio**, 81 NY2d 1062).

On the first cause of action defendant timely requested verification which plaintiff did not provide. On the third cause of action defendant concedes that it untimely paid this claim accordingly plaintiff is entitled to statutory attorneys fees. On the fourth cause of action defendant has raised a genuine issue of fact as to whether the assignor's treatment is related to a motorcycle accident and therefore no coverage. On the fifth cause of action plaintiff has failed to meet its prima facie entitlement to summary judgment. Defendant has also failed to show a prima facie entitlement to summary judgement on any of the four remaining causes of action.

Therefore, it is hereby

**ORDERED**, that the plaintiff's motion for summary judgment is denied as to the first, fourth and fifth causes of action. It is further

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**ORDERED**, that the plaintiff's motion is granted as to the third cause of action for statutory attorneys fees on that claim. It is further

**ORDERED**, that the defendant's cross-motion for summary judgment is denied in its entirety. It is further

**ORDERED**, that counsel for the parties all parties are directed to appear on **July 22, 2004, at 2:30 pm.**, before Justice Joseph Covello at 100 Supreme Court Drive, Mineola, New York, 11501, **AT THE PRELIMINARY CONFERENCE DESK, LOWER LEVEL (Not Chambers) for a PRELIMINARY CONFERENCE**, on the remaining cause of action. It is further

**ORDERED**, that a representative from each parties office fully familiar with the case (or the individual party if appearing *pro se*) must appear for the Preliminary Conference. In the event of actual engagement (Court Rule 125.1) you must contact a DCM Case Coordinator prior to the PC date. Service may not answer on DCM matters. No motions are to be made without prior authorization of the DCM Dept.

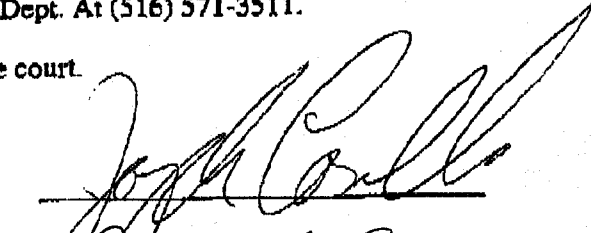
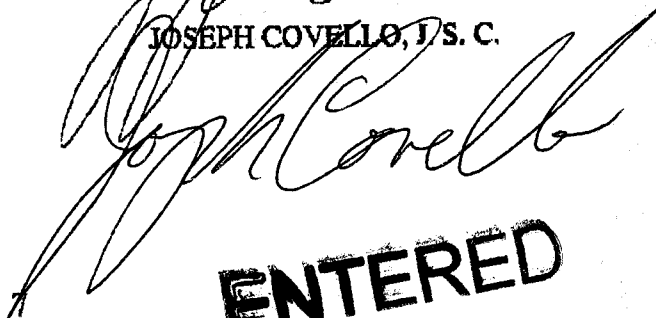
**Failure to appear may result in the imposition of sanctions and a case management plan being ordered in your absence.**

If you have any questions, please call DCM Dept. At (516) 571-3511.

This constitutes the decision and order of the court.

Dated: June 25, 2004

7-6-04

  
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JOSEPH COVELLO, J.S. C.  


**ENTERED**

JUL 13 2004  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE