

S

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**PRESENT: HON. WILLIAM R. LaMARCA  
Justice**

**NEW YORK METHODIST HOSPITAL, a/a/o  
KYLE COOK; WESTCHESTER MEDICAL  
CENTER, a/a/o COLIN SMITH, SEGUNDO TAPIA,**

**Motion Sequence #1, #2  
Submitted February 15, 2008**

**Plaintiffs,**

**-against-**

**INDEX NO: 18565/07**

**TRAVELERS PROPERTY CASUALTY INSURANCE  
COMPANY,**

**Defendant.**

**The following papers were read on these motions:**

<b>Notice of Motion (#1).....</b>	<b>1</b>
<b>Notice of Cross-Motion(#2).....</b>	<b>2</b>
<b>Reply and Opposition to Cross-Motion.....</b>	<b>3</b>
<b>Reply Affirmation.....</b>	<b>4</b>

**Relief Requested**

Plaintiffs, NEW YORK METHODIST HOSPITAL a/a/o KYLE COOK, and WESTCHESTER MEDICAL CENTER a/a/o COLIN SMITH and SEGUNDO TAPIA, move for summary judgment against defendant, TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY (hereinafter referred to as "TRAVELERS"), on the ground that TRAVELERS has failed to timely pay or deny the claims submitted under the subject policy of insurance and that it is entitled to interest and attorneys fees because of the delay in

payment. TRAVELERS opposes the motion and cross-moves for summary judgment dismissing the complaint on the grounds that the claim is either premature or that a condition precedent warrants dismissal. This matter arises out of the alleged failure of TRAVELERS to pay three (3) separate no-fault billings. Initially, the Court notes that the first cause of action, NEW YORK METHODIST HOSPITAL a/a/o KYLE COOK v. TRAVELERS has been withdrawn and the motion only concerns the claims of WESTCHESTER MEDICAL CENTER a/a/o COLIN SMITH (second cause of action) and SEGUNDO TAPIA (third cause of action). The motion and cross-motion are determined as follows:

#### **The Statute**

11 NYCRR, Part 65, the regulations implementing the Comprehensive Motor Vehicle Insurance Reparations Act, commonly referred to as the No-Fault Law, provides that “No-Fault Benefits are overdue if not paid within 30 calendar days after the insurer receives proof of Claim...”. (11 NYCRR 65-3.8[a][1]). Within thirty (30) days of receiving a claim, the insurer is required to either pay or deny the claim in whole or in part (see, Insurance Law §5106[a]; 11 NYCRR 65-3.8 [c]). However, this thirty (30) day period may be extended by a timely demand by the insurance company for further verification of a claim (see, 11 NYCRR 65-3.5). Within 10 business days after receipt of the completed application for no fault benefits, the insurer must forward, to the parties required to complete them, the prescribed verification forms it will require prior to payment of the initial claim (see, 11 NYCRR 65-3.5[a]). Subsequent to the receipt of one or more of the completed prescribed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the

prescribed verification form (see, 11 NYCRR 65-3.5[b]). If the demanded verification is not received within thirty (30) days, the insurance company must follow up within ten (10) calendar days of the claimant's failure to respond, either by telephone call or mail (see, 11 NYCRR § 65-3.6[b]); *New York Hospital Medical Center of Queens v State Farm Mutual Automobile Insurance Company*, 293 AD2d 588, 741 NYS2d 86 [2<sup>nd</sup> Dept. 2002]). As a complete proof of claim is a prerequisite to receiving no-fault benefits, a claim need not be paid or denied until all demanded verification is provided (see, 11 NYCRR 65-3.5[c]; *Montefiore Medical Center v New York Central Mutual Fire Insurance Company*, 9 AD3d 354, 780 NYS2d 161 (2<sup>nd</sup> Dept. 2004); *New York & Presbyterian Hospital v American Transit Insurance Co.*, 287 AD2d 699, 733 NYS2d 80 (2<sup>nd</sup> Dept. 2001); *Hospital for Joint Diseases v Elrac, Inc.*, 11 AD3d 432, 783 NYS2d 612 (2<sup>nd</sup> Dept. 2004). Statutory interest and attorneys fees may be directed If payment is not timely made on a completed claim. See, *Insurance Law § 5106(a)*, 11 NYCRR §65-3.9 and §3.10.

**Second Cause of Action - COLIN SMITH**

Plaintiff, WESTCHESTER MEDICAL CENTER (hereinafter referred to as "WESTCHESTER"), is the assignee for health services rendered to COLIN SMITH during the period from August 1, 2007 through August 3, 2007, arising out of an automobile accident that occurred on August 1, 2007. COLIN SMITH, as the insured, was a covered person under the automobile policy issued by TRAVELERS which contained a New York State no-fault endorsement. WESTCHESTER claims that it billed TRAVELERS with a Hospital Facility Form (Form N-F5) and a UB-92 on August 20, 2007 in the sum of \$2,279.77, which was received by TRAVELERS on August 24, 2007, via Certified Mail,

Return Receipt Requested. It is plaintiff's position that TRAVELERS failed to either timely pay or issue a Denial of Claim Form and, therefore, WESTCHESTER is entitled to summary judgment with interest and attorney's fees as a matter of law, citing *Hempstead General Hospital v Insurance Company of North America*, 208 AD2d 501, 617 NYS2d 478 (2<sup>nd</sup> Dept. 1994) and *Presbyterian Hospital v. Maryland Casualty Co.*, 90 NY2d 274, 660 NYS2d 536, 683 NE2d 1 (C.A. 1997).

In opposition to the motion, counsel for TRAVELERS contends that plaintiff failed to establish a *prima facie* case because the UB-92 form identifies the patient as "Trauma Russia", and not COLIN SMITH. Additionally, the affidavits of TRAVELERS employees assert that the claim is premature because requests for verification of the claim were made on September 18, 2007 and on October 23, 2007 and that the records had not been received. Counsel contends that the claim was not over-due when the action was commenced and, therefore, the cross-motion for summary judgment dismissing the complaint should be granted.

In reply, WESTCHESTER states that the argument concerning the name of "Trauma Russia" is frivolous because that is not the actual name of the patient, but the name given to a patient that is unconscious or non-responsive when they come into the hospital, until the actual name is ascertained. It is WESTCHESTER's position that TRAVELERS had no difficulty identifying the claim and their further requests for verification concern COLIN SMITH. Counsel for WESTCHESTER states that the complete hospital records were mailed to TRAVELERS on September 18, 2007, which completed the claim, and that the further requests, made on October 23, 2007, for lab results was faxed on

January 2, 2008. Counsel for WESTCHESTER states that since receipt of the additional verification TRAVELERS did not pay or issue a denial.

Counsel for TRAVELERS, points out that an insurer is not obligated to pay or deny a claim until all demanded verification is received. Therefore, counsel argues that, since the requested verification was not received until January 2, 2008, the claim was not overdue when the action was commenced, on October 17, 2007, and was , therefore, premature.

### **Third Cause of Action - SEGUNDO TAPIA**

Plaintiff, WESTCHESTER MEDICAL CENTER (hereinafter referred to as "WESTCHESTER"), is the assignee for health services rendered to SEGUNDO TAPIA during the period from January 1, 2007 through January 4, 2007, arising out of an automobile accident that occurred on January 1, 2007. SEGUNDO TAPIA was a covered person under the automobile policy issued by TRAVELERS to Saul Garzon which contained a New York State no-fault endorsement. WESTCHESTER claims that it billed TRAVELERS with a Hospital Facility Form (Form N-F5) and a UB-92 on July 19, 2007 in the sum of \$15,151.71, which was received by TRAVELERS on July 23, 2007, via Certified Mail, Return Receipt Requested and that the claim became overdue on August 23, 2007. It is plaintiff's position that TRAVELERS denial of the claim, on August 25, 2007, was defective and untimely. Counsel for WESTCHESTER states that the sums denied are incorrect and that the denial, based upon failure to provide written notice of the claim within thirty (30) days from the accident is "invalid". WESTCHESTER claims that it is entitled to summary judgment with interest and attorney's fees as a matter of law, citing *Hempstead*

*General Hospital v Insurance Company of North America, supra, and Presbyterian Hospital v Maryland Casualty Co., supra.*

In opposition to the motion, counsel for TRAVELERS contends that the claim denial was proper as defendant failed to satisfy a condition precedent which required that the carrier receive written notice of the accident no more than thirty (30) days after the accident. Lisa Knowlton, a claims representative for TRAVELERS, states that notice of the accident was received by telephone on April 4, 2007, more than ninety (90) days after the loss, which occurred on January 1, 2007. She claims that all benefits were denied on the basis that the notice of claim was untimely, on May 16, 2007. A review of the Denial of Claim Form, NF-10, of that date (Exhibit "D" annexed to cross-motion), apparently sent to the insured, shows an incomplete Form, with items 23-32 missing, with the name of the injured listed as "Segundo R. Lupercio". A review of the Denial of Claim Form, NF-10, dated April 25, 2007, apparently sent to WESTCHESTER, has items 23-32 filled in with the amount of the dispute listed as \$54,402.00 and the name of the injured listed as "Segundo Lupercio". Although counsel for TRAVELERS states that the amount of the bill is taken from the hospital generated UB-92 form and "the amount in dispute is identical to the amount of the bill", clearly the UB-92 form is not a no-fault bill and the NF-5 form is the authorized no-fault bill with the proper DRG rate. However, counsel for WESTCHESTER points out that, notwithstanding the discrepancy in the amount in dispute, the Denial of Claim is beyond the thirty (30) day period permitted by statute (billing received on July 23, 2007 and denial made on August 25, 2007) and is late on its face. He states that even the earlier denial to the insured, dated May 16, 2007, is substantially incomplete and therefore defective.

In reply, counsel for TRAVELERS asserts that the denial is not defective, despite the incorrect and missing information, because the basis for the denial was claimant's failure to fulfill a condition precedent required by the policy which was addressed to the entire claim and not any specific bill. It is TRAVELERS' position that an insurer can deny a claim retroactively to the date of loss for a claimant's failure to fulfill a condition precedent and that the thirty (30) day rule does not apply, citing *Stephen Fogel Psychological, P.C. v Progressive Casualty Insurance Co.*, 35 AD3d 720, 827 NYS2d 217 (2<sup>nd</sup> Dept. 2006).

### The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2<sup>nd</sup> Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2<sup>nd</sup> Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2<sup>nd</sup> Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2<sup>nd</sup> Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2<sup>nd</sup> Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheev v Pilevsky*, *supra*). The burden

on 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, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 [C.A. 1985]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2<sup>nd</sup> Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2<sup>nd</sup> Dept. 1988]).

**As to the Second Cause of Action - COLIN SMITH**

After a careful reading of the submissions herein, the Court credits the analysis of TRAVELERS which contends that an insurer is not obligated to pay or deny a claim until all demanded verification is received. Since all requested verification was not received until January 2, 2008, the claim was not overdue when the action was commenced, on October 17, 2007, and the action was therefore premature. Therefore, the Court denies WESTCHESTER's motion for summary judgment and grants TRAVELERS' cross-motion for summary judgment dismissing the second cause of action.



### As to the Third Cause of Action - SEGUNDO TAPIA

After a careful reading of the submissions herein, the Court credits the analysis of WESTCHESTER, that the denial of claim forms forwarded to both the insured and the carrier are incomplete and defective. Not only is the name of the claimant incorrect, but the sums claimed to be in dispute is also incorrect. Additionally, the N-F5 form received by TRAVELERS on July 23, 2007 was overdue on August 23, 2007, and their Denial of Claim forwarded on August 25, 2007 was untimely. No-fault claims that were never actually denied but were not paid within thirty (30) days of presentation, are "overdue" within the meaning of the Insurance Law requiring an award of interest and attorney fees on the claim from the date the claim was first presented. *Hempstead General Hospital v Insurance Company of North America, supra*. Although TRAVELERS argues that the claim was previously denied on the basis of claimant's failure to notify the carrier within thirty (30) days of the accident, in a N-F5 form forwarded to the insured on May 16, 2005, said form is also incomplete and defective in many ways. Moreover, the Court rejects TRAVELERS' reliance on *Stephen Fogel Psychological, P.C. v Progressive Casualty Insurance Co., supra*, which deals with claimants failure to attend an independent medical examination (IME), which was required whether the carrier demanded the IME before the claim form was submitted or after the claim form was submitted. While the decision does state that the insurer may deny the claim retroactively to the date of loss for claimant's failure to attend an IME, it does not state that the thirty (30) day rule does not apply and does not address the issue of an untimely denial of claim. Accordingly, the Court finds that TRAVELERS denial of the claim is untimely and that WESTCHESTER is entitled to

summary judgment. While the Court finds that the failure to inform the insurer of the claim within the required thirty (30) day period is a valid basis for denying payment of the claim, said denial must be timely and adhere to the thirty (30) day rule. See, *Insurance Law §5106(a) and 11 NYCRR 65-3.8 (a)(1)*. Attorney's fees are limited to 20% of the amount of first party benefits, plus interest thereon, subject to a maximum fee of \$850.00. See, 11 NYCRR §65-4.6(e). Interest shall be assessed at the rate of 2% per month. See, *Insurance Law § 5106 (a); Smithtown General Hospital v. State Farm Mutual Auto Insurance Co.*, 207 AD2d 338, 615 NYS2d 426 (2<sup>nd</sup> Dept. 1994).

**Conclusion**

Based on the foregoing, it is hereby

**ORDERED**, that the motion of plaintiff, WESTCHESTER MEDICAL CENTER a/a/o COLIN SMITH, for summary judgment on the second cause of action is denied and the cross-motion of TRAVELERS for summary judgment dismissing the action is granted; and it is further

**ORDERED**, that the motion of plaintiff, WESTCHESTER MEDICAL CENTER a/a/o SEGUNDO TAPIA, for summary judgment on the third cause of action is granted and the cross-motion of TRAVELERS for summary judgment dismissing the action is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court. Settle judgment on notice.

Dated: May 7, 2008

  
WILLIAM R. LaMARCA

**ENTERED**

MAY 12 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

TO: Joseph Henig, PC  
Attorney for Plaintiff  
1598 Bellmore Avenue  
Bellmore, NY 11710

McDonnell & Adels, PC  
Attorneys for Defendant  
401 Franklin Avenue  
Garden City, NY 11530

nymethodist&westchestermedical-travelers,#1,#2/sumjudg