

**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. PETER B. SKELOS,  
Justice.

TRIAL/IAS PART 24  
NASSAU COUNTY

THE HOSPITAL FOR JOINT DISEASES, a/a/o  
RAEANNE EDWARDS; NYACK HOSPITAL,  
a/a/o MICHAEL D. WALKER; NEW YORK  
HOSPITAL MEDICAL CENTER OF QUEENS,  
a/a/o DANIEL CHAMBERS, CHONG ISBELL,

Plaintiffs,

-against-

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

MOTIONS # 01, 02  
INDEX # 8474/02  
MOTION SUBMITTED:  
SEPTEMBER 12, 2002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	1
Cross Motion/Answering Affidavits.....	2
Reply Affidavits.....	3

Plaintiff hospitals move for summary judgment and an order directing the defendant, State Farm Mutual Automobile Insurance Company (State Farm), to make certain payments under the no-fault policies of the respective patients/assignors. Plaintiffs contend that defendant has failed to act in accordance with Insurance Law § 5106 which requires timely payment or denial of the requests for no-fault benefits. The various causes of action are decided herein.

### First Cause of Action (Edwards)

Rae Anne Edwards was hospitalized at the Hospital for Joint Diseases (HJD) from February 14, 2002 to February 28, 2002. HJD claims that the hospitalization arises from an automobile accident that occurred on October 13, 2001. On March 11, 2002, the hospital submitted forms N-F 5 and UB-92 to State Farm for payment of no-fault benefits in the amount of \$10,791.20. HJD alleges that the application was received by State Farm on or about March 13, 2002 and that State Farm neither paid nor denied the claim within 30 days of the application.

A State Farm claims representative, Rory Stecker, an individual personally familiar with the payment history under the subject policy, avers that the policy limit of \$50,000.00 was previously exhausted and that notice to that effect was sent to HJD on March 26, 2002. By way of his affidavit, Stecker introduced a payment log showing that State Farm previously paid over \$50,000.00 in no-fault benefits arising from the accident. Exhaustion of benefits constitutes a defense to this cause of action (*see, Presbyterian Hospital v General Accident Ins. Co. of America*, 229 AD2d 479, 480; *Presbyterian Hospital v Empire Ins. Co.*, 220 AD2d 733). Plaintiff's motion for summary judgment on the first cause of action is therefore denied and this cause of action dismissed.

### Second Cause of Action (Walker)

Michael D. Walker was hospitalized at the Nyack Hospital (Nyack) from January 25, 2002 to January 28, 2002. Nyack claims that the hospitalization arises from an automobile accident on January 25, 2002. On February 12, 2002, the hospital submitted forms N-F 5 and UB-92 to State Farm for payment of no-fault benefits in the amount of \$3,213.30. Nyack alleges that the application was received by State Farm on or about February 14, 2002. On July

15, 2002 the defendant issued a denial of claim apparently on the basis of intoxication. Plaintiff claims that this denial is untimely.

In her affirmation in opposition, State Farm's counsel introduces exhibits indicating that State Farm timely commenced an investigation into the cause of the single car accident, sent timely requests to plaintiff's counsel requesting additional information to verify the claim, and notified plaintiff of a delay in processing the claim pending receipt of a blood alcohol report from the police. Defendant's counsel also introduces the denial of claim form allegedly sent to plaintiff on July 15, 2002. Significantly, counsel fails to introduce the blood alcohol report upon which State Farm allegedly based its denial of coverage.

The court finds that none of defendant's documents were properly introduced as admissible evidence sufficient to create an issue of fact. All of the above referenced documents were introduced by way of an affirmation prepared by State Farm's attorney. There is no indication that counsel has personal knowledge of the facts surrounding the preparation or mailing of the document requests or denial of claim, and no such affirmation by a person with knowledge is submitted. As such, plaintiff is entitled to summary judgment on the second cause of action (*see, Franklyn Folding Box Co. v Grinnell Mfg, Inc.*, 234 AD2d 505; *cf., Hosp. For Joint Diseases v Nationwide Mutual Ins. Co.*, 284 AD2d 374, 375).

### Third Cause of Action ( Chambers)

Daniel Chambers was hospitalized at the New York Hospital Medical Center of Queens (NYHMCQ) from February 16, 2002 to February 17, 2002 for injuries relating to an automobile accident which occurred on February 16, 2002. On March 7, 2002, the hospital submitted forms N-F 5 and UB-92 to State Farm for payment of no-fault benefits in the amount of \$3,129.72. NYHMCQ alleges that the application was received by State Farm on or about

March 11, 2002 and that State Farm neither paid nor denied the claim within 30 days of the application. However, plaintiff concedes that defendant paid the sum of \$2,087.69 on April 12, 2002. The hospital claims that it is entitled to the balance of the bill, statutory interest, and attorney fees.

In an affidavit submitted in opposition to the motion, Kerry Forte, a State Farm manager, avers that the charges contained in plaintiff's bill were in excess of the no-fault fee schedule. She further avers that *both* payment of the proper amount *and* a denial of claim for the amount in excess were mailed to the plaintiff on or about April 3, 2002, within the 30 day period prescribed by law. This stands in contrast to the case of *New York Hospital Medical Center of Queens v Country- Wide Insurance Company*, 295 AD2d 583, relied upon by plaintiff, wherein the court precluded the hospital from asserting a billing error defense *after* the 30 day response period had run. There was no such delay here. Accordingly, plaintiff's motion for summary judgment on the third cause of action is denied and that cause of action is dismissed.

#### Fourth Cause of Action (Isbell)

Chong Isbell was hospitalized at NYHMCQ from October 27, 2000 to October 28, 2000. NYHMCQ claims that the hospitalization arises from an automobile accident which occurred on October 27, 2000. According to the affidavit of Guy Ronzo, a biller and account representative at plaintiff hospital, on May 15, 2001, the hospital submitted forms N-F 5 and UB-92 to State Farm for payment of no-fault benefits in the amount of \$881.64. Plaintiff alleges that the application was received by State Farm on or about May 20, 2001 and that State Farm neither paid nor denied the claim within 30 days of the application.

The Ronzo affidavit does not actually allege that the N-F 5 and UB-92 forms were mailed to the defendant nor does it describe the method of mailing. There is no proof of mailing

whatsoever (*cf.*, *Park Health Center v Green Bus Line*, 2002 WL 416484 [App. Term 2002]; *Hosp. For Joint Diseases v Nationwide Mutual Ins. Co.*, 284 AD2d 374, 375). As such, plaintiff has failed to establish prima facie entitlement to summary judgment. The motion is denied as to the fourth cause of action.

ORDERED that plaintiff NYACK HOSPITAL shall have judgment on the second cause of action in the sum of \$3,213.30 plus statutory interest and attorney fees pursuant to 11 NYCRR 65.17(b)(6)(v). Plaintiff is directed to submit judgment on notice.

ORDERED that the first and third causes of action are dismissed.

ORDERED that counsel are to appear in the DCM Part (Room 186) for the purpose of entering a preliminary conference order on the fourth cause of action on January 23, 2002 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: January 15, 2003

  
PETER B. SKELOS, J.S.C.

**ENTERED**

**JAN 17 2003**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**