SC #N

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

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| **THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, a/a/o DAVID RAPACIOLI, RICHARD PAO; WESTCHESTER MEDICAL CENTER, a/a/o HENRY ALBU; MARY IMMACULATE HOSPITAL, a/a/o GLADYS DANIEL,** | **TRIAL/IAS, PART 16 NASSAU COUNTY** |
| **Plaintiffs,** | **INDEX NO.: 8114/02** |
| **-against-** | **MOTION SEQ.# 001, 002** |
| **GOVERNMENT EMPLOYEES INSURANCE COMPANY,** | **MOTION DATE: 01-07-03** |
| **Defendant(s).** | |

**The following papers having been read on this motion [numbered 1-3]:**

**Notice of Motion for Summary Judgment.....1**
**Notice of Cross-Motion with Affirmation in Opposition to Motion.....2**
**Reply & Opposition to Cross-Motion.....3**

Motion by the three plaintiff hospitals pursuant to CPLR 3212 for summary judgment is granted only with respect to the First, Second and Fourth Causes of Action. Plaintiff The New York Hospital Medical Center is awarded judgment for attorneys fees on the First Cause of Action in the amount of $850.00, and is awarded judgment on the Second Cause of Action in the amount of $2,559.55 plus statutory interest from April 12, 2002, and attorneys fees. Plaintiff Mary Immaculate Hospital is awarded attorneys fees in

the amount of $443.83 on the Fourth Cause of Action. Plaintiff Westchester Medical Center's motion for summary judgment on the Third Cause of Action is denied, and upon searching the record, summary judgment is granted to defendant Government Employees Insurance Company (GEICO) and the Third Cause of Action is dismissed. Cross-motion by defendant GEICO to dismiss the entire complaint on the grounds that plaintiffs lack standing is denied in its entirety.

Plaintiff hospitals, as assignees of four patients whose no-fault medical claims are allegedly unpaid and overdue, bring this action to recover for the unpaid hospital bills, statutory interest and attorney's fees pursuant to Insurance Law Section 5106 (a).

After this action was commenced the claims covered by the First and Fourth causes of action were paid in full with interest, and plaintiffs New York Hospital Medical Center of Queens and Mary Immaculate Hospital here seek attorneys' fees.

Recovery of attorney's fees is authorized by subdivision 1 of section 675 of the Insurance Law. The section provides that such recovery "shall be subject to limitations promulgated by the superintendent in regulations " (**Hempstead General Hosp. v. Allstate Ins. Co.,** 106 AD2d 429, 430, affd 64 NY2d 958). The regulations are set forth in 11 NYCRR 65.16 (c) (8), and these two causes of action are governed by subdivision (ix) which provides in relevant part:

> If a dispute involving an overdue or denied claim is resolved by the parties . . . after a court action has been commenced, the claimant's attorney shall be entitled to a fee which shall be computed in accordance with the limitations set forth in this paragraph.

Accordingly, plaintiffs are entitled to statutory attorneys' fees on the First and Fourth causes of action.

With respect to all causes of action defendant maintains that it should be awarded summary judgment as the plaintiffs have failed to establish standing (notwithstanding that the First and Fourth have been paid) . Defendant complains that the assignments of claim are not signed by the claimants and bear only the legend "signature on file". GEICO cites authority which does not address the issue (**see, Presbyterian Hosp. v. Maryland Cas. Co.**, 90 NY2d 274 [regarding defense of intoxication]; **Central Gen. Hosp. v. Chubb Group of Ins. Cos.**, 90 NY2d 195 [timely notification not required where injury does not arise out of an insured incident]); and it fails to address authority which governs. It is well established that the failure to timely object to a defect in the claim form results in a waiver (**Presbyterian Hosp. v. Aetna Cas. & Sur. Co.**, 233 AD2d 433, **lv app dsmd** 89 NY2d 1030 [Aetna "failed to allege any deficiency in the plaintiff hospital's assignment in its denial of claim"]; **see also, New York & Presbyterian Hosp. v. American Transit Ins. Co.**, 287 AD2d 699, 701).

GEICO also contends that disclosure should be provided before plaintiffs seek summary judgment. The typical negligence action, where disclosure provides a litigant the first opportunity to discover the merits of his or her adversary's case. However, the statutory scheme in a no-fault claim provides an insurer with disclosure without litigation and before payment is due. GEICO had the opportunity to request verification prior to the institution of suit; indeed if verification was desired, defendant was obligated to

request verification within ten days of receipt of the claim (11 NYCRR § 65.15[d][2]). Where, as here, the carrier fails to timely pay, deny, or request verification, it is precluded from raising any defense. Therefore disclosure is unnecessary *and* moot. The Court notes that a detailed discussion is provided in **Studin v. Allstate Ins. Co.**, 152 Misc.2d 221.

Addressing the Second cause of action plaintiff The New York Hospital Center of Queens (the hospital), as assignee of Richard Pao, seeks payment for injuries incurred in an accident on November 18, 2001. On March 11, 2002 the hospital submitted an NF-5 and UB92 for the sum of $2,559.55 and alleges that defendant failed to pay or deny or request verification within 30 days of receipt. In opposition GEICO generally alleges that the hospital failed to make out a prima facie case, e.g., claiming that it failed to establish medical necessity.

11 NYCRR 65.15(b)(6) provides that "an insurer shall accept a completed hospital facility form (NYS Form N-F 5) (or an N-F 5 and Uniform Billing Form . . . ) submitted by a provider of health services with respect to the claim of such provider." Plaintiff has produced copies of the NYS Form N-F 5, in addition to a uniform billing form (UB92) for Pao's hospitalization. The form contained the necessary information including "information regarding the description of the accident, whether the treatment was rendered solely as a result of injuries arising out of an automobile accident, as well as the particulars of the injuries and treatment received" (**Interboro General Hosp. v. Allcity Ins. Co.**, 149 AD2d 569, 570, **app dsmd** 74 NY2d 792). Thus, contrary to

defendant's contention, plaintiff New York Hospital Medical Center of Queens has established a prima facie case and is entitled to summary judgment (**Liberty Queens Med., P.C. v. Liberty Mut. Ins. Co.,** 2002 WL 31108069, 2002 [ NY Supreme App.Term]; **see, Interboro General Hosp. v. Allcity Ins. Co., supra**).

With respect to the Third cause of action defendant states that the injuries did not arise out of the covered accident. GEICO also contends that it timely requested verification and issued a denial of claim within thirty days after receipt of the verification, providing certain supporting documentary evidence. GEICO offers a copy of plaintiff Westchester Medical Center's Discharge Summary which shows that the claimant was treated for a seizure which occurred while he was driving. The diagnosis reads "1) Alcohol withdrawal. 2) Delirium tremens. 3) Seizure secondary to alcohol withdrawal. 4) Hypokalemia." Item number 4, hypokalemia, is identified in the report as an alcohol withdrawal symptom. It appears from the record that plaintiff's assignor, Henry Albu, was not treated for, and did not sustain, any injuries from the automobile accident.

In response plaintiff Westchester Medical Center maintains that an expert's affidavit is required to give the court medical substantiation and "guidance in specialized scientific matters" such as whether the injuries resulted from the accident (**see Mount Sinai Hosp. v. Triboro Coach Inc.**, 263 AD2d 11). The plaintiff correctly states the general rule, applicable in this case, that the symptoms of alcohol withdrawal are plain and within the understanding of ordinary lay persons and jurors as not trauma induced.

Moreover, plaintiff's own report does not raise any factual issue regarding the existence of injuries from the accident.

Plaintiff's additional argument that the Discharge Summary is not in "admissible form" is without merit. Plaintiff relies upon **Rue v. Stokes** which in general states that "[u]nsworn reports, letters, transcripts and other documents do not constitute evidentiary proof in admissible form and may not be considered in opposition to a motion for summary judgment" ( **Rue v. Stokes**, 191 AD2d 245, 246-247). However, the plaintiff's discharge summary constitutes an exception to the hearsay rule, as it constitutes an admission by plaintiff that the treatment it rendered was not for injuries sustained in an accident. In addition the statements in the records regarding alcohol withdrawal "qualify as business records", another exception to the hearsay rule, since "the statements were germane to treatment or diagnosis" (**Rivera v. City of New York**, 293 AD2d 383). Accordingly, the record is admissible and in opposition plaintiff raises no factual issue with respect to the timely served disclaimer, and defendant is awarded summary judgment on the Third cause of action.

This constitutes the Order of this Court.

Dated: April 23 2003

ENTER:

J. S. C.

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MAY 20 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE