SCAN 3

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 39
NASSAU COUNTY

HOSPITAL FOR JOINT DISEASES, As Assignee of ADRIAN ALAS; THE NEW YORK AND PRESBYTERIAN HOSPITAL, As Assignee of SANTOS MUNOZ; THE ST. LUKE'S ROOSEVELT HOSPITAL, As Assignee of IGNATIUS SMITH, NATALIE PERKOVIC; ST. JOHN'S RIVERSIDE HOSPITAL, As Assignee of PARVEEN BILQUIS SHABBIR.

Plaintiffs.

Index No.: 024714/99
Sequence No.: 1 & 2

- against -

ALLSTATE INSURANCE COMPANY.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	

Motion by plaintiff hospitals for summary judgment against defendants on the first, second and fifth causes of action of the complaint (the third and fourth causes of action having been withdrawn) is determined as hereinafter provided. Defendant's cross-motion to dismiss the complaint is granted in part and denied in part as set forth below.

In this lawsuit plaintiff hospitals as assignees of various claimants, seek to recover unpaid benefits due under the no-fault provision of section 5106(a) of the Insurance Law. They seek summary judgment as to the claims asserted in the first, second and fifth causes of action contending that defendant is precluded from interposing a defense with respect to these claims because of its failure to issue a timely denial of same.

Defendant does not deny its untimely disclaimer but counters with a cross-motion for summary dismissal of the claims on the grounds that the medical condition for which claimants Adrian Alan (first cause of action) and Santos Munoz (second cause of action) were treated were not related to the accident. Defendant also seeks dismissal of the fifth cause of action claiming the bill, interest and attorneys' fee have been paid.

Pursuant to Insurance Law section 5106(a) payment of no-fault first-party benefits "shall be made as the loss is incurred". The "benefits are overdue if not paid within thirty days after claimant supplies proof of the fact and amount of loss sustained". [Insurance Law section 5106(a).] "Within 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part." [11 NYCRR §65.15(g)(3).] 11 NYCRR §65.15(g)(5) requires that an insurer denying a claim on a no-coverage basis "notify the applicant within 10 business days after such determination". An insurer who fails to properly deny a claim within 30 days as required by the applicable statutory provisions may be precluded from interposing a defense to plaintiff's lawsuit. (Presbyt. Hosp v. Maryland Cas, 90 NY2d 274, 284.)

The court rejects defendant's position that preclusion should not apply in the first and second causes of action because the injuries for which these patients were treated were not covered by the insurer. Generally, the preclusion remedy does not apply to a defense of no coverage at all. The insurer's tardiness in disclaiming does not create coverage where no coverage exists such as instances in which the event, the vehicle, the person or the injury is outside the ambit of the policy purchased by the insured. (Cent Gen Hosp v. Chubb Group, 90 NY2d 195, 199; Bonetti v. Integon Nat. Ins. Co., ___ AD2d ___, 703 N.Y.S.2d 217, 218.)

Where, as here, defendant has untimely disclaimed, it has the burden of coming forward with proof in admissible form sufficient to establish the fact or evidentiary foundation on which it bases its contention that the treated condition was not related to the accident. (Mount Sinai v. Triboro Coach, 263 AD2d 11, 19-20.) The insurer fails to demonstrate its entitlement to the exclusion defense where the insurer fails to submit a sworn statement from an individual with knowledge of the facts, to wit, an affidavit of a medical expert. (Mount Sinai v. Triboro Coach, Supra).

Plaintiff has submitted an unsworn letter from S. Farkas, M.D. in opposition to that branch of plaintiff's motion for summary judgment. Further, defendant has failed to submit an affidavit of an expert regarding Mr. Munoz' injuries. Therefore, a proper factual foundation has not been laid for defendant's good faith belief that his injury did not arise out of an insured accident. (Mount Sinai v. Triboro Coach, supra, pp. 20-21.) Plaintiff is, therefore, entitled to summary judgment against defendant on the first and second causes of action.

Plaintiff is further entitled to attorneys fees on the first and second causes of action. In the absence of statutory or contractual authority, a party may normally not recover the costs of litigation. (Plant Planters, Inc. v. Pollock, 91 A.D.2d 1017; Millman v. Brownlee, 133 A.D.2d 221, app.den. 70 N.Y.2d 613; Hirschfield v. T.C. Sector, Inc., 132 A.D.2d 332).

As statutory authority exists for attorneys fees in this matter, the court hereby grants plaintiff attorneys fees as set forth in 11 NYCRR §65.17(b)(6)(v). 11 NYCRR §65.17(b)(6)(v)

provides:

> "[f]or all other disputes subject to AAA and IDA arbitrations, subject to the provisions of subparagraphs i and iii of this paragraph, attorneys fees shall be limited as follows: 20 percent of the amount of first party benefits, plus interest thereon, awarded by the arbitrator or court, subject to a maximum fee of $850. If the nature of the dispute results in an attorneys fee which could be computed in accordance with subparagraph iv and this subparagraph, the higher attorneys fees shall be payable."

11 NYCRR §65.17(b)(6)(i) in turn provides:

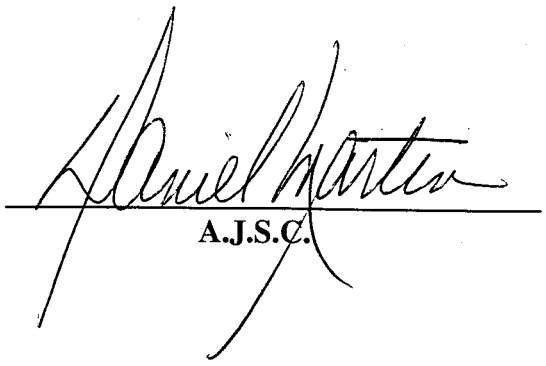
> "Limitations on attorney's fees pursuant to section 5106 of the Insurance Law. The following limitations shall apply to the payment by insurer's of applicants' attorney's fees for services necessarily performed in the resolution of no-fault disputes: (i) If an arbitration was initiated or a court action was commenced by an attorney on behalf of an applicant and the claim or portion thereof was not denied or overdue at the time the...action was commenced, no attorney's fee shall be granted."

Accordingly, plaintiff is hereby granted summary judgment on its second cause of action.

Accordingly, plaintiffs' motion for summary judgment against defendant is granted as to the first and second causes of action of the complaint only and denied in all other respects.

Defendant's cross-motion is granted to the extent that the fifth cause of action of the complaint is dismissed. All payments required with respect to Parveen Bilquis Shabbir (fifth cause of action) have been made.

Submit judgment on notice.



A.J.S.C.

Dated: June 30, 2000