

**ALLSTATE SOCIAL WORK AND PSYCHOLOGICAL SVCS PLLC, Plaintiff
against GEICO GENERAL INSURANCE CO., Defendant**

070376/04

CIVIL COURT OF THE CITY OF NEW YORK, KINGS COUNTY

2005 NY Slip Op 50024U; 2005 N.Y. Misc. LEXIS 48

January 17, 2005, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION.

DISPOSITION: Summary judgment awarded to plaintiff.

JUDGES: Eileen N. Nadelson, J.

OPINIONBY: Eileen N. Nadelson

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Plaintiff, a medical provider, instituted this action to recover first party no-fault benefits from Defendant insurer. Plaintiff moved for summary judgment, alleging that Defendant neither paid nor denied the claim within the statutorily mandated thirty-day period after receipt of the claims. *Ins. Law sec. 5106; Regulations sec. 65-3.8.*

Defendant, in opposition, claimed that the denials were timely on their face; however, Plaintiff argued that Defendant failed to provide legally sufficient proof of mailing the subject denials within the thirty-day period.

Defendant's proof of mailing consists of an affidavit from one of its employees who states that it is part of her regular duties and responsibilities to handle claims filed for no-fault benefits. The affidavit goes on to state that she reviewed the records of the instant claim and based on that review, has determined that the denial was mailed on the date appearing on the denial form. She finally states that, "as [*2] per the regular course of business of this office, the bill was timely denied."

The question before the court, one that has caused much confusion and litigation, is the information that

must appear on an affidavit of mailing to meet the requirements of New York's no-fault law to evidence a proper proof of mailing.

Generally, proof of proper mailing gives rise to a presumption that the item was received by the addressee. This presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed. *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 A.D. 2d 679, 729 N.Y.S.2d 776 (2d Dept. 2001).

In *A & S Medical, P.C. v. Allstate Insurance Co.*, 2002 N.Y. Misc. LEXIS 563, 2002 NY Slip Op. 50121(U) (1st Dept. 2002), the Plaintiff established proof of mailing the claim by an affidavit of one of its employees who actually placed the application in an envelop and then mailed the envelop at the post office herself by return receipt certified mail. This Plaintiff further presented the postal receipts, which the court concluded constituted proof of mailing the claim. In this [*3] case, the court further adduced that the defendant's affidavit of an employee who reviewed the file and concluded that the claim was not received was inadequate to rebut the presumption of the plaintiff's mailing of the claim.

Proof of proper mailing requires evidence of actual mailing or a standard office practice or procedure designed to ensure that the items are properly addressed and received. Affidavits that make no reference to the specifics of the office mailing practice or procedure, which merely aver that the bills were mailed within the statutory time period, are insufficient to establish proof of actual mailing. *Comprehensive Medical v. Lumbermens Mutual Insurance Co.*, 4 Misc. 3d 133(A), 2004 N.Y. Misc. LEXIS 1063 (NY Sup. App. Term 2004).

Consequently, in order to meet its burden of proving that denials were mailed within the thirty-day period, an insurer must attach an affidavit of an employee who personally mailed the denial or, conversely, the affidavit of an employee with personal knowledge of the office's mailing practices and procedures, who describes those practices or procedures in detail, indicating how he or she acquired the knowledge of such practices or procedures, and [*4] whose personal review of the file indicates that those practices or procedures were followed with respect to the claim under review.

In the instant case, Defendant has failed to meet its burden of proving that the denials were mailed within the thirty-day period because the affidavit of its employee with respect to the mailing is legally deficient. The employee states that she is familiar with the office practices and procedures, but neglects to specify the

details of those procedures. The affiant fails to state how she became familiar with these procedures, and her "personal knowledge" consists merely of a review of the files, without stating at what point in the claim process she reviewed those files or the basis for her belief that regular office procedures were followed. Without sufficient substantiation that the denials were in fact mailed on the date claimed, the court must find for Plaintiff.

Summary judgment is awarded to Plaintiff. The clerk of the court is ordered to enter judgment in favor of Plaintiff in the amount of \$ 1,181.63, plus statutory interest, costs, and attorney fees.

Dated: January 17, 2005

EILEEN N. NADELSON, J.C.C.