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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS, PART 32

CITY TRANSPORTATION CORP., a/a/o
NANCY ROSADO,

Plaintiff,

-against-

STATE FARM AUTOMOBILE INS. CO.,

Defendant.

Index No.: 078713/03
Motion Calendar Date: 3/15/04
Motion Calendar No.: 73

DECISION/ORDER

Present: HON. ELLEN GESMER
Judge, Civil Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1,2 _____
Answering Affidavits/Affirmations.....	3 _____
Reply Affidavits/Affirmations.....	4 _____
Memoranda of Law.....	_____
Other.....	_____

May an ambulette service sue for first party no-fault benefits as the assignee of an injured person to whom it rendered services? Defendant contends that an ambulette service may not do so, under No-Fault Insurance Regulation, 11 NYCRR 65-3.11(a), and seeks the entry of summary judgment in its favor on that basis. The Court agrees with defendant's argument, for the reasons set forth below, and grants summary judgment in its favor.

The complaint in this action alleges that plaintiff supplied "necessary transportation services" to Nancy Rosado who was injured in a car accident on July 28, 2002. The complaint further alleges that Ms. Rosado assigned her rights to benefits under the No-Fault Insurance Law §5101 et seq. to plaintiff. Plaintiff brings this action, as the assignee of Ms. Rosado, to recover \$840.00 in first party no-fault benefits, plus attorneys' fees and interest.

Since Ms. Rosado's accident occurred after April 5, 2002, her claim for no-fault benefits is governed by the revised Regulations Implementing the Comprehensive Motor Vehicle Insurance Reparations Act, in particular, Regulation 68-C (*Medical Socy v Serio*, 100 NY2d 854, 862, n.2 [2003]). In a major change, the new regulations permit injured persons to assign their benefits only to "providers of health care services" (11 NYCRR 65-3.11[a]). In contrast, the old regulations permitted assignment of benefits to any "provider of services" (11 NYCRR 65.15[j][1]). Defendant contends that, because of this change, the regulation as revised prohibits assignment to plaintiff, which provides transportation services.

Since the new regulation limits assignments to "providers of health care services," it is necessary to determine the meaning of that phrase in the no-fault scheme. The no-fault statute itself does not provide any definition (*see* Ins. Law 5102 et seq.), but the revised regulations define "other professional health services" as "limited to those services that are required or would be required to be licensed by the State of New York if performed within the State of New York. Such professional

health services should be necessary for the treatment of the injuries sustained and within the lawful scope of the licensee's practice" (11 NYCRR 65-3.16[a][6]).¹ The Office of General Counsel of the Department of Insurance has issued an opinion dated January 16, 2003 ("the Opinion") interpreting that regulation as it relates to ambulette services. The Opinion, which by its terms represents "the position of the New York State Insurance Department," ruled that:

1. Ambulette services are not professional health services authorized for reimbursement pursuant to Insurance law §5102(a)(1);
2. Ambulette services may be reimbursable as "other reasonable and necessary expenses," up to \$25.00 per day, under Insurance Law §5102(a)(3); and
3. Ambulette services are not health care services to which benefits can be assigned under the statute.

That interpretation is entitled to deference, in light of the broad power given to the Superintendent of Insurance to "interpret, clarify and implement" the Insurance Law (*Medical Socy v Serio*, 100 NY2d 854, 863-864 [2003]). Accordingly, this Court must follow the Opinion unless "it runs counter to the clear wording of a statutory provision" (*John Paterno, Inc. by & Through Paterno v Curiale*, 88 NY2d 328, 334 [1996]) or is not rationally based (*Med. Malpractice Ins. Assn. v Superintendent of Ins.*, 72 NY2d 753, 763 [1988]).

This Court finds that the Opinion is a rational interpretation of the statute. First, in the recent Court of Appeals decision upholding the revised regulation, the Court specifically discussed 11 NYCRR 65-3.11(a), and noted that the non-health related services to which it was addressed specifically included housekeeping and transportation services. The court went on to note:

Here, the Superintendent has determined that the restriction [on assignments] is necessary to reduce abuses in the payment of benefits for non-health related services, particularly with respect to questionable claims for transportation or housekeeping expenses, and that permitting assignment of such claims thus contravenes public policy. This determination is not irrational or unreasonable, and must therefore be upheld in deference to the Superintendent's special competence and expertise with respect to the insurance industry (*see New York Pub. Interest Research Group, Inc. v State Dept. of Ins.*, 66 NY2d at 448).

(*Medical Socy v Serio*, 100 NY2d 854, 871-872 [2003]). In view of this ruling by the Court of Appeals, it would have been irrational for the Superintendent of Insurance to have held that transportation services could be the subject of assignment; therefore, this provides strong support for the rationality of the position taken in the Opinion.

Moreover, plaintiff essentially concedes that the regulation is rational since plaintiff affirms that it is no longer accepting assignments of benefits (*See Affidavit of Leonid Zayets*). Moreover, plaintiff does not even attempt to show that the services rendered to its assignor were medically necessary, except by a hearsay statement in Mr. Zayets' affidavit as to the alleged opinion of an unnamed medical provider.

In order to support its argument that the Opinion is irrational, plaintiff argues that the

¹The same definition was previously found in the old regulations at 11 NYCRR 65.15(o)(vi).

Department previously took an inconsistent position in a letter dated May 23, 2002 from Hyman Silberstein, a Senior Examiner in the Property Bureau of the Department. However, the Opinion states "to the extent that this opinion is inconsistent with earlier opinions of this Department... those opinions are overruled," thus explicitly overruling any position taken in the earlier letter. In any event, the letter cited by defendant is merely a letter from a single employee in the Property Bureau of the Department and does not constitute the opinion of the Department.

Finally, plaintiff argues, plaintively, that it relied on Mr. Silberstein's letter when it provided transportation services to various individuals, including the assignor in this case. Although the argument is not stated explicitly, plaintiff seems to be arguing that it relied to its detriment on Mr. Silberstein's letter and as a result, the Department of Insurance should be estopped from taking a contrary position. However, "absent an unusual factual situation, estoppel is not available against a governmental agency engaging in the exercise of its governmental functions" (*Advanced Refractory Technologies v Power Auth.*, 81 NY2d 670, 677 [1993]; see also *Novak & Co., L.T. v Bd. of Educ.*, 217 AD2d 575, 576 [2d Dept 1995]). Consequently, plaintiff cannot prevail on an estoppel theory.

For the reasons set forth above, the Court holds that a provider of ambulette services may not be assigned the rights of an injured person under the no-fault statute. Accordingly, defendant's motion for summary judgment is granted.

This constitutes the Decision and Order of the Court.

Dated: April 22, 2004



ELLEN GESMER
Judge, Civil Court