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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS Part 32

Index No. 87060/02
Motion Calendar
Date Submitted: ~~04/08~~ 1-27-04

CORONA QUEENS MEDICAL, P.C.,
Assignee of WALTER RANGEL,

Plaintiff,

-against-

GENERAL ASSURANCE COMPANY,

Defendant.

DECISION/ORDER

Present:
Hon. Ellen M. Spodek
Judge, Civil Court

ENTERED & FILED
MAR 31 2004
CIVIL COURT
KINGS COUNTY

Recitation, as required by CPLR §2219(a), of the papers considered in the review of plaintiff's motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavit.....	1-2
Order to Show Cause and Affidavits Annexed.....	_____
Answering Affidavits	_____
Replying Affidavits	_____
Exhibits	_____
Other: _____	_____

Upon the foregoing papers, plaintiff Corona Queens Medical, P.C. assignee of Walter Rangel moves for an order, pursuant to CPLR 3212, granting summary judgment on its complaint against defendant General Assurance Company. Defendant cross-moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint.

In this action, plaintiff seeks to recover first-party No-Fault benefits in the sum of two hundred eighty-four dollars and sixty cents (\$284.60) with interest and statutory attorneys fees from defendant for alleged medical services provided to patient James Dillon.

The following facts are undisputed. On August 14, 2002, plaintiff's assignor, Walter

condition precedent of the insurance contract. As such, defendant argues that it is entitled to summary judgment since plaintiff's assignor was not covered under the insurance policy (*Adams v Allstate Ins. Co.*, 210 AD2d 319).

Under the "Conditions" heading of Section 1 of the Mandatory Personal Injury Protection Endorsement set forth under Insurance Regulation 11 NYCCRR 65-1.1, no action shall lie against an insurance company "unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." One such term of coverage is that "[t]he eligible injured person shall submit to medical examination by physicians selected by or acceptable to the Company, when, and as often as, the company may reasonably require." Defendant contends that since plaintiff's assignor failed to appear for the IME, plaintiff's assignor breached a condition precedent to coverage under the insurance contract and, therefore, an action cannot lie against the insurer. Defendant fails to address the reasons that it requested plaintiff's assignor to appear for the IMEs.

The aforementioned Insurance Regulations must also be read in context with Insurance Regulation 11 NYCRR 65.15(g)(2)(i) which provides,

"An insurer may not interrupt the payment of benefits for any element of basic or extended economic loss pending the administering of a medical examination, unless the applicant or the applicant's attorney is responsible for the delay or inability to schedule the examination, in which any denial of payment shall be made only in accordance with policy provisions on a prescribed denial of claims form (NYS N-F 10)."

An insurer may issue a denial of claim form based upon the failure of an assignor to appear at IME only where it can be demonstrated that "the applicant or the applicant's attorney is responsible for the delay or inability to schedule the examination." Here, defendant issued a timely denial of claim on grounds that the assignor failed to appear at IMEs. In its motion and in

opposition to defendant's cross motion, plaintiff fails to proffer any information as to the reasons why its assignor failed to appear at the scheduled IMEs. Contrary to plaintiff's contentions, if it is determined that plaintiff's assignor or his attorney were responsible for the delay or inability to schedule the examination, defendant would have been permitted to issue a denial of claim as per 11 NYCRR 65.15(g)(2)(i).

Therefore, the court finds that plaintiff's motion and defendant's cross motion should be denied since there exists multiple issues of fact as to the validity of defendant's denial of claim. There is an issue of fact as to whether defendant's request for IMEs were reasonable under the circumstances (*see, e.g., Beverly Hills P.C. v Progressive Ins. Co.*, 194 Misc2d 425, 427). If the fact-finder determines that the request for IMEs were reasonable, then the fact-finder must also determine "whether applicant or applicant's attorney is responsible for the delay or inability to schedule the examination." If the fact-finder concludes that the applicant or applicant's attorney is responsible for the delay or inability to schedule the examination, then the applicant has breached a condition precedent to coverage under the insurance contract and no action shall lie against the insurer for recovery of benefits.

Finally, the Court notes that its holding does not contradict *Urban Medical Diagnostics v Lib. Mut. Insurance Company*, 2001 NY Slip Op. 40655[U], and *Millenium Medical Diagnostics, P.C. v Liberty Mut. Ins. Co.*, 2001 NY Slip Op. 40654[U]. In those two cases, the Appellate Term stated that the assignor's failure to appear for IMEs "should not, in and of itself, be a bar to plaintiff's recovery for services rendered prior to his failure to appear." Based on that language, plaintiff contends that where the medical provider has already treated its assignor prior to the insurer's request for IMEs of the assignor, that it is entitled to payment regardless of whether the assignor has attended the IMEs or the reasons why the assignor did not attend the

IMEs.

Plaintiff's interpretation is flawed. The Appellate Term did not award plaintiff summary judgment in either case and this Court is not barring plaintiff from recovery merely because its assignor failed to appear for IMEs. Rather, the court is holding that there must be an evaluation of the reasonableness of defendant's initial requests for IMEs (see, 11 NYCCRR 65-1.1) and the reasons why the assignor did not attend the IMEs (11 NYCRR 65.15(g)(2)(i)). If the court were to follow plaintiff's interpretation of *Millenium* and *Urban*, it would eliminate any incentive for an assignor to comply with the Mandatory Personal Injury Protection Endorsement requiring him or her to comply with an insurer's reasonable request for IMEs. The health care provider would benefit from an assignor's willful failure to attend the IMEs by having gotten paid for services which the insurer may have later determined, through IMEs, to have been medically unnecessary and for which it would have been able to issue a timely denial based on lack of medical necessity. If the court were to follow plaintiff's rationale, it would severely impede defendant's rights under the insurance contract to protect itself from fraud or excessive charges.

The purpose of No-Fault Insurance which is to remove vehicular accident cases from the "sphere of common law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation" is not necessarily undermined when an insurer reasonably requests IMEs of the assignor since the insurer must still make payment of benefits pending the administering of the IMEs unless the assignor or his attorney is responsible for the delay or inability to schedule the examination (*Urban Medical Diagnostics v Lib. Mut. Insurance Company*, 2001 NY Slip Op. 40655[U], and *Millenium Medical Diagnostics, P.C. v Liberty Mut. Ins. Co.*, 2001 NY Slip Op. 40654[U], quoting, *Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211, 214). If the insurer determines that the assignor is responsible for the delay, then it must

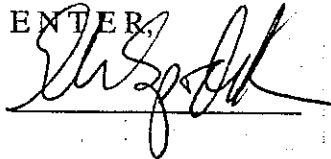
still issue a timely denial of claim form, as was done here (see, 11 NYCRR 65.15(g)(2)(i)).

Accordingly, plaintiff's motion for summary judgment and defendant's cross motion for summary judgment are both denied.

The foregoing constitutes the decision and order of this court.

Dated: March 25, 2004

ENTER



Hon. Ellen M. Spodek, J.C.C.

HON. ELLEN M. SPODEK