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Expert Analysis
No-Fault Insurance **Wrap**-Up

APPELLATE COURTS ADDRESS ISSUES OF PROCEDURE AND FOUNDATION

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The case of St. Vincent Med. Care, P.C. v. Country Wide Ins. Co.,[FN1] is a procedural dynamo, covering many facets. The defendant argued that plaintiff had no standing to maintain its action because the assignment was signed by a minor and was therefore defective. The Appellate Term rejected the unique argument, finding that because Country Wide did not preserve the defense with timely verification requests, or by rejecting plaintiff's assignment when it was received, the defense was waived.

The court also found that, by failing to attach any evidence to establish its fee schedule defense, Country Wide could not maintain that defense.[FN2] Although Country Wide argued that its cross-motion based upon lack of medical necessity should have been granted as to certain causes of action, the Appellate Term determined that appealing from the judgment, rather than the underlying order, precluded it from addressing the issue.

Crossbay Acupuncture, P.C. v. Hartford Cas. Ins. Co.[FN3] is an interesting decision; not because of the result, but rather because of the path the Appellate Term took. The lower court granted defendant's motion to dismiss pursuant to CPLR R.3211(a)(7). Although the defendant and the lower court referred to the motion as a motion to dismiss for failure to state a cause of action, the Appellate Term determined that the motion was actually a motion for summary judgment, and that the lower court properly treated it as one.[FN4]

The distinction between a motion for summary judgment and a motion to dismiss for failure to state a cause of action is no small one. 'In assessing a motion to dismiss made pursuant to CPLR R.3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference.'[FN5] In assessing a motion for summary judgment, on the other hand, 'the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility.'[FN6]

Accordingly, how a court treats a motion, will in some cases, determine the outcome. To avoid surprise and confusion, practitioners should be careful in choosing whether to make a motion to dismiss, or one for summary judgment.

Verification and EUOs

Under the new regulations,[FN7] EUOs (Examinations Under Oath), unlike IMEs (Independent Medical Examina-

tions), do not need to be scheduled within 30 days of receipt of plaintiff's claim form. However, this does not mean that the verification letters do not have to be timely issued. St. Vincent Med. Care, P.C. v. Travelers Ins. Co.[FN8] addressed this issue. In St. Vincent, defendant's ‘EUO scheduling letters‘ were mailed 52 days after it received plaintiff's bills. This, according to the Appellate Term, was not sufficient to toll defendant's time to pay or deny.

The following case is one of the most peculiar decisions to come out of the Appellate Term this year. The court appears to have left open the door for the possibility that a defendant need not attach verification letters at all, let alone in admissible form, when moving for summary judgment. In Ambrister v. Integon Natl. Ins. Co.,[FN9] the defendant attached one verification letter to prove that it mailed two verification requests. Plaintiff argued that defendant's failure to attach both its initial and follow up requests was fatal to its defense.

The Appellate Term disagreed. It found that defendant's explanation that it ‘stamps‘ the ‘original request‘ with ‘second notice‘ and ‘insert[s] the date of the second notice‘ when a provider does not respond to the first verification request, to be sufficient.

The court held that defendant met its burden because the verification request had two dates: the date of the original letter and the ‘stamped‘ original letter with the date of the second notice, the court held that defendant met its burden.

Foundation

Progressive Med. Inc. v. Allstate Ins. Co.[FN10] involved an unusual **nofault** trial, which raised two interesting issues.

At trial, the parties apparently agreed that the limited issue for the court's consideration was the issue of medical necessity. The court asked for a copy of the claim form, which was provided, but not entered into evidence. Defendant then called its peer reviewer to testify that the services provided were not medically necessary. Plaintiff raised a hearsay objection, alleging, inter alia, that the reviewer's opinion was based upon records not in evidence. The objection was sustained by the court and the reviewer's testimony was stricken.

Nevertheless, following the trial, the court dismissed plaintiff's action, finding that plaintiff ‘specifically declined to present a prima facie case, ‘ in that it failed to submit a claim form into evidence in order to establish ‘the health benefit's medical necessity.‘

The first issue addressed on plaintiff's appeal was the lower court's determination that plaintiff failed to make out a prima facie case.

The Appellate Term reversed, noting that defendant's attorney had confirmed on the record that the only issue was medical necessity, and the court's statement that ‘I don't think there's any dispute that a form—a claim was submitted, that it was denied, the denial was timely, the issue was medical necessity. We all understand that,‘ was unchallenged by either party. Under such circumstances, the court noted that the submission of a claim form into evidence to raise, prima facie, the presumption of medical necessity was unnecessary:

Based upon the court's statements that the only issue for trial was medical necessity and that a claim form had been submitted and timely denied, as well as defendant's presentation of its witness instead of moving for judgment pursuant to CPLR 4401, we find that the parties agreed that the sole issue for trial was defendant's defense of lack of medical necessity. The record reveals no basis, under the specific facts of this case, for the court's finding that plaintiff was required to submit a claim form in order to establish, prima facie, ‘the health benefit's medical necessity.‘

Turning to the second issue—the propriety of the lower court's striking of the reviewer's testimony on hearsay grounds—the Appellate Term affirmed such ruling:

Defendant failed to demonstrate either that the testimony did not rely on outofcourt documents for the truth of the matters stated therein, or that the documents were being relied upon for their truth but fell within an exception to the rule against hearsay. Consequently, we cannot say that it was an improvident exercise of discretion for the court to strike the testimony.[FN11]

Practitioners should note, however, that the court took pains to point out the sparse record.

A Default Denied

Despite plaintiff's many attempts to receive a default judgment, the Appellate Division found that it failed to show that it was entitled to that relief. In New S. Ins. Co. v. Dobbins,[FN12] the plaintiff-insurer moved for a default judgment in its declaratory judgment action, requesting an order that it ‘is not obligated to provide insurance coverage in connection with a vehicular accident.‘ That motion was denied. After renewal and reargument, the lower court's decision remained the same. According to the lower court and the Appellate Division, the insurer's proof was lacking.

In support of its motion to vacate plaintiff offered its verified complaint[FN13] and an affidavit from one of plaintiff's investigators. The Appellate Division found both insufficient because neither the plaintiff's counsel, nor the investigator had personal knowledge of the facts. Additionally, the investigator's affidavit referred to the statements of one of the drivers, which was inadmissible hearsay.

CPLR R.3212(f), Again

In the last edition of the wrapup[FN14] we discussed two cases that addressed CPLR R.3212(f), concluding that ‘It appears as if the Appellate Term has set two standards when reviewing 3212(f) arguments, one for Malella cases, and one for everything else.‘ Shortly thereafter, we received some contrary guidance from the Appellate Term in Bath Med. Supply Inc. v. Allstate Indem. Co.[FN15]

In Bath, the plaintiff moved for summary judgment and the defendant cross-moved to dismiss[FN16] based upon the plaintiff's failure to comply with outstanding discovery demands. The lower court ‘denied plaintiff's motion as premature, pursuant to CPLR 3212(f), and granted defendant's CPLR 3126 cross motion to dismiss unless, within 30 days of the order, plaintiff and its assignor[FN17] submitted to examinations before trial.‘

The Appellate Term reversed, finding inter alia, that defendant was not, in fact, entitled to discovery as to fraudulent billing, because it did not make a showing that the defense was preserved with a timely denial.

The court went further, finding that ‘defendant offered no factual basis for its contention that plaintiff was not properly incorporated,‘ and noting that defendant failed to demonstrate that discovery was needed in order to show the existence of a triable issue of fact on the incorporation issue based on defendant's ability to secure public records documenting plaintiff's licensing status without the need for discovery.

Likewise, in GZ Med. & Diagnostic, P.C. v. Mercury Ins. Co.,[FN18] the defendant moved for summary judgment, based upon a peer review that determined that the services were not medically necessary. Plaintiff opposed, arguing, inter alia, that it was ‘not in possession of all the information and documents relied upon by defendant's peer reviewer.‘ The Appellate Term found that plaintiff could not find relief in CPLR R. 3212(f) because, ‘in this case‘ plaintiff did not show that discovery was necessary to oppose defendant's motion.

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FN1. 2010 N.Y. Slip Op. 50488(U)(App. Term, 2nd, 11th, and 13th Jud. Dists., 2010).

FN2. Compare Great Wall Acupuncture, P.C. v. Geico Ins. Co., 26 Misc.3d 23 (App. Term, 2nd, 11th and 13th Jud. Dists. 2009) ('We hold, as a matter of law, that an insurer may use the workers' compensation fee schedule for acupuncture services performed by chiropractors to determine the amount which a licensed acupuncturist is entitled to receive for such acupuncture services').

FN3. Ins. Co., 2010 N.Y. Slip Op. 50487(U) (App. Term, 2nd, 11th and 13th Jud. Dists. 2010).

FN4. This is not altogether unusual. Consider Pistolese v. William Floyd Union Free Dist., 69 A.D.3d 825 (2d Dept. 2010) where the Appellate Division held that defendant's pre-answer motion should have been treated as one for summary judgment. Normally when a court decides to convert a motion to dismiss to a motion for summary judgment, notice is required. See CPLR R. 3211(c). But this is not a hard and fast rule, as the parties are free to chart their own course. See generally, Stainless Broadcasting Co. v. Clear Channel Broadcasting Licenses, L.P., 58 A.D.3d 1010 (3d Dept. 2009).

FN5. Garner v. China Natural Gas Inc., 2010 N.Y. Slip Op. 02095 (2nd Dept. 2010).

FN6. Rizzo v. Lincoln Diner Corp., 626 N.Y.S.2d 280 (2nd Dept. 1995).

FN7. See, Eagle Surgical Supply Inc. v. Progressive Cas. Ins. Co., 21 Misc.3d 49 (App. Term, 2nd and 11th Jud. Dists. 2008).

FN8. 26 Misc.3d 144(A)(App. Term, 2nd, 11th and 13th Jud. Dists. 2010).

FN9. 2010 N.Y. Slip Op. 50489(U)(App. Term, 2nd, 11th and 13th Jud. Dists. 2010).

FN10. 26 Misc.3d 138(A)(App. Term, 9th and 10th Jud. Dists. 2010).

FN11. Compare, PLP Acupuncture, P.C. v. Progressive Cas. Ins. Co., 2 Misc.3d 142(A) (App. Term 2nd, 11th and 13 Jud. Dists. 2009).

FN12. 894 N.Y.S.2d 912 (2d Dept. 2010).

FN13. The complaint was verified by plaintiff's counsel.

FN14. **No-Fault** Insurance **Wrap**-Up, Feb. 11, 2010, NYLJ at p. 3.

FN15. 2010 N.Y. Slip Op. 20059 (App. Term, 9th and 10th Jud. Dists. 2010).

FN16. Defendant also argued that summary judgment should not be granted to plaintiff because plaintiff did not establish a prima facie case and because plaintiff did not appear for EUOs. The Appellate Term found that plaintiff did establish a prima facie case and that defendant did not provide evidence that it issued timely denials, preserving the EUO defense.

FN17. The Appellate Term also reiterated the fact that a plaintiff's assignor 'is not a party or under the plaintiff's

control,‘ and as a result, the lower court cannot require plaintiff to produce the assignor.

FN18. 2010 N.Y. Slip Op. 50491(U)(App. Term, 2nd, 11th and 13th Jud. Dists. 2010).
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