

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 41

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DR. INNA KIGEL, D.O. MEDICAL, PC Assignee of CENAIDA
SANCHEZ, KIM JEANETTE SOYOUNG, LAC Assignee of
CENAIDA SANCHEZ,

Plaintiffs,

- against -

AUTO ONE INSURANCE COMPANY,

Defendant.

Index Number: 67403/07

Calendar Numbers: 8 & 11

Submission Date: 8/5/08

Decision and Order

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Arthur F. Engoron, Judge

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 and 2, were used on this motion and cross-motion for summary judgment:

	<u>Papers Numbered:</u>
Moving Papers	1
Cross-Moving Papers	2

Upon the foregoing papers, it is hereby ordered that defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied.

On or about March 17, 2003, plaintiffs' assignor was involved in a motor vehicle accident for which defendant was the no-fault insurance carrier. Plaintiffs provided medical services to their assignor for injuries allegedly stemming from said motor vehicle accident. A total of thirteen bills for said medical services were received by defendant, twelve of which were timely denied on the basis that plaintiffs' assignor failed to appear for several scheduled IMEs. Defendant now moves for summary judgment and plaintiff opposes on the basis that defendant has not demonstrated that the IME requests were properly mailed and has not demonstrated that the assignor failed to appear for the IMEs on at least two different occasions. Contrary to plaintiff's contentions, a review of the affidavit of Joleen Veneziano (Moving Exh. F), an employee of the IME scheduling service used by defendant, makes it clear that her service sent the assignor timely and proper scheduling letters (Moving Exh. D). Not only is this IME scheduling service, by its very nature, designed to schedule IMEs and mail the scheduling letters, but Ms. Veneziano states that the records of the company are tracked in the computer and kept in the ordinary course of business, and are prepared contemporaneously with the mailing of the scheduling letters, and that based on those records she can attest to the fact that the letters were mailed to plaintiffs' assignor (and to her attorney once one had appeared on plaintiffs' assignor's behalf) and not returned. Defendant has also submitted (Moving Exh. D) copies of these scheduling letters it received via "cc:," date stamped within one to three days after the date on the letters.

Additionally, the affidavit of Ms. Veneziano makes it clear that the assignor failed to show for her examinations on at least two occasions, and did not show for any of the scheduled and re-scheduled IMEs. Additionally the affidavit of defendant's claims handler Travis Miller and mailroom supervisor Jay Santiago (Moving Exh. F) demonstrate that defendant timely denied the plaintiffs' bills. Furthermore, plaintiff has failed to submit an affidavit from Ms. Sanchez that she never received the scheduling letters, or evidence that the letters were not mailed to the correct addresses for Ms. Sanchez or her attorney, or that Ms. Sanchez had a valid reason for not attending the scheduled IMEs. Thus, defendant's motion for summary judgment seeking to dismiss plaintiffs' claim for twelve of the bills at issue, based on defendant's denials listing plaintiffs' assignor's failure to appear for IMEs as the basis, is granted.

Additionally, defendant seeks summary judgment on the thirteenth bill it received, on the basis that it paid said bill in the proper amount, once reduced according to fee schedule. As defendant points out, at the time plaintiff Jeanette Soyoung, provided acupuncture services to Ms. Sanchez, there was no fee schedule amount for such services, and instead, the correct amount due was determined based on reasonable and customary charges. In support of its claim that the reduced amount paid by defendant was correct, defendant attaches an affidavit from Marina Merson, L.Ac, who reviewed the bill at issue and determined that the proper amount for the treatment at issue was \$61.20, which defendant thereafter paid. Plaintiff has not disputed these findings in their opposition, and therefore this Court finds that the payment of \$739.20 of the bill for \$1,185 was proper and correct, and therefore defendant is entitled to summary judgment for this bill.

Lastly, defendant claims that it never received the fourteenth bill at issue in the amount of 608.40 and dated May 28, 2003. In support of its position, defendant submits the affidavit of Jay Santiago, mailroom supervisor, who attests to the fact that all claims-related mail (such as bills) come to the mailroom, where they are opened and then distributed to the claims handlers, and an affidavit from its claims handler, Travis Miller, who attests that he found no record of a bill for the treatment at issue ever having been submitted, and had there been such bill it was defendant's custom and practice to enter it into the system. Plaintiff offers absolutely no opposition, and no proof that such bill was ever sent to defendant. It is well settled that "[f]acts appearing in movant's papers which the opposing party does not controvert, may be deemed to be admitted" Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 (1975); accord, D. Siegel, NY Prac § 281, at 442 (3d ed. 1999). Thus defendant has demonstrated that it never received this fourteenth bill at issue and therefore is not responsible for payment of that bill.

Having found that defendant timely and properly paid or denied plaintiffs' bills, or that the bill was not received, plaintiff's request for summary judgment is hereby denied as moot.

Based on the foregoing, defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied as moot. The clerk of the court is hereby directed to enter judgment in favor of defendant dismissing this action.

Dated: November 26, 2008



Arthur F. Engoron, J.C.C.