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<b>Amercure Acupuncture, P.C. v GEICO Ins. Co.</b>
2010 NY Slip Op 20098
Decided on March 16, 2010
Appellate Term, Second Department
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Decided on March 16, 2010

**SUPREME COURT OF THE STATE OF NEW YORK***APPELLATE TERM: 2nd, 11th and 13th JUDICIAL DISTRICTS*PRESENT: : RIOS, J.P., PESCE and STEINHARDT, JJ  
2008-2041 Q C.**Amercure Acupuncture, P.C. as assignee of WILLIAMS STACEONA, Respondent,****against****GEICO Ins. Co., Appellant.**

Appeal from an order of the Civil Court of the City of New York, Queens County (Diane A. Lebedeff, J.), entered October 3, 2008, deemed from a judgment of the same court entered November 5, 2008 (see CPLR 5501 [c]). The judgment, entered pursuant to the October 3, 2008 order granting plaintiff's motion for summary judgment and denying defendant's cross motion for summary judgment dismissing the complaint, awarded plaintiff the principal sum of \$475.20.

ORDERED that the judgment is reversed without costs, the order entered October 3,

2008 is vacated, the branches of plaintiff's motion seeking summary judgment upon the first, second and third causes of action are denied, the branches of defendant's cross motion seeking summary judgment dismissing plaintiff's first, second and third causes of action are granted and the matter is remitted to the Civil Court for a hearing in accordance herewith and a new determination thereafter upon the branch of the motion and the branch of the cross motion, each seeking summary judgment upon the fourth cause of action.

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff moved for summary judgment. Defendant cross-moved for summary judgment dismissing the complaint on the ground that, with respect to the acupuncture services at issue in the first, second and third causes of action, it had timely paid plaintiff the amount to which plaintiff was entitled for such acupuncture services pursuant to the fee schedule applicable to chiropractors who render the same services, and that it had timely denied the amounts sought in excess of the fee schedule for the services included in these causes of action. Defendant further sought summary judgment dismissing plaintiff's fourth cause of action on the ground of lack of medical necessity. The Civil Court granted plaintiff's motion for summary judgment, determining that defendant had failed to establish that it had timely denied plaintiff's claims. Defendant appealed from the order granting plaintiff's motion for summary judgment and denying its cross motion for summary judgment dismissing the complaint. The appeal is deemed to be from the judgment which was subsequently entered (*see* CPLR 5501 [c]).

Contrary to defendant's contention, the affidavit of plaintiff's billing manager established [\*2] that the documents annexed to plaintiff's motion were admissible pursuant to CPLR 4518 (*see Art of Healing Medicine, P.C. v Travelers Home & Mar. Ins. Co.*, 55 AD3d 644 [2008]; *Dan Med., P.C. v New York Cent. Mut. Fire Ins. Co.*, 14 Misc 3d 44 [App Term, 2d & 11th Jud Dists 2006]). Inasmuch as defendant raises no other issue with respect to plaintiff's prima facie case, we turn to defendant's opposition papers to determine whether defendant demonstrated the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In opposition to plaintiff's motion and in support of the cross motion, defendant established that it had timely mailed its denial of claim forms, by submitting an affidavit of an employee with knowledge of defendant's standard office practices or procedures designed

to ensure that the items were properly addressed and mailed (*see e.g. St. Vincent's Hosp. of Richmond v Government Empls. Ins. Co.*, 50 AD3d 1123 [2008]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v Chubb Group of Ins.*, 17 Misc 3d 16 [App Term, 2d & 11th Jud Dists 2007]). As defendant further demonstrated that it had timely paid the acupuncture claims at issue in the first, second and third causes of action in accordance with the fee schedule applicable to chiropractors who render the same services, defendant is entitled to summary judgment dismissing those causes of action (*Great Wall Acupuncture, P.C. v Geico Ins. Co.*, 26 Misc 3d 23 [App Term, 2d, 11th & 13th Jud Dists 2009]).

In opposition to the branch of plaintiff's motion seeking summary judgment upon the fourth cause of action and in support of the branch of its cross motion seeking summary judgment upon that cause of action, defendant submitted an "affirmed" report by its doctor who had performed an independent medical examination (IME) of plaintiff's assignor, to establish that the acupuncture services rendered thereafter by plaintiff were not medically necessary. However, plaintiff alleged, before the Civil Court and on appeal, that the IME doctor's "affirmed" report is not admissible because it impermissibly bears a stamped facsimile of the doctor's signature. We recognize that such an allegation, when properly asserted, ordinarily raises an issue of fact that cannot be resolved solely by an examination of the papers submitted on a motion for summary judgment (*see Seoulbank, NY Agency v D & J Export & Import Corp.*, 270 AD2d 193 [2000]; *Dyckman v Barrett*, 187 AD2d 553 [1992]; *Mani Med., P.C. v Eveready Ins. Co.*, 25 Misc 3d 132[A], 2008 NY Slip Op 52697[U] [App Term, 2d & 11th Jud Dists 2008]; *see also James v Albank*, 307 AD2d 1024 [2003]). While the branch of plaintiff's motion and the branch of defendant's cross motion, each seeking summary judgment on the fourth cause of action, could simply be denied due to the existence of such issue of fact, we are of the opinion, under the circumstances presented, that the better practice would be for the Civil Court to hold a hearing pursuant to CPLR 2218 on the limited issue of the validity of the signature upon defendant's doctor's "affirmed" IME report. Such hearing will allow the court to determine whether the report was in admissible form (*see also Uniform Rules for Civ Ct* [22 NYCRR] § 208.11 [b] [4]) and, thus, enable the court to resolve the remaining branch of the motion and the remaining branch of the cross motion on their merits.

Accordingly, the judgment is reversed, the order entered October 3, 2008 is vacated,

the branches of plaintiff's motion seeking summary judgment upon the first, second and third causes of action are denied, the branches of defendant's cross motion seeking summary judgment dismissing plaintiff's first, second and third causes of action are granted, and the matter is [\*3]remitted to the Civil Court for a framed issue hearing (*see* CPLR 2218) to determine the admissibility of the IME report and for a new determination thereafter of the branch of the motion and the branch of the cross motion, each seeking summary judgment upon the fourth cause of action.

Rios, J.P., Pesce and Steinhardt, JJ., concur.

Decision Date: March 16, 2010

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