

At a term of the Appellate Term of the Supreme Court
of the State of New York for the 2nd, 11th & 13th Judicial Districts

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MARSHA L. STEINHARDT, J.P.
MICHAEL L. PESCE
MICHELLE WESTON, JJ.

DEC 20 2010

NOVEMBER 10, 2010 TERM
2009-00113 Q C
2009-001471 Q C

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BELT PARKWAY IMAGING, P.C. and
PARKWAY MRI, P.C. as Assignees of
DENISE ARRINDELL and STEVEN ARRINDELL,
Respondents,

-against-

Lower Court #
110756/04

STATE WIDE INSURANCE COMPANY,
Appellant.

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The above named appellant having appealed to this court from a **JUDGMENT** of the **CIVIL COURT, CITY OF NEW YORK, QUEENS COUNTY** entered on **DECEMBER 30, 2008**, and from an **ORDER** of the same court, entered on **MAY 27, 2009** and the said appeals having been argued by **SKIP SHORT, ESQ.** counsel for the appellant and argued by **CRAIG SANDERS, ESQ.** counsel for the respondents and due deliberation having been had thereon; it is hereby,

ORDERED AND ADJUDGED that on the court's own motion, the appeals are consolidated for purposes of disposition; and it is further,

ORDERED AND ADJUDGED that the judgment is affirmed, without costs; and it is further,

ORDERED AND ADJUDGED that the appeal from the order entered May 27, 2009 is dismissed as academic.


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

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PAUL KENNY
CHIEF CLERK
APPELLATE TERM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd, 11th and 13th JUDICIAL DISTRICTS

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PRESENT : STEINHARDT, J.P., PESCE and WESTON, JJ.

-----X
BELT PARKWAY IMAGING, P.C. and
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Respondents,

-against-

DEC 20 2010

NOs. 2009-113 Q C
2009-1471 Q C

DECIDED

STATE WIDE INSURANCE COMPANY,

Appellant.

-----X
Appeals from a judgment of the Civil Court of the City of New York, Queens County (Bernice Daun Siegal, J.), entered December 30, 2008, and from an order of the same court (Diane A. Lebedeff, J.), entered May 27, 2009. The judgment, after a nonjury trial, awarded plaintiffs the principal sum of \$4,223.17. The order denied defendant's motion to vacate the judgment.

ORDERED that, on the court's own motion, the appeals are consolidated for purposes of disposition; and it is further,

ORDERED that the judgment is affirmed, without costs; and it is further,

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ORDERED that the appeal from the order entered May 27, 2009 is dismissed as academic.

Plaintiffs commenced this action to recover assigned first-party no-fault benefits for medical services rendered. After a nonjury trial, the Civil Court (Bernice Daun Siegal, J.) found, among other things, that defendant had failed to establish, by clear and convincing evidence, its defense that plaintiffs were ineligible for reimbursement of no-fault benefits on the ground that they were operated in violation of state licensing requirements. As a result, judgment was entered in favor of plaintiffs in the principal sum of \$4,223.17. Thereafter, defendant moved to vacate the judgment on the ground that the judgment awarded no-fault statutory interest based on an improper accrual date. The Civil Court (Diane A. Lebedeff, J.) denied defendant's motion. Defendant appeals from the judgment and the post-judgment order, which appeals we consolidate for disposition.

The appeal from the post-judgment order is dismissed as academic since the issue can be reviewed on the appeal from the judgment (see Binghamton Precast & Supply v A. Servidone, Inc./Anthony Constr. Corp., 257 AD2d 731, 732 n [1999]).

It is well settled that a provider of healthcare services is ineligible for reimbursement of assigned first-party no-fault benefits "if the provider fails to meet any

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applicable New York State or local licensing requirement necessary to perform such service in New York" (Insurance Department Regulations [11 NYCRR] § 65-3.16 [a] [12]; see State Farm Mut. Auto. Ins. Co. v Mallela, 4 NY3d 313, 321 [2005]). State law mandates that professional service corporations be owned and controlled only by licensed professionals (see Business Corporation Law § 1503 [a]; §§ 1507, 1508), and that licensed professionals render the services provided by such corporations (see Business Corporation Law § 1504 [a]). A professional corporation which is actually controlled by a management company owned by unlicensed individuals in violation of the Business Corporation Law is not entitled to be reimbursed for no-fault benefits (see One Beacon Ins. Group, LLC v Midland Med. Care, P.C., 54 AD3d 738 [2008]).

On appeal, defendant contends that the Civil Court erred in finding that defendant had to establish its defense - - that plaintiffs were operated in violation of state licensing requirements thereby making plaintiffs ineligible for reimbursement of no-fault benefits - - by clear and convincing evidence rather than merely by a preponderance of the evidence. In support of this proposition, defendant cites V.S. Med. Servs., P.C. v Allstate Ins. Co. (25 Misc 3d 39 [App Term, 2d, 11th & 13th Jud Dists 2009] [an insurer need only establish the defense of a staged accident by a preponderance of the evidence]). We need not ultimately decide this issue here since,

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upon a review of the record, we find that the evidence adduced at trial was insufficient to establish, even by a preponderance of the evidence, that plaintiffs were operated in violation of state licensing requirements. To the extent that defendant sought to establish at trial that the management company hired by plaintiffs was the entity that actually "operated" (Mallela at 319) the plaintiff corporations, the record is devoid of facts establishing any of the indicia of ownership or control by one other than plaintiffs' licensed professional.

Where, as here, a provider is found to be entitled to reimbursement of no-fault benefits, it is entitled to no-fault statutory interest from the time that the claim is overdue (see former Insurance Department Regulations [11 NYCRR] § 65.15 [h] [1], now Insurance Department Regulations [11 NYCRR] § 65-3.9 [a]). However, statutory interest is tolled if the provider fails to request arbitration or commence a lawsuit within 30 days after receiving the denial (see LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co., 12 NY3d 217, 223 [2009]; East Acupuncture, P.C. v Allstate Ins. Co., 15 Misc 3d 104 [App Term, 2d & 11th Jud Dists 2007], affd 61 AD3d 202 [2009]). Since defendant failed to establish that it ever sent denial of claim forms to plaintiffs, the accrual of interest was never tolled and interest due on the claims commenced from 30 days after the claims were submitted to the insurer for payment (see Hempstead

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Gen. Hosp. v Insurance Co. of N. Am., 208 AD2d 501 [1994]). Upon a review of the record, we find that the Civil Court properly determined the date that interest began to accrue.

With regard to defendant's contention that the interest was improperly compounded, former Insurance Department Regulations (11 NYCRR) § 65.15 (h) (1) provided for interest at the rate of "two percent per month, compounded." While the aforementioned regulation was superseded on April 5, 2002 by Insurance Department Regulations (11 NYCRR) § 65-3.9 (a), which provides for "interest at a rate of two percent per month, calculated on a pro-rata basis using a 30-day month," the claims involved herein are all governed by the former Insurance Department Regulations. Defendant further asserts that to the extent that the former regulation provided for the compounding of interest, it was inconsistent with the statute. However, the statute merely provides for interest to be calculated at a rate of 2% per month and does not indicate a legislative preference for either simple or compound interest. Since the regulation providing for compound interest is not inconsistent with Insurance Law § 5106 (a) and it "is neither irrational nor unreasonable, it is entitled to deference" (East Acupuncture, P.C., 61 AD3d at 209). Accordingly, defendant's contention that the court erred in awarding compound interest lacks merit.

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Finally, defendant's defense of statute of limitations was waived since defendant never raised said defense in its answer or in a pre-answer motion to dismiss the complaint (see CPLR 3211 [e]; Ferri v Ferri, 71 AD3d 949 [2010]).

In light of the foregoing, the judgment is affirmed.

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