

DIS-1140 MM ✓

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX, Part 41

HARVEY FAMILY CHIRO PT & ACUP PLLC

Index No. CV-708197/15

Plaintiff,

-against-

DECISION AND ORDER

Hon. Bianca Perez

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Defendant.

As required by CPLR § 2219(a), the papers considered in the review of this Motion include:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

The plaintiff filed the instant action against the defendant seeking to recover assigned no-fault insurance benefits. The amount of the bills in question total \$5,021.64.

The defendant now moves pursuant to CPLR 3212 for an order granting summary judgment in favor of the defendant. The defendant contends that it timely paid and denied the bills pursuant to the Workers Compensation Fee Schedule.

The plaintiff opposes.

Standard of Review

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact. See, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Summary judgment is inappropriate where there are material issues of fact in dispute or where more than one conclusion may be drawn from the facts. See, Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039 (2016).

In considering a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference. See, Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

Initially, a movant has the burden to set forth evidentiary facts sufficient to entitle that party to judgment as a matter of law, whereupon the burden is shifted to the opposing party to come forward with proof, again in evidentiary form, to show the existence of genuine triable issues of fact. See, Piccolo v. De Carlo, 90 A.D.2d 609 (3rd Dept 1982).

Discussion

A defendant establishes entitlement to summary judgment when it establishes that all sums paid to a medical provider were in accordance to the prevailing fee schedule, even if less than the amount billed. See, Z.M.S. & Y Acupuncture, P.C. v GEICO Gen. Ins. Co., 58 Misc.3d 143(A), (App Term 2nd 2017).

The defendant presented the affidavit of Mr. Matthew Kenyon, a certified professional coder who conducted a review of the bills to determine whether the correct CPT codes were applied and billed correctly.

Mr. Kenyon's findings were that the total amount that is allowed to be paid is \$2,621.29, as per the Workers Compensation Medical Fee Schedule, Chiropractic and Physical Medicine Fee Schedule, and that the defendant overpaid by \$0.01 since the defendant paid \$2,621.30.

Mr. Kenyon described the process by which services should be billed and supported the calculations with reference to the applicable fee schedule. Accordingly, the Court finds that the defendant met its burden of proving proper payment under the fee schedule based on the affidavit of Mr. Kenyon.

The Court further finds that the plaintiff failed to demonstrate by admissible evidence the existence of a material issue of fact. The affidavit of the chiropractor, Richard Harvey DC, which was submitted by the plaintiff, fails to raise an issue of fact as to the right amount of the claims under the fee schedule. Mr. Harvey's affidavit attests to the medical necessity of a particular treatment, which is not the issue in dispute. Mr. Harvey's affidavit does not address any of the billing codes. The doctor's statement that the "fees charged herein are comparable to fees in the area" is insufficient and conclusory.

The Court also cannot accept the report from Ms. Mercy Acuna which is attached as an exhibit to the plaintiff's papers as it is not accompanied by an affidavit from Ms. Acuna and the report is not in its entirety.

Thus, the plaintiff's argument that it billed properly under the fee schedule is not supported by an affidavit from an individual who is familiar with coding and fee schedules. The Court cannot accept the attorney's affirmation as proof that the bills were properly coded as it is not based on personal knowledge and has no probative value in a motion for summary judgment. See, W. W. Norton & Co., Inc. v. Roslyn Targ Literary Agency, Inc., 81 A.D.2d 798 (1st Dept 1981); Amaze Medical Supply Inc. v. Allstate Ins. Co., 3 Misc.3d 133(A) (App Term 2nd 2004).

Conclusion

The defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

Dated: November 26, 2018

ENTERED

NOV 26 2018

CIVIL COURT
BRONX COUNTY


Hon. Bianka Perez, J.C.C.