

SUPREME COURT OF THE STATE OF NEW YORK

HON. JOAN A. MADDEN NEW YORK COUNTY

J.S.C.

Index Number : 650766/2013

NEW YORK DIAGNOSTIC MEDICAL

vs

GEICO CASUALTY INSURANCE CO.

Sequence Number : 001

DISMISS

PART 1/

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):Dated: April 11, 2014

HON. JOAN A. MADDEN

J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED☐ NON-FINAL DISPOSITION2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

NEW YORK DIAGNOSTIC MEDICAL CARE P.C., INDEX NO. 650766/13

Plaintiff,

-against-

GEICO CASUALTY INSURANCE CO.,

Defendant.

-----X

JOAN A. MADDEN, J.:

Defendant's motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action, is granted.

In determining whether to grant a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the court should liberally construe the pleadings, accept as true the facts as alleged in the complaint, according plaintiff the benefit every favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Leon v. Martinez, 84 NY2d 83 (1994); Frank v. DaimlerChrysler Corp., 292 AD2d 118 (1st Dept), lv app den 299 NY2d 502 (2002). The court, however, need not accept allegations that are "inherently incredible or flatly contradicted by documentary evidence" or well-established law. Ullman v. Norma Kamali, Inc., 207 AD2d 691 (1st Dept 1994); see Bumbury v. City of New York, 62 AD3d 621 (1st Dept 2009)(dissent).

Here, the complaint asserts causes of action for declaratory and monetary relief, alleging that plaintiff submitted to defendant "over \$800,000 of claim forms for MRIs performed upon

hundreds of no-fault patients, including the \$676,908.02 of claims listed in Exhibit A,” each of which was denied by defendant based upon a peer reviews. The complaint alleges that under the no-fault insurance law and regulations, insurers like defendant Geico, cannot rely on peer reviews in denying claims for no-fault benefits, specifically claims for MRIs, based on lack of medical necessity. Plaintiff’s allegations lack merit as a matter of law, based well-established appellate case law that is binding on this court.

In Countrywide Insurance Co v. 563 Grand Medical, P.C., 50 AD3d 313 (1st Dept 2008) and Channel Chiropractic, P.C. v. Country-Wide Insurance Co, 38 AD3d 294 (1st Dept 2007), the Appellate Division First Department holds that a nurses’ peer reviews denying no-fault claims for lack of medical necessity are not “per se invalid.” Even though the First Department holdings refer to nurses’ peer reviews, since that was the specific issue raised in those cases, implicit in First Department’s holding is a determination as to the permissible use of peer reviews, whether conducted by a nurse or a doctor. Notably, in Channel Chiropractic, P.C. v. Countywide Insurance Co, the First Department affirmed the lower court’s determination that Insurance Regulation 11 NYCRR 65-3.8(b)(4) “implicitly permits an insurer to deny a no-fault claim on the basis either of a peer review report or a medical examination.” Channel Chiropractic, P.C. v. Countrywide Insurance Co, 2005 WL 6229141 (Sup Ct, NY Co 2005) (n.o.r.).

Insurance Regulation 11 NYCRR 65-3.8(b)(4) provides as follows: “If the specific reason for a denial of a no-fault claim, or any element thereof, is a medical examination or *peer review* report requested by the insurer, the insurer shall release a copy of that report to the applicant for benefits, the applicant’s attorney, or the applicant’s treating physician, upon the written request of any of these parties” (emphasis added). Courts have consistently cited this regulation in

concluding that an insurer can rely on a peer review report to support a denial of no-fault medical benefits based on lack of medical necessity. See Wykoff Heights Medical Center v. Government Employees Insurance Co, 114 AD3d 855 (2nd Dept 2014); Countrywide Insurance Co v. 563 Grand Medical, PC, *supra*; A.B. Medical Services, PLLC v. GEICO Casualty Insurance Co, 39 AD3d 778 (2nd Dept 2007); A.B. Medical Services, PLLC v. Liberty Mutual Insurance Co, 39 AD3d 779 (2nd Dept 2007); Channel Chiropractic, P.C. v. Country-Wide Insurance, *supra*; New York University Hospital Rusk Institute v. Government Employees Insurance Co, 39 AD3d 832 (2nd Dept 2007); A-Quality Medical Supply v. GEICO General Insurance Co, 39 Misc3d 24 (App Term 2nd Dept 2013); Park Health Center v. Peerless Insurance Co, 2 Misc3d 127(A) (App Term 2nd Dept 2003); Rockaway Blvd Medical PC v. Travelers Property Casualty Corp, 2003 WL 21049583 (App Term 2nd Dept 2003) (n.o.r.); New York Diagnostic Medical Care PC v. Geico Casualty Insurance Co, 2009 WL 5330383 (Sup Ct, NY Co 2009) (n.o.r.).

Plaintiff cites no relevant legal authority to support an interpretation of the no-fault insurance law and regulations that would, as a matter of law, preclude peer review for an MRI or any other type of medical service, when the language of 11 NYCRR 65-3.8(b)(4) explicitly provides that peer review is contemplated in determining the medical necessity of “a no-fault claim” in general. Plaintiff’s reliance on statutes, regulations and case law outside the no-fault context, and plaintiff’s attempt to distinguish the First Department’s opinions in Countrywide Insurance Co v. 563 Grand Medical, PC, *supra* and Channel Chiropractic, P.C. v. Country-Wide Insurance, *supra*, are unavailing. As noted by Justice Emily Jane Goodman in New York Diagnostic Medical Care PC v. Geico Casualty Insurance Co, *supra*, if as plaintiff asserts, “the danger of peer review in denying legitimate claims is more serious than the dangers of unneeded

procedures being ordered and paid for by no-fault, that is an issue for the Legislature to address.”

Id.

Thus, in view of the foregoing authorities, this court is bound to conclude that plaintiff's claims are without merit as a matter of law, and the complaint must be dismissed for failure to state a cause of action. See Ullman v. Norma Kamali, Inc., supra.

Plaintiff's cross-motion for a stay pending appeal pursuant to CPLR 2201, is denied.

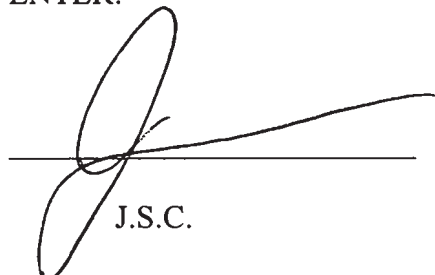
Accordingly, it is

ORDERED that defendant's motion to dismiss is granted and the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion for a stay pending appeal is denied.

DATED: April 11, 2014

ENTER:



J.S.C.