IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ADVANCED 3-D DIAGNOSTICS, INC., as assignee of Marck Chery,

Appellant,

v.

AUTO-OWNERS INSURANCE COMPANY,

Appellee.
_____/

CASE NO.: 2014-CV-000058-A-O
Lower Case No.: 2013-SC-001600-O

Appeal from the County Court,
for Orange County, Florida,
Faye L. Allen, County Judge.

Sherryll Martens Dunaj, Esquire,
for Appellant.

Rhamen M. Love-Lane, Esquire,
for Appellee.

Before MYERS, JR., S. KEST, and THORPE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant, Advanced 3-D Diagnostics, Inc. ("Advanced") as assignee of the insured, Marck Chery ("Chery"), timely appeals the trial court's "Summary Judgment in Favor of Defendant" (includes Final Judgment) entered on August 8, 2014 in favor of Appellee, Auto-Owners Insurance Company ("Auto-Owners"). This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

Chery who had personal injury protection ("PIP") insurance coverage with Auto-Owners, was injured in an automobile accident on November 28, 2011. Thereafter, he received medical services from Advanced consisting of taking and reading x-rays of his injuries. Per the assignment of benefits from Chery, on December 12, 2011, Advanced submitted to Auto-Owners a claim for the medical services it provided to Chery totaling $725.00. Auto Owners paid $370.12 for the claim. Subsequently, Advanced claimed that it was entitled to payment of $580.00 (80% of the total of $725.00 charged) and sent Auto-Owners a demand letter seeking payment for the alleged balance owed of $209.88. Auto-Owners did not pay the alleged balance due.

On February 11, 2013, Advanced filed suit against Auto-Owners for breach of contract to collect the alleged balance due and also filed requests for admissions and production. Thereafter, Auto-Owners filed its Answer and Affirmative Defenses. Subsequently on August 27 and 28, 2013, Advanced filed more discovery motions, motions for a more definite statement and to strike affirmative defenses, and a motion for summary judgment (only as to Auto-Owners' affirmative defense addressing assignment). Thereafter, Auto-Owners filed its first request for admissions and motion to compel depositions. Also, orders were entered to compel discovery responses.

On March 12, 2014, Auto-Owners filed its Motion for Final Summary Judgment ("MSJ") that was heard on June 23, 2014. Based on the arguments presented, the trial court found that there were no disputed material facts and granted summary judgment in favor of Auto-Owners. On August 8, 2014, the trial court entered the written Order and the Final Judgment that Advanced now appeals.

Summary of Arguments on Appeal

Advanced argues that the trial court erred: 1) in overruling its objections to the defective and unsworn affidavit of Auto-Owners' claim representative that was filed less than 20 days before the hearing addressing Auto-Owners' MSJ; 2) in deeming the belatedly answered admissions technically admitted; and 3) in placing the burden of proof on the non-movant and in not considering the prima facie reasonableness of the medical bill. Lastly, Advanced filed a motion for appellate attorney fees pursuant to Florida Rule of Appellate Procedure 9.400(b) and sections 627.736(8) and 627.428, Florida Statutes.

Conversely, Auto-Owners argues that the entry of summary judgment in its favor was proper because: 1) Advanced failed to prove there was a breach of contract; 2) Advanced failed to meet its burden of proof; 3) Advanced's bill is not prima facie evidence of reasonableness to satisfy its burden of proof; 4) the court properly deemed the admissions admitted and properly relied on them; and 5) Auto-Owners' Affidavit that was filed to authenticate documents was proper but inconsequential. Lastly, Auto-Owners in its answer brief requests appellate attorney's fees and costs, but it did not file/serve a separate motion for attorney fees as required Florida Rule of Appellate Procedure 9.400(b).

Standard of Review

The standard of review for summary judgment is de novo. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Accordingly, an appellate court must determine if there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Krol* at 491- 492, *citing* Fla. R. Civ. P. 1.510(c); *Helping Hand Private Foundation, Inc. v. Ocean Palms Beach Club, Inc.*, 77 So. 3d 896, 897 (Fla. 5th DCA

2012) (explaining that summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law).

Analysis

First, as Advanced correctly argues, Florida Rule of Civil Procedure 1.510 places the burden of proof at summary judgment on the movant, regardless of who has the burden at trial. *Besco USA International Corp. v. Home Savings of America FSB*, 675 So. 2d 687, 688 (Fla. 5th DCA 1996) (explaining that a movant for summary judgment has a greater burden than a plaintiff at trial because the movant must prove a negative being the nonexistence of a genuine issue of a material fact and if the slightest doubt exists as to the presence of an issue of fact, then summary judgment cannot be granted). Thus, Auto-Owners in bringing its MSJ had the burden of proof to fulfill.

In the instant case, the primary issue was whether Auto-Owners' payment of Advanced's claim was in compliance with the applicable statute, section 627.736, Florida Statutes, that addresses the payment of PIP medical benefit claims at 80% of the reasonable services and supplies provided. The portions of the statute involved with this issue are as follows:

Section 627.736(1)(a), Florida Statutes (2011)[1]:

> 1) REQUIRED BENEFITS.—Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and

[1] The 2011 version of the statute is cited because the subject claim was submitted by Advanced in 2011.

paragraph (4)(e), to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:

(a) Medical benefits.—**Eighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services.** However, the medical benefits shall provide reimbursement only for such services and care that are lawfully provided, supervised, ordered, or prescribed by a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, or a chiropractic physician licensed under chapter 460 or that are provided by any of the following persons or entities: … [*Emphasis added*]

(5) CHARGES FOR TREATMENT OF INJURED PERSONS.—

(a)1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection **insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered,** and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. In no event, however, may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies. **With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.** [*Emphasis added*]

Advanced contends that its total charge of $725.00 was reasonable based on the usual customary charges for similar services within the community and that Auto-Owners paid less than the usual and customary reimbursement levels in the community. Thus, Advanced concludes that the amount paid should have been $580.00 (80% of $725.00). Conversely, Auto-Owners determined a lesser amount to be reasonable and ultimately paid Advanced

$370.12 for its claim. Accordingly, per its MSJ, Auto-Owners had the burden to show that based on the pleadings and evidence in the record at that time, the amount paid for the claim and method it applied for determining that amount was in compliance with the statute entitling it to summary judgment.

Next, the evidence presented in support of Auto-Owners' MSJ consisted of Advanced's medical claim, two Explanation of Review documents, Advanced's demand letter, Auto-Owner's response letter to the demand letter, the subject insurance policy, the Affidavit of Auto-Owners' claim representative/records custodian, Benson Gloster ("Gloster Affidavit"), and Advanced's responses and admissions to Auto-Owners' Request to Produce and Request for Admissions. In reviewing the evidence, this Court specifically addresses Advanced's arguments concerning the Affidavit as follows:

Gloster Affidavit: This Affidavit was filed on June 13, 2014, only 10 days prior to the hearing on June 23, 2014 addressing Auto-Owners' MSJ; thus, it was not filed in compliance with Florida Rule of Civil Procedure 1.510(c) that requires the filing of affidavits at least 20 days prior to the hearing. Also, the Affidavit was incomplete because the "sworn to and subscribed" portion of the Affidavit was left blank as to the date and the "personally known to me" portion was not circled or marked nor was any information included as to identification of the affiant. Accordingly, Advanced moved to strike the Affidavit as untimely and defective. However, at the hearing the trial court accepted the Affidavit into evidence. Upon review, this Court concurs with Advanced that the trial court erred in allowing the untimely and defective Affidavit to be submitted as evidence in the record.

However, notwithstanding the trial court's acceptance of the Affidavit and the admissions into evidence, this Court finds that those documents as well as the other evidence in the record did not reveal how Auto-Owners determined the reasonable amount to pay for the claim and thus, were insufficient to negate Advanced's allegations that the amount it charged was reasonable. Specifically, the Gloster Affidavit only includes statements addressing the custody/certification of the records and merely recites portions of what was stated in some of these documents. The statements in the Affidavit did not include statements or attach documents explaining the method Auto-Owners applied for determining the amount to pay for the claim. At most, the Explanation of Review documents only state that the bill was evaluated against the prevailing billing practices for medical providers within Advanced's geographic area. Also, Advanced's responses to the request to produce and admissions referenced in Auto-Owners' MSJ only pertain to the lack of written materials utilized by Advanced in determining the amount it charged. *See Spencer v. Halifax Hospital District*, 242 So. 2d 143, 145 (Fla. 1st DCA 1970) (finding that upon review of the pleadings, admissions, affidavits and exhibits on file, appellee did not show the absence of a genuine issue of fact on the material questions of the reasonableness of the charges and consideration for executing the instrument imposing responsibility for the hospital bill); *Leal V. Palm Springs General Hospital, Inc. of Hialeah*, 218 So. 2d 800 (Fla. 3d DCA 1969) (finding upon examining the record that genuine issues of fact existed which should have precluded the entrance of a summary judgment as to the issue of reasonableness of the hospital's charges); *Eastland Investment Co. v. Baker*, 344 So. 2d 882, 883 (Fla. 3d DCA 1977) (finding appellant's affidavit in opposition to summary judgment alleging usury was insufficient due to the affidavit's lack of calculations).

In conclusion, when evaluating a motion for summary judgment, including the pleadings and evidence, the court must view every possible inference in favor of a party against whom a summary judgment has been rendered. *Besco USA International Corp.*, 675 So. 2d at 688. Further, the failure by Auto-Owners to support its motion with competent evidence precluded the burden from shifting to Advanced as the non-moving party. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) (explaining that once the movant has tendered competent evidence in support of a motion for summary judgment, the burden then shifts to the non-moving party to come forward with counterevidence sufficient to reveal a genuine issue of material fact). Accordingly, the issue as to the reasonable amount charged and paid remains a genuine issue of material fact precluding summary judgment.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED:**

1. The trial court's "Summary Judgment in Favor of Defendant" (with Final Judgment) entered on August 8, 2014 is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

2. Advanced's "Appellant's Motion for Attorneys' Fees" filed November 17, 2014 is **GRANTED** contingent upon Advanced prevailing in the lower court and the assessment of those fees is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 2nd day of June, 2015.

/S/
DONALD A. MYERS, JR.
Presiding Circuit Judge

S. KEST and THORPE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Sherryll Martens Dunaj, Esquire**, Simon, Schindler, & Sandberg, LLP, 2650 Biscayne Blvd., Miami, Florida 33137; **Rhamen M. Love-Lane, Esquire**, Smith, Rolfes, & Skavdahl Company, LPA, 200 South Orange Avenue, Suite 1240, Orlando, Florida 32801, and the **Honorable Faye L. Allen, Orange County Judge**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 3rd day of June, 2015.

/S/_____
Judicial Assistant