

**IN THE COUNTY COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CIVIL DIVISION
CASE NUMBER: 14-019831 COCE (53)**

**ATLANTIC COAST ORTHOPAEDICS, LLC
(a/a/o Markeva Lynn),**

Plaintiff,

vs.

**PROGRESSIVE SELECT INSURANCE
COMPANY,**

Defendant.

FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

THIS MATTER came to be heard before this Honorable Court for hearing on October 13, 2016 on Defendant and Plaintiff's Cross Motions for Final Summary Judgment and this Court having reviewed the file and motions, heard arguments of counsel, and otherwise, being fully advised in the premises, finds as follows:

Undisputed Facts and Procedural History

This action arises out of claim for Personal Injury Protection benefits by, Plaintiff, Atlantic Coast Orthopaedics, LLC (hereinafter "Atlantic") as assignee of Markeva Lynn submitted to Defendant, Progressive Select Insurance Company (hereinafter "Progressive"). On December 17, 2013, Markeva Lynn was involved in an automobile accident in which she allegedly sustained injuries. Markeva Lynn subsequently sought medical treatment for injuries allegedly arising from said automobile accident from the Plaintiff. Plaintiff billed Defendant for services rendered to Markeva Lynn on January 22, 2014 and March 19, 2014 in the amount of

\$1,000.00. Defendant received the bill for January 22, 2014 on February 3, 2014. After multiple attempts to schedule a recorded statement of Markeva Lynn, Progressive sent a letter on March 11, 2014 requesting that Markeva Lynn appear for an Examination Under Oath scheduled on March 26, 2014. Markeva Lynn failed to appear for the Examination Under Oath and also failed to attend two subsequent Examinations Under Oath on April 10, 2014 and April 23, 2014. Defendant denied Plaintiff's bills based upon Markeva Lynn's failure to attend three properly scheduled and noticed Examinations Under Oath.

On or about October 21, 2014, Plaintiff, as assignee of Markeva Lynn, filed a Complaint for damages against Progressive alleging breach of contract and seeking to recover Personal Injury Protection benefits for treatment rendered to Markeva Lynn. In response, Defendant filed an Answer and Affirmative Defenses asserting that Plaintiff is not entitled to PIP benefits based upon Markeva's Lynn's failure to comply with a condition precedent by failing to appear for three properly scheduled Examinations Under Oath. Plaintiff and Defendant filed Cross Motions for Summary Judgement.

Defendant filed evidence demonstrating that the assignor received notice of and failed to attend three Examinations Under Oath. Plaintiff does not dispute that the assignor failed to appear for the Examinations Under Oath. Plaintiff contends that Defendant is barred from relying upon the assignor's failure to attend the Examinations Under Oath (as to the medical bill for date of service January 22, 2014) as a defense because the first Examination Under Oath was set more than 30 days from receipt of Plaintiff's first bill.

Legal Analysis

This case is controlled by Florida Statutes, § 627.736 (6)(g), as amended effective January 1, 2013, which provides "[a]n insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are

not limited to, submitting to an examination under oath. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. Compliance with this paragraph is a ***condition precedent to receiving benefits***. (Emphasis Added). A plain reading of the clear and unambiguous language of the statute authorizes insurance carriers such as Progressive to require an insured seeking benefits under the No-Fault Statute, to submit to an Examination Under Oath. Additionally, the statute makes attendance at an Examination Under Oath, if requested by the insurer, a statutory condition precedent to receiving benefits.

Further, the policy at issue specifically provides “[a] person seeking coverage **must:** allow us to take signed and recorded statements, **including sworn statements and examinations under oath**, which we may conduct outside the presence of you or any other person claiming coverage, and answer all reasonable questions we may ask and provide any documents, records, or other tangible items that we request, when, where, and as often as we may reasonably require. Thus, the policy clearly incorporates the statutory requirement to submit to an examination under oath and provides notice of said requirement to the insured.

This Court finds the statutory language above to be clear and unambiguous. When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. *See State of Florida v. Warren*, 796 So.2d 489 (Fla. 2001) The 2013 version of the No-Fault Florida Statute made clear that a person seeking personal injury benefits must appear for an examination under oath as a condition precedent to receiving benefits.

Plaintiff contends that Defendant’s defense based upon failure to attend the Examinations Under Oath, is invalid because the first Examination Under Oath was not requested within 30

days of receipt of Plaintiff's first bill. The Plaintiff relies upon §627.736(4) Florida Statutes to support its position that an Examination Under Oath must be set within 30 days of receipt of Plaintiff's bills. That section provides in pertinent part:

(4) PAYMENT OF BENEFITS.—

Benefits due from an insurer under ss. 627.730-627.7405are due and payable as loss accrues upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730-627.7405.

(b) Personal injury protection insurance benefits paid pursuant to this section are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.

d) All overdue payments bear simple interest at the rate established under s. 55.03 or the rate established in the insurance contract, whichever is greater, for the quarter in which the payment became overdue, calculated from the date the insurer was furnished with written notice of the amount of covered loss. Interest is due at the time payment of the overdue claim is made.

The Fourth District has interpreted section 627.736(4) to mean that "if PIP benefits are payable, they are due within thirty days after notice." However, "failing to obtain proof that it is not responsible for payment ... does not deprive the insurer of its right to contest payment." *AIU Insurance Company v. Daidone*, 760 So.2d 1110 (Fla. 4th DCA 2000). In *Fortune Ins. Co. v. Everglades Diagnostics, Inc.*, 721 So.2d 384 (Fla. 4th DCA 1998), the court found the provisions of §627.736(4) "merely make the insurer liable for interest if payment is not made within 30 days from notice," and "the function of the statute is to define when interest begins to accrue on unpaid PIP benefits." This Court does not read 627.736(4) Florida Statutes as requiring an Examination Under Oath be set within 30 days of receipt of Plaintiff's bill or be waived.

Plaintiff further relies upon *Amador v. United Automobile Ins. Co.*, 748 So.2d 307 (Fla. 3rd DCA 1999) to support its position that Defendant is precluded from relying upon an Examination Under Oath set more than 30 days from receipt of Plaintiff's bills. 748 So.2d 307464 (Fla. 2000). In addition, Plaintiff ^{relied} ~~filed~~ upon appellate cases from the 17th and 11th

Judicial Circuits cited in its motion for summary judgment. In *Amador*, more than thirty days after receiving notice of a claim for PIP benefits, the insurer scheduled an examination under oath. Rather than attending, the insured filed a complaint for a declaratory judgment, injunctive relief and for breach of contract. The court in *Amador* rejected the insurer's argument that the insured could not file suit, even beyond the thirty-day period, if the insured had failed to comply with the request for the examination under oath. *Id at. 309*. The court held that if the insurer does not pay within the statutory thirty days, the insurer may not "deny an insured the right to access the courts for purposes of enforcing the PIP statute". *Id*.

This court agrees with Plaintiff's analysis of *Amador* to the extent that an insured can file suit or, under the current No-Fault law, a demand letter, after expiration of the thirty-day period. However, the court rejects Plaintiff's argument that an insurer waives the right to take an Examination Under Oath or the right to rely upon a defense based upon an Examination Under Oath if the Examination Under Oath is set more than 30 days from receipt of Plaintiff's bills. If an insurer fails to pay a claim within the thirty-day period, it is not barred from contesting the claim, but would be required to pay interest if its duty to pay the claim is ever established. Further, the holding in *Amador* does not relieve a person seeking PIP benefits of the duty to appear for an Examination Under Oath as a statutory condition precedent to receiving the PIP benefits if the Examination Under Oath is not set within the thirty-day period.

In summary, the current No-Fault law clearly requires a person seeking PIP benefits to submit to an examination under oath as a condition precedent to obtaining PIP benefits. The subject policy put the insured on notice of the duty to attend an examination under oath if so requested. Defendant scheduled and properly noticed three examinations under oath prior of the assignor prior to the filing of this suit, and the assignor failed to attend all three. Thus, the assignor failed to comply with the statutory condition precedent and is not entitled to PIP

benefits.

In accordance with the foregoing, it is therefore **ORDERED AND ADJUDGED** that:

Defendant's Motion for Final Summary Judgment is hereby GRANTED. FINAL SUMMARY JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE DEFENDANT AND IT SHALL GO HENCE FORTH WITHOUT DAY, and the Court reserves jurisdiction to determine entitlement and amount of attorney's fees and costs to the Defendant, upon a timely motion.

DONE AND ORDERED in Chambers in Broward County, Florida on this _____ day of September, 2016.

ROBERT W. LEE

NOV 18 2016

County Court Judge

TRUE COPY

Conformed Copies To:

Lynne French Davis, Esquire, Counsel for Defendant
Todd A. Landau, Esquire, Counsel for Plaintiff