IN THE COUNTY COURT
IN AND FOR BROWARD COUNTY, FLORIDA
CIVIL DIVISION
CASE NUMBER: 14-013903 CONO (70)

HEALTH DIAGNOSTICS OF ORLANDO, L.L.C. D/B/A STAND-UP MRI OF SW FLORIDA (a/a/o Pesilus Plancher),

Plaintiff,

vs.

ARTISAN AND TRUCKERS CASUALTY COMPANY/PROGRESSIVE CONSUMERS INSURANCE COMPANY,

Defendant.

_____ /

ORDER DENYING PLAINTIFF'S MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES AND COSTS BASED ON DEFENDANT'S CONFESSION OF JUDGMENT

THIS MATTER came to be heard before this Honorable Court on Plaintiff's Motion for Entitlement to Attorney's Fees and Cost Based on Confession of Judgment, and this Honorable Court having heard arguments of counsel, and otherwise, being fully advised in the premises, finds as follows:

Undisputed Facts and Procedural History

This action involves a claim for personal injury protection benefits arising out of a motor vehicle accident which occurred on April 13, 2013. The named insured, Pesilus Plancher, was covered under a policy of insurance issued by Defendant that provided personal injury protection benefits in accordance with the Florida Motor Vehicle No-Fault Law. The subject policy was in effect from November 11, 2012 through May 11, 2013.

Following the accident, Defendant received medical bills from Plaintiff and various other providers. Defendant adjusted the medical bills and paid out $2,500 in personal injury protection benefits for the insured's medical treatment. Defendant limited the PIP benefits to $2,500.00 because a qualified provider had not determined that the insured had an emergency medical condition.

Plaintiff filed this breach of contract action on November 19, 2014. Defendant filed a Motion for Final Summary Judgment as to the issue of Emergency Medical Condition. On December 13, 2016, Plaintiff submitted an Attestation of Emergency Medical Condition to Counsel for Defendant. Based upon the attestation of Emergency Medical Condition, Defendant issued payment to Plaintiff on January 13, 2017. It is undisputed that there was no Emergency Medical Condition determination made prior to December 13, 2016.

Plaintiff thereafter filed its Motion for Entitlement to Attorney's Fees and Costs Based on Defendant's Confession of Judgment. Plaintiff's position is that the post-suit payment was a confession of judgment because the bill was not paid by Defendant within 30 days pursuant to Fla. Stat. 627.736(4)(b), and Defendant did not toll the 30 days by requesting additional documentation pursuant to Fla. Stat. 627.736(6)(b). Defendant, on the other hand, argues that Defendant did not receive notice of a covered loss for PIP benefits exceeding $2,500 prior to suit. Thus, Plaintiff's pre-suit demand and lawsuit were premature.

Plaintiff further argues that Defendant improperly applied the Emergency Medical Condition limitation to a policy issued prior to January 1, 2013, the effective date of the statutory amendment adopting the Emergency Medical Condition provisions. Defendant's position is that the provisions were not applied retroactively. The insured was on notice that, effective January 1,

2013, the coverage under the policy issued on October 4, 2012, would change to conform to the amended PIP statute.

Conclusions of Law

The issues for the Court's determination are as follows: 1) whether Florida's No Fault Statute requires submission of an Emergency Medical Condition determination in order to put an insurer on notice of a covered loss for claims exceeding $2,500.00; 2) whether Defendant's payment of the subject services, after receipt of an Emergency Medical Condition designation, during the pendency of this litigation, constitutes a confession of judgment entitling Plaintiff to its attorney's fees and costs under Florida Statue §627.428; and 3) whether Defendant properly applied the Emergency Medical Condition limitations to the subject policy issued prior to January 1, 2013.

The Court finds that the No-Fault Statute requires submission of an Emergency Medical Condition determination to establish notice of a covered loss under Florida Statute 627.736(4)(b). *See* *Alternative Medical Center of Fort Lauderdale, Inc. v. Progressive,* 24 Fla. L. Weekly Supp. 999a (Fla .Broward County January 31, 2017); *Bofshever Wellness Center, LLC a/a/o Ruth Cereste v. Progressive American Insurance Company*, 24 Fla. L. Weekly Supp. 373a (Fla. Broward Cnty. Ct. March 10, 2016); *see also* *Enterprise Leasing Co. v. AFO Imaging, Inc. a/a/o Santonio Simmons*, 24 Fla. L. Weekly Supp. 487a (Fla. Hillsborough Cnty. Circuit Ct. Appellate October 24, 2016)(stating that "[u]nder §627.736(5)(d), written notice of a covered loss is achieved by the submission of a substantially completed CMS 1500 claim form containing all material and relevant information. Because an EMC diagnosis is directly related to the amount of benefits available for claims, it is both material and relevant information that must be provided in any notice of a covered

loss for claims exceeding $2500. Here, where an EMC diagnosis was not provided, AFO did not provide Enterprise with a valid notice of a covered loss for benefits over $2500 before it filed suit"); *see also* Dorsal Rehab, Inc. a/a/o Deluise Skylar v. Progressive American Insurance Company, 23 Fla. L. Weekly Supp. 490b (Fla. Broward Cnty. Ct. September 2, 2015) (holding that the affidavit submitted in opposition to summary judgment did not create an issue of material fact. The court stated "[b]ecause [the affidavit] was prepared and submitted to defendant after suit was filed, it is legally insufficient to put defendant on notice of a covered loss prior to suit. Benefits are not due until defendant has received notice of a covered loss. See F.S. 627.736(4)(b).").

Thus, it is patently clear that Plaintiff has an obligation to establish a legal right to entitlement to $10,000 in personal injury protection benefits prior to initiating litigation. *See* Med. Ctr. Of the Palm Beaches v. USAA Cas. Ins. Co., 202 So. 3d 88 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2018b]. In this case, Defendant was not put on notice of an emergency medical condition until well into litigation. Plaintiff should have provided Defendant with documentation of an emergency medical condition before filing suit. *Id.* at 93 (holding that the provider's demand letter was premature since it failed to respond to insurer's pre-suit request for an EMC documentation).

This Court rejects Plaintiff's argument that Defendant's post suit payment was a confession of judgment absent a request by Defendant for an Emergency Medical Condition determination pursuant to Fla. Stat. 627.736(6)(b). While Fla. Stat. 627.736(6)(b) permits an insurer to request an Emergency Medical Condition determination, Defendant was not required to request the Emergency Medical Condition determination in order to limit benefits to $2,500.00. As stated above, the Emergency Medical Condition determination is material to an insured's claim for

benefits over $2,500.00 and must be provided to an insurer to establish a claim for benefits exceeding $2,500.00. Plaintiff failed to provide the Emergency Medical Condition determination prior to initiating litigation. Thus, Defendant's post suit payment after receipt of the Emergency Medical Determination does not constitute a confession of judgment. Plaintiff is, therefore, not entitled to its attorney's fees and costs under Florida Statue §627.428.

This Court further finds that Defendant properly applied the Emergency Medical Condition limitations set forth in Fla. Stat. 627.736 (2013) to the subject policy issued on October 4, 2012. The operative statutory provisions applicable in this case, F.S. 627.736(1)(a)(3) & (1)(a)(4) addressing the existence or non-existence of an Emergency Medical Condition were enacted on May 4, 2012 and effective January 1, 2013. The policy of insurance issued by Defendant to the insured on October 25, 2012, contained an amendatory endorsement adopting the statutory language that stated, in pertinent part, "Effective January 1, 2013. . . the maximum reimbursement for services and care is limited to $2,500, unless it has been determined that the insured person had an emergency medical condition".

A court must reject retroactive application when a "statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010) citing *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995). "In making judgments concerning retroactivity of a statute, familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *R.A.M. of S. Florida, Inc., v. WCI Communities, Inc.*, 869 So.2d 1210 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D761b].

In this case, there was no retroactive application of law because the law in question already existed and was built into the insurance policy as a material part of the contract. Thus, proper notice of the applicable coverage provisions for reimbursement of PIP claims was provided to the insured, and the Defendant applied the correct coverage provisions of the policy by limiting reimbursement of PIP benefits to $2,500.00 for this non-emergency medical condition claim.

In accordance with the foregoing, it is therefore ORDERED AND ADJUDGED that Plaintiff's Motion for Entitlement to Attorney's Fees and Cost Based on Confession of Judgment is hereby DENIED.

DONE AND ORDERED in Chambers at Broward County, Florida this _____ day of _____, 2017.

JOHN D. FRY
AUG 07 2017
A TRUE COPY

_____
HONORABLE JOHN J. FRY
COUNTY COURT JUDGE

cc: Lynne French Davis, Andrews Biernacki Davis, Counsel for Defendant
Thomas J. Wendzel, Cindy Goldstein, P.A., Counsel for Plaintiff