IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTHONY DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N14C-02-250-CEB
	)	
STATE FARM INSURANCE COMPANIES, a foreign corporation,	)	
	)	
Defendant.	)	

Date Submitted: January 9, 2015
Date Decided: February 2, 2015

OPINION.
Upon Consideration of Defendant's Motion for Summary Judgment.
GRANTED.
Upon Consideration of Plaintiff's Partial Motion for Summary Judgment.
DENIED.

Edward T. Ciconte, Esquire, CICONTE, WASSERMAN, SCERBA & KERRICK, Wilmington, Delaware. Attorney for Plaintiff.

Patrick G. Rock, Esquire and Jason D. Warren, Esquire, HECKLER & FRABIZZIO, Wilmington, Delaware. Attorneys for Defendant.

BUTLER, J.

FACTS

Anthony Davis ("Plaintiff") was in a car accident on August 11, 2011 and he sought, and received, "no fault" insurance coverage from his insurer, GEICO Casualty Company ("GEICO"). On November 21, 2012, GEICO sent a letter to Plaintiff's counsel informing counsel that Plaintiff's personal injury protection ("PIP") benefits had been exhausted. Somewhere along the way, it was learned that Plaintiff's mother had a policy with State Farm Insurance Company ("State Farm"). There is no dispute that Mr. Davis is a "covered person" under his mother's State Farm policy. On November 4, 2013 -- almost a year after exhausting the benefits under his GEICO policy -- Plaintiff sought coverage under his mother's State Farm policy.

Before State Farm responded, Plaintiff filed this lawsuit four days later, on November 8, 2013. According to Plaintiff, his November 4, 2013 letter included enclosures of medical bills, supporting medical records, and lost wage information. The PIP claim was opened by State Farm on December 3, 2013. On December 4, 2013 State Farm notified Plaintiff's counsel that two years had passed since the date of the accident and that Plaintiff's counsel should call to discuss the claim.

During December 2013, some communications were exchanged between State Farm and Plaintiff's counsel regarding information pertaining to Plaintiff's medical bills. State Farm formally denied the claim on February 24, 2014 in its

Answer to Plaintiff's Complaint. State Farm affirmatively noted the Plaintiff's failure to submit the medical expenses within two years of the date of the accident in its defense.

PROCEDURAL POSTURE / SUMMARY OF ARGUMENTS

State Farm has filed a Motion for Summary Judgment, arguing that Delaware's PIP statute ("the Statute")[1] precludes recovery because Plaintiff failed to submit his medical expenses and lost wage information within the two years following the date of the accident. Plaintiff argues that his submission was timely and, even if not, that Defendant waived the right to raise the defense because it failed to do so in writing within thirty days of Plaintiff's submission of expenses to the carrier. Plaintiff filed a Cross Motion, arguing that State Farm's failure to comply with the requirements of 21 *Del. C*. §2118B(c),[2] by not paying the claim or providing a written explanation setting forth the basis for denial of the claim within thirty days of Plaintiff's submission of expenses to State Farm, entitles Plaintiff to summary judgment on the issue of liability. This Court heard argument on the instant motions on January 9, 2015.

[1] 21 *Del. C*. §2118(a)(2)(i).

[2] 21 *Del. C*. §2118B(c).

STANDARD OF REVIEW

When this Court considers a motion for summary judgment under Superior Court Civil Rule 56, the Court will "examine the record to determine whether genuine issues of material fact exist. If, after viewing the record in a light most favorable to the non-moving party, the Court finds there are no genuine issues of material fact, summary judgment is appropriate."[3] Where the parties have filed cross motions for summary judgment, and have not presented any genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[4] "Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law."[5]

DISCUSSION

State Farm argues that summary judgment should be granted in its favor because Plaintiff did not promptly submit expenses to the insurer within the time

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[3] *Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, No. CIV.A.04C-04-264JEB, 2007 WL 495899, at *1 (Del. Super. Ct. Feb. 5, 2007).

[4] Super. Ct. Civ. R. 56(h).

[5] *RSUI Indem. Co. v. Sempris, LLC*, No. N13C–10–096 MMJ CCLD, 2014 WL 4407717, at *2 (Del. Super. Ct. Sept. 3, 2014).

required by Delaware's PIP statute. 21 *Del.C.* § 2118(a)(2)(i)[6] requires the insurer to "pay expenses which are incurred within two years of the date of the accident or ninety days more, where impractical to present them within two years."[7] There is only one exception to this rule and it is not an issue in this case.[8] The incident giving rise to the claim occurred on August 11, 2011, and the two year window expired in August, 2013. Since Plaintiff filed his claim in November, 2013, he filed outside the two year window and is not entitled to payment, unless the ninety day grace period applies.

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[6] 21 *Del.C.* § 2118(a)(2)(i) provides:

> 1. Expenses under paragraph (a)(2)a. of this section shall be submitted to the insurer as promptly as practical, in no event more than 2 years after they are received by the insured.
>
> 2. Payments of expenses under paragraph (a)(2)a. of this section shall be made as soon as practical after they are received during the period of 2 years from the accident. Expenses which are incurred within the 2 years but which have been impractical to present to an insurer within the 2 years shall be paid if presented within 90 days after the end of the 2-year period.

[7] *Carriere v. Peninsula Indem. Co.*, No. CIV.A.99C-02-210-JOH, 2000 WL 973134, at *3 (Del. Super. Ct. June 12, 2000) ("[T]he insurer shall pay expenses which are incurred within two years of the date of the accident or ninety days more, where impractical to present them within two years.").

[8] 21 *Del.C.* § 2118(a)(2)a.3. ("Where a qualified medical practitioner shall, within 2 years from the date of an accident, verify in writing that surgical or dental procedures will be necessary and are then medically ascertainable but impractical or impossible to perform during that 2-year period, the cost of such dental or surgical procedures, including expenses for related medical treatment, and the net amount of lost earnings lost in connection with such dental or surgical procedures shall be payable.").

In order for the ninety day grace period to apply, the Statute requires that it be "impractical to present [the expenses] to an insurer within the 2 years" following the date of the accident.[9] Essentially, Plaintiff argues that this Court should ignore the language in the Statute that would require Plaintiff to show impracticality in order to be entitled to the extra ninety days.

In *Hayman v. Govt. Employees Ins. Co.* the court granted the insurer's motion for summary judgment because the plaintiff failed to make any showing of hardship or impracticality and, therefore, was not entitled to the ninety day extension.[10] Consistent with the language of the Statute and the holding in *Hayman*, we conclude that a plaintiff must make a showing of impracticality or hardship in order to be entitled to a ninety day extension of the two year limitations period.[11]

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[9] 21 *Del.C.* § 2118(a)(2)(i)(2); The Delaware Supreme Court has referred to this rule as the "27 month rule." At the same time, the Court noted "[Plaintiff] submitted all of her expenses to State Farm within two years of the accident. Thus, there is no issue before this Court regarding either the operation or internal consistency of the two different statutory extensions of time for submitting claims in Sections 2118(a)(2)i.1 and 2." *Harper v. State Farm Mut. Auto. Ins. Co.*, 703 A.2d 136, 141 n.8 (Del. 1997).

[10] *Hayman v. Govt. Employees Ins. Co.*, C.A. No. 07C-12-106, Silverman, J. (Del. Super. Ct. Dec. 23, 2008).

[11] Plaintiff cites *State Farm Mut. Auto. Ins. Co. v. Ciamaricone* for the proposition that the Court's "regular practice" is to allow the ninety day extension without requiring a showing of impracticality. *State Farm Mut. Auto. Ins. Co. v. Ciamaricone*, No. CIV.A.09C-02-140 MJB, 2011 WL 809513, at *2 (Del. Super. Ct. Mar. 3, 2011). In *Ciamaricone*, the court wrote that "[g]enerally, the additional ninety day period has been liberally interpreted to allow a full ninety day extension without requiring claimants to demonstrate 'impractical[ity].'" *Id.* Unfortunately, the *Ciamaricone* court did not cite the reader to any other case in which this Court "generally"

There is nothing in the record to indicate that it was impractical for Plaintiff to submit his expenses to State Farm within two years following the date of the accident. As early as November 21, 2012, Plaintiff's counsel was notified by GEICO that Plaintiff's PIP benefits under his own policy had been exhausted. Plaintiff incurred no new expenses relating to the accident after receiving the letter from GEICO. Plaintiff has offered no explanation why it took almost a year to submit the expenses to State Farm and request excess no-fault benefits under his mother's policy. Plaintiff has made no effort to show that there was any impracticality in submitting the expenses within two years following the accident and we therefore find none.

Plaintiff instead argues that State Farm has waived any right to claim this defense because State Farm did not send written notification of the basis for denial of the claim to Plaintiff until more than 30 days had elapsed since Plaintiff originally submitted his expenses on November 4, 2013. Plaintiff says this violates 21 *Del.C.* § 2118B(c), which provides:

> When an insurer receives a written request for payment of a claim for benefits pursuant to § 2118(a)(2) of this title, the insurer shall promptly process the claim and shall, no later than 30 days following the insurer's receipt of said written request . . . make payment of the amount of claimed benefits that are due to the claimant or, if said claim is wholly or partly denied, provide the claimant with a written explanation of the reasons for such denial. If an insurer fails to

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allowed such a "liberal" interpretation to clear, unambiguous statutory language, and we have been unable to unearth one.

> comply with the provisions of this subsection, then the amount of unpaid benefits due from the insurer to the claimant shall be increased . . . [at the rate specified by § 2118B(c)].[12]

In *Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, the insurer denied some claims within the thirty days, but changed its basis for denying those claims after the commencement of litigation, and well after the thirty days had expired.[13] But that is not what happened here

State Farm opened the claim on December 3, 2013. In a letter dated December 4, 2013, State Farm notified Plaintiff's counsel that two years had passed since the date of the accident and requested that Plaintiff's counsel call to discuss the claim. State Farm did not change its basis for denial of Plaintiff's claim at any time. In the Answer to the Complaint, State Farm included Plaintiff's failure to submit medical bills and expenses within two years of the date of the accident as an affirmative defense.

Moreover, even if State Farm had not replied to Plaintiff's submission at all, the correct remedy would be to apply the rate of interest provided by 21 *Del.C.* § 2118B(c) to the amount of unpaid benefits due from the insurer. Waiver of the

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[12] 21 *Del.C.* § 2118B(c).

[13] *Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, CIV.A.04C-04-264 JEB, 2007 WL 495899, at *3 (Del. Super. Ct. Feb. 5, 2007) ("The requirement that a written explanation be provided is meaningless unless the proffered explanation is correct. It is also meaningless if a carrier can offer a different defense at some later point. The Court concludes that a PIP carrier is precluded from shifting its position on defense of a denial after the 30 days expires. This conclusion is inherent within the statute itself and helps uphold the purpose of PIP coverage.").

defense is not appropriate. Plaintiff did not rely to their detriment on any position taken by State Farm, State Farm did not change its position at any point, and State Farm has consistently raised the same defense throughout this dispute.

CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Judge Charles E. Butler