Defense Association of New York
Seminar, November 9, 2010

Avoiding Mistakes When Appearing in Court

Martin Schoenfeld
Associate Justice, Appellate Term
First Judicial District

Introduction

"You've got to change your evil ways, baby"
(Santana, Evil Ways)

Powell v. Metropolitan Entertainment Company
195 Misc.2d 847 (John Fogerty)

Subjective Rules

N.Y. County Supreme Court, Civil Branch Rules of the Justices
http://www.nycourts.gov/supctmanh/UNIFRL-Sept%203-2010.pdf

N.Y. County Lawyers' Association, Guide to Civil Practice in the New York County Supreme Court

"I heard it through the grapevine" (Marvin Gaye)
The Robing Room, Where Judges are Judged
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Colleagues

Objective Conduct (Not objectionable conduct)

Be prepared
Be respectful
Don't be tardy
Dress code

Credibility

"Honesty is...mostly what I need from you"
(Billy Joel, Honesty)

Kayatt v. Dinkins
148 Misc.2d 510

Trials

As an officer of the court, counsel should support the authority of the court and the dignity of the trial courtroom by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors and others in the courtroom.
See, Standard 4.71(a) – Courtroom Professionalism, ABA Standards: Criminal Justice Section (Feb. 1991)

See also, Rule 3.3(f) – N.Y. Rules of Professional Conduct (April 2009)
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Preserving your record

Avoid too many sidebar conferences

Be clear to court reporters

Use the words "question" and "answer" when reading from an E.B.T. transcript

Motions

"Something in the way she moves"
(George Harrison, Something)

Memorandum of law shall not exceed 30 pages each, and affidavits shall not exceed 25 pages each

Dannasch v. Bifulco
184 AD2d 415
New arguments cannot be introduced in reply papers

The CPLR does not provide for sur-reply papers

Conclusion

"Why can't we be friends"
(War, Why Can't We Be Friends)

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Rule #1 : The judge is always right
Rule #2: If the judge is wrong, refer to Rule #1

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WHAT JUDGES EXPECT FROM ATTORNEYS AND EMERGING ISSUES IN CLAIMS RESOLUTION

DANY- Continuing Legal Education - November 9, 2010

Speaker: George J. Silver, Acting Supreme Court Justice, New York County

I. THE MEDICARE SET-ASIDE AND ITS EFFECT ON THE RESOLUTION OF CASES-THE JUDICIAL PROSPECTIVE

A. Brief Overview of the Medicare Set-Aside Statute

B. The Impact of the Medicare Set-Aside
   1. Discovery Phase
   2. Settlement Phase

C. The Future is Now

II. THE EMERGING IMPACT OF BIO-MECHANICAL ISSUES IN THE TRIAL OR SETTLEMENT OF CASES

A. Brief Overview

B. The Judicial Prospective

III. WHAT JUDGES EXPECT FROM ATTORNEYS

A. Discovery Phase

B. Pre-Trial Phase

C. Trial Phase

The Medicare Secondary Payer Act (MSP)

42 CRF 411.24 (h) allows the United States the right to be repaid on amounts paid by Medicare for medical treatment upon settlement of the personal injury action.

Tips for Practicioners:

The process may be lengthy so you should start to gather information about Medicare's claim as soon as possible.

Discovery

Never ruin a settlement because of a Medicare Set-Aside

Don't do it yourself.

No-Fault First-Party Benefits:
Recent Appellate Cases:
January 1, 2010 to September 30, 2010.
Peter P. Sweeney
Supervising Judge, Civil Court, Kings County

THE 45 DAY RULE - BURDEN OF PROOF - WRITTEN JUSTIFICATION WHERE DEFENDANT ISSUES A TIMELY DENIAL OF CLAIM BASED ON THE 45 DAY RULE WHICH INFORMS PLAINTIFF THAT THE DELAY COULD BE EXCUSED IF PLAINTIFF PROVIDED WRITTEN JUSTIFICATION FOR THE DELAY, WHO HAS THE BURDEN OF PROOF AS TO WHETHER WRITTEN JUSTIFICATION WAS PROVIDED?

***AR Medical Rehabilitation, P.C. v. MVAIC*, 27 Misc.3d 135(A), 2010 N.Y. Slip Op. 50828(U) [App Term, 2nd, 11th & 13th Jud Dists].**

It is undisputed that plaintiff was required to submit its claim form to MVAIC within 45 days after the services at issue were rendered and that plaintiff did not do so (*see* Insurance Department Regulations [11 NYCRR] § 65-1.1; *Nir v. MVAIC,* 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U] [App Term, 2d & 11th Jud Dists 2007]; *NY Arthroscopy & Sports Medicine PLLC v. Motor Veh. Acc. Indem. Corp.,* 15 Misc.3d 89 [App Term, 1st Dept 2007]). MVAIC's denial of plaintiff's claim for $3,903.92, based upon its untimely submission, also informed plaintiff that it could excuse the delay if plaintiff provided "written justification" for the delay (*see* Insurance Department Regulations [11 NYCRR] § 65-3.3[e]; *see also Matter of Medical Socy. of State of N.Y. v. Serio,* 100 N.Y.2d 854, 862-863 [2003]; *Nir,* 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U]). In opposition to MVAIC's motion for summary judgment, plaintiff did not establish that it had provided MVAIC with a written justification for its untimely submission of the claim form seeking the sum of $3,903.92. As plaintiff's remaining contentions lack merit, the order, insofar as appealed from, is affirmed.

45 DAY RULE - REASONABLE JUSTIFICATION WHERE PLAINTIFF WAITS MORE THAN 45 DAYS AFTER LEARNING OF AN INSURER'S THE DISCLAIMER OF COVERAGE BEFORE SUBMITTING A CLAIM TO MVAIC AND DOES NOT JUSTIFY WHY, MVAIC DOES NOT HAVE TO HONOR THE CLAIM.

***Alba Medical Supply, Inc. v. Motor Vehicle Accident Indemnification Corp.*, 26 Misc.3d 141(A), 2010 N.Y. Slip Op. 50372(U) [App Term, 2nd, 11th & 13th Jud Dists].**

It is undisputed that plaintiff was required to submit its claim form to MVAIC within 45 days after the supplies at issue were furnished (*see* Insurance Department Regulations [11 NYCRR] § 65-1.1; *Nir v. MVAIC,* 17 Misc.3d 134 [A], 2007 N.Y. Slip Op 52124[U] [App Term, 2d & 11th Jud Dists 2007]; *NY Arthroscopy & Sports*

Medicine PLLC v. Motor Veh. Acc. Indem. Corp., 15 Misc.3d 89 [App Term, 1st Dept 2007]) and that plaintiff did not do so. MVAIC's denial of plaintiff's claim based upon the untimely submission also informed plaintiff that it could excuse the delay if plaintiff provided "reasonable justification" for the delay (*see* Insurance Department Regulations [11 NYCRR] § 65-3.3[e]; *see also Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 862-863 [2003]; *Nir*, 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U]). Plaintiff asserts that it sent the claim form to MVAIC more than 45 days after the supplies were furnished because it had first sent the claim to an insurer which had disclaimed coverage. However, plaintiff does not explain why plaintiff's counsel, who submitted the claim form on plaintiff's behalf, waited more than 45 days after learning of the disclaimer before submitting the claim form to MVAIC. Consequently, plaintiff failed to proffer a reasonable justification for its untimely submission of the claim form to MVAIC. As plaintiff's remaining contentions lack merit (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins .*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]; *see also Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.*, 197 A.D.2d 479 [1993]), the order granting MVAIC's motion for summary judgment dismissing the complaint is affirmed.

45 DAY RULE - REASONABLE JUSTIFICATION

WHERE A PLAINTIFF PROMPTLY SUBMITS A LATE CLAIM TO DEFENDANT AFTER ITS INITIAL CLAIM WAS DENIED BY ANOTHER INSURANCE CARRIER, PLAINTIFF MUST STILL PROFFER AN EXPLANATION AS TO WHY IT FIRST SUBMITTED THE CLAIM TO THE OTHER INSURANCE CARRIER .

***Prestige Medical & Surgical Supply, Inc. v. Chubb Indem. Ins. Co.*, 26 Misc.3d 145(A), 2010 N.Y. Slip Op. 50449(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The affidavit of defendant's claims adjuster sufficiently established the timely mailing of the denial of claim form, since the affidavit described in detail defendant's standard office practices or procedures used to ensure that the denial was properly addressed and mailed (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]). Defendant denied the claim on the ground that plaintiff's submission of the claim was untimely. The denial of claim form adequately advised plaintiff, pursuant to Insurance Department Regulations (11 NYCRR) § 65-3.3(e), that late submission of the claim would be excused if plaintiff provided a reasonable justification for the failure to timely submit the claim. Although the record reveals that plaintiff promptly submitted its claim to defendant after its initial claim was denied by another insurance carrier, plaintiff failed to proffer any explanation as to why it first submitted the claim to the other insurance carrier. As a result, plaintiff failed to provide defendant with a reasonable justification for plaintiff's untimely submission of the claim to defendant (*see St. Vincent's Hosp. & Med. Ctr. v. Country Wide Ins. Co.*, 24 AD3d 748 [2005]; *Nir v. MVAIC*, 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U] [App Term, 2d & 11th Jud Dists 2007]; *NY Arthroscopy & Sports Medicine PLLC v. Motor Veh. Acc. Indem. Corp.*, 15 Misc.3d 89 [App Term, 1st Dept 2007]). Accordingly, the order, insofar as appealed from, is affirmed.

APPELLATE PRACTICE - CROSS-MOTIONS

A DEFENDANT CANNOT ARGUE ON APPEAL THAT THE COURT IMPROPERLY DENIED ITS CROSS-MOTION UNLESS IT APPEALS FROM THE ORDER WHICH DENIED THE CROSS-MOTION.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant also argues that the Civil Court improperly denied its cross motion for summary judgment as to plaintiff's tenth cause of action because plaintiff failed to rebut defendant's prima facie showing of lack of medical necessity as to this cause of action. However, since defendant did not appeal from the underlying order and the appeal from the judgment does not bring up for review so much of the order as denied the branch of defendant's cross motion seeking summary judgment dismissing plaintiff's tenth cause of action, said part of the order is not before us on appeal

ARBITRATION - VACATING ARBITRATION AWARDS

A DOCUMENT PURPORTING TO BE AN AFFIRMATION THAT IS SIGNED BY AN ATTORNEY WHO DID NOT AFFIRM THE STATEMENTS CONTAINED THEREIN "TO BE TRUE UNDER THE PENALTIES OF PERJURY" IS INSUFFICIENT TO SUPPORT AN APPLICATION TO VACATE AN ARBITRATION AWARD.

***RJ Professional Acupuncturist, P.C. v. Country Wide Ins. Co.*, 27 Misc.3d 127(A), 2010 N.Y. Slip Op. 50579(U) [App Term, 2nd, 11th & 13th Jud Dists].**

RJ Professional Acupuncturist, P.C. commenced this proceeding pursuant to CPLR 7511 to vacate a master arbitrator's award which upheld an arbitrator's award denying petitioner's claim for assigned first-party no-fault benefits. The Civil Court granted the petition, vacated the master arbitrator's award and directed the entry of judgment in favor of petitioner in the principal sum of $6,498.52.

The papers submitted by petitioner to the Civil Court were insufficient on their face to warrant the granting of any relief (*see SP Med., P.C. v. Country-Wide Ins. Co.*, 20 Misc.3d 126[A], 2008 N.Y. Slip Op 51230[U] [App Term, 2d & 11th Jud Dists 2008]). The only document submitted by petitioner in support of the petition was one denominated an "Affirmation in Support." The attorney who purportedly signed the document did not affirm the statements contained therein "to be true under the penalties of perjury" (CPLR 2106) but merely indicated that he "states as follows" (*cf. Puntino v. Chin*, 288 A.D.2d 202 [2001]; *Jones v. Schmitt*, 7 Misc.3d 47, 794 N.Y.S.2d 568 [App Term, 2d & 11th Jud Dists 2005]; *see also A.B. Med. Servs. PLLC v. Prudential Prop. & Cas. Ins. Co.*, 11 Misc.3d 137[A], 2006 N.Y. Slip Op 50504 [U] [App Term, 2d & 11th Jud Dists 2006]). Consequently, the document is insufficient as an affirmation (*SP Med., P.C.*, 20 Misc.3d 126[A], 2008 N.Y. Slip Op 51230[U]). In view of the foregoing, the order is reversed and the petition to vacate the master arbitrator's award is denied without prejudice to renewal upon proper papers (*see Matter of Sadler Textiles [Winston Uniform Corp.]*, 39 A.D.2d 845 [1972]).

ASSIGNMENTS - BY MINORS

THE DEFENSE THAT AN ASSIGNMENT IS INEFFECTIVE BECAUSE IT WAS SIGNED BY A MINOR IS WAIVED UNLESS THE CARRIER SEEKS VERIFICATION OF THE ASSIGNMENT.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant further argues that plaintiff had no standing to bring the instant action since the assignment of benefits form was defective in that it was signed by a minor. However, since defendant did not timely object to the form or seek verification of the assignment, it waived any defenses based thereon (*see Hospital for Joint Diseases v. Allstate Ins. Co.*, 21 A.D.3d 348 [2005]; *see also New York Hosp. Med. Ctr. of Queens v. New York Cent. Mut. Fire Ins. Co.*, 8 A.D.3d 640 [2004]; *A.B. Med. Servs. PLLC v. Nationwide Mut. Ins. Co.*, 6 Misc.3d 70, 792 N.Y.S.2d 289 [App Term, 2d & 11th Jud Dists 2004]).

ATTORNEYS FEES - MULTIPLE CLAIMS

ATTORNEY'S FEES ARE TO BE CALCULATED BASED "ON THE AGGREGATE OF ALL BILLS FOR EACH INSURED" TO A MAXIMUM OF $850.

***A.M. Medical Services, P.C. v. New York Central Mut. Ins.*, 26 Misc.3d 140(A),2010 N.Y. Slip Op. 50264(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff alleged five unpaid claims as its cause of action. The Civil Court granted plaintiff's motion for summary judgment as to four of the claims. Following this court's affirmance of the order (*A.M. Med. Servs., P.C. v. New York Cent. Mut. Ins.*, 13 Misc.3d 126[A], 2006 N.Y. Slip Op 51662 [U] [App Term, 2d & 11th Jud Dists 2006]), defendant moved to modify plaintiff's proposed judgment to limit the award of attorney's fees to the sum of $850, rather than the proposed total of $1,745.47 sought therein, which fee had been calculated on a per claim basis. The Civil Court granted defendant's motion. Thereafter, in light of the opinion of the Appellate Division, Third Department, in *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 46 AD3d 1290 [2007]), the Civil Court granted plaintiff's motion for leave to renew defendant's motion and, upon renewal, allowed the fees as previously proposed by plaintiff. Defendant appeals from that order. Plaintiff subsequently entered a judgment which included the award of $1,745.47 as attorney's fees, from which judgment this appeal is deemed taken (CPLR 5512 [a]).

In *LMK Psychological Servs., P.C. v. State Farm Mut. Aut. Ins. Co.* (12 NY3d 217, 222-223 [2009]), the Court of Appeals reversed the Appellate Division and accepted the opinion of the Superintendent of Insurance (Ops Gen Counsel N.Y. Ins Dept No. 03-10-04 [Oct.2003]), which "interpreted a claim to be the total medical expenses claimed in a cause of action pertaining to a single insured, and not ... each separate medical bill submitted by the provider." As a result, the Court of Appeals held that attorney's fees are to be calculated based "on the aggregate of all bills for each insured," to a maximum of $850 (*LMK Psychological Servs., P.C.*, 12 NY3d at 223).

Accordingly, as there is but one insured involved herein, the award of attorney's fees to plaintiff is reduced to the sum of $850.

COLLATERAL ESTOPPEL - PRIOR DECLARATORY JUDGMENT ACTION

A PLAINTIFF IS NOT COLLATERALLY ESTOPPED FROM A DECLARATORY JUDGMENT IF HE OR SHE WAS NEVER NAMED NOR SERVED IN THE DECLARATORY JUDGMENT ACTION, WAS NOT IN PRIVITY WITH SOMEONE WHO WAS, AND WHO OTHERWISE HAD NO FULL AND FAIR OPPORTUNITY TO APPEAR AND DEFEND ITS INTERESTS IN THE ACTION.

***Magic Recovery Medical & Surgical Supply Inc. v. State Farm Mut. Auto. Ins. Co.*, 27 Misc.3d 67, 901 N.Y.S.2d 774, 2010 N.Y. Slip Op. 20130 [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff herein was neither named nor served in the declaratory judgment actions nor, at the time, was it in privity with someone who was, and plaintiff otherwise had no full and fair opportunity to appear and defend its interests in those proceedings. Accordingly, the judgments do not collaterally estop plaintiff from recovering in this action (*Gramatan Home Invs. Corp. v. Lopez,* 46 N.Y.2d 481, 414 N.Y.S.2d 308, 386 N.E.2d 1328 [1979]; *Mid Atl. Med., P.C. v. Victoria Select Ins. Co.,* 20 Misc.3d 143(A), 2008 N.Y. Slip Op. 51758(U), 2008 WL 3865849 [App. Term, 2d & 11th Jud. Dists. 2008]; *see also Green v. Santa Fe Indus.,* 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 514 N.E.2d 105 [1987]). Moreover, as the declaratory judgments were obtained on default, there was no actual litigation of the issues and, therefore, no identity of issues (*Kaufman v. Eli Lilly & Co.,* 65 N.Y.2d 449, 456-457, 492 N.Y.S.2d 584, 482 N.E.2d 63 [1985]; *Zimmerman v. Tower Ins. Co. of NY,* 13 A.D.3d 137, 139-140, 788 N.Y.S.2d 309 [2004]; *Chambers v. City of New York,* 309 A.D.2d 81, 85-86, 764 N.Y.S.2d 708 [2003]; *Holt v. Holt,* 262 A.D.2d 530, 530, 692 N.Y.S.2d 451 [1999]). As the Civil Court did not address the alternative ground asserted by defendant in its motion for summary judgment, the matter must be remitted to the Civil Court for a determination of that ground (*e.g. McElroy v. Sivasubramaniam,* 305 A.D.2d 944, 761 N.Y.S.2d 688 [2003]).

COVERAGE DEFENSE - FRAUDULENT INCORPORATION - DOCTORS PERFORMING ACUPUNCTURE

A PROFESSIONAL CORPORATION WHICH IS OWNED BY A DOCTOR WHO IS NOT LICENSED TO PRACTICE ACUPUNCTURE IS NOT ENTITLED TO RECOVER ASSIGNED NO-FAULT BENEFITS FOR ACUPUNCTURE SERVICES.

***Quality Medical Care, P.C. v. New York Central Mut. Fire Ins. Co.*, 26 Misc.3d 139(A), 2010 N.Y. Slip Op. 50262(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Insurance Department Regulations (11 NYCRR) § 65-3.16(a)(12) states that "[a] provider of health care services is not eligible for reimbursement [of no-fault benefits] if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service[s]" (*see e.g. Allstate Ins. Co. v. Belt Parkway Imaging, P.C.,* 33 AD3d 407 [2006]; *Multiquest, P .L.L.C. v. Allstate Ins. Co.,* 17 Misc.3d 37, 38-39 [App Term, 2d & 11th Jud Dists 2007]).

Only someone properly licensed or certified may practice acupuncture in New York State (Education Law § 8212; *Great Wall Acupuncture v. GEICO Ins. Co.,* Misc.3d, 2009 N.Y. Slip Op 29467 [App Term, 2d, 11th & 13th Jud Dists 2009]; *Lexington Acupuncture, P.C. v. State Farm Ins. Co.,* 12 Misc.3d 90, 92 [App Term, 2d & 11th Jud Dists 2006]). Physicians are not authorized to practice acupuncture by virtue of

their medical licenses; rather, they must satisfy the certification requirements if they are to practice acupuncture (Education Law §§ 8212, 8216[3]; Education Department Regulations [8 NYCRR] § 60.9). Thus, the certificate of incorporation for a professional service corporation that seeks to obtain reimbursement of no-fault benefits for acupuncture services rendered "shall have attached thereto a certificate or certificates issued by the [Education Department] certifying that each of the proposed shareholders, directors and officers is authorized by law to practice a profession which the corporation is being organized to practice and, if applicable, that one or more of such individuals is authorized to practice [acupuncture]" (Business Corporation Law § 1503[b]; *see e.g. Midborough Acupuncture P.C. v. State Farm Ins. Co.,* 13 Misc.3d 58, 60 [App Term, 2d & 11th Jud Dists 2006]; *Lexington Acupuncture, P.C.,* 12 Misc.3d at 92).

Where, as here, a professional service corporation is owned solely by a doctor who is not a certified acupuncturist at the time the acupuncture services at issue were rendered, such professional service corporation is not entitled to reimbursement of assigned no-fault benefits for such services notwithstanding the fact that the acupuncture services were rendered by a licensed acupuncturist employed by the corporation and that the corporation's owner subsequently became a certified acupuncturist (Business Corporation Law § 1503[b]; § 1507; Insurance Department Regulations [11 NYCRR] § 65-3.12 [a]; *cf. Healthmakers Med. Group, P.C. v. Travelers Indem. Co.,* 13 Misc.3d 136[A], 2006 N.Y. Slip Op 52118[U] [App Term, 1st Dept 2006]). Accordingly, the judgment is reversed and the complaint dismissed.

COVERAGE DEFENSES - FRAUD IN THE PROCUREMENT

THE DEFENSE OF FRAUDULENT PROCUREMENT IS A COVERAGE DEFENSE AND IS NOT WAIVED BY AN UNTIMELY DENIAL OF A CLAIM.

***Total Family Chiropractic/Dr. Brian Ross v. Mercury Cas. Co.*, 28 Misc.3d 138(A), 2010 N.Y. Slip Op. 51470(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant argues that plaintiff failed to establish that it was entitled to summary judgment upon the claim form dated March 22, 2007 for services rendered to assignor Karoy Brown on February 7 and 9, 2007, as it was duplicative of the claim form plaintiff submitted to defendant dated February 17, 2007, which sought payment for the same services. Upon a review of the record, we agree with defendant's contention, and defendant is awarded summary judgment dismissing the complaint insofar as it sought to recover upon the claim form dated March 22, 2007 (*see e.g. First Aid Occupational Therapy PLLC v. Country-Wide Ins. Co.,* 27 Misc.3d 128[A], 2010 N.Y. Slip Op 50594[U] [App Term, 2d, 11th & 13th Jud Dists 2010]). In an attempt to establish that the time period in which it had to pay or deny the claims was tolled due to outstanding verification requests, defendant relied upon spreadsheets annexed to the affidavit of its claim representative. However, because the claim representative did not establish that the spreadsheets constituted evidence in admissible form (*see* CPLR 4518[a]; *People v. Kennedy,* 68 N.Y.2d 569, 579-580 [1986]; *Palisades Collection, LLC v. Kedik,* 67 AD3d 1329, 1330-1331 [2009]; *Speirs v. Not Fade Away Tie Dye Co.,* 236 A.D.2d 531 [1997]), defendant has not shown that it made timely verification requests.

While defendant has failed to demonstrate that it is not precluded from raising most defenses (*see Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.,* 90 N.Y.2d 274, 282 [1997]), in any event, defendant is not precluded from raising the defense of fraudulent procurement of the insurance policy (*see Matter of Insurance Co. of N. Am. v. Kaplun,* 274 A.D.2d 293 [2000]; *A.B. Med. Servs. PLLC v. Commercial Mut. Ins. Co.,* 12 Misc.3d 8 [App Term, 2d & 11th Jud Dists 2006]). The certified transcripts of plaintiff's assignors' examinations under oath, annexed to defendant's motion papers, support defendant's assertion that the assignors' testimony at an examination before trial would be material and necessary to the defense of fraudulent procurement of an insurance policy (*see* CPLR 3101[a]). Since plaintiff served the notice of trial two weeks after defendant served its answer and it is uncontroverted that defendant timely moved to vacate the notice of trial within 20 days of its receipt of same (*see* Uniform Rules for Civ Ct [22 NYCRR] § 208.17[c]), the branch of defendant's motion seeking to strike the notice of trial is granted. However, as plaintiff's assignors are not directors, members or employees of plaintiff, defendant must subpoena them to compel their appearance at examinations before trial (*see* CPLR 3016[b]; *see also A.M. Med. Servs., P.C. v. Allstate Inso Co.,* 14 Misc.3d 143[A], 2007 N.Y. Slip Op 50384[U] [App Term, 2d & 11th Jud Dists 2007]). Accordingly, the judgment is reversed, the order entered February 13, 2009 is vacated, the branch of defendant's motion seeking summary judgment dismissing the complaint is granted to the extent of dismissing the complaint insofar as it sought to recover upon the claim form dated March 22, 2007, the branch of defendant's motion seeking to strike the notice of trial and to compel plaintiff's assignors to attend examinations before trial is granted to the extent of striking the notice of trial, plaintiff's cross motion for summary judgment is denied, and the matter is remitted to the Civil Court for all further proceedings.

COVERAGE DEFENSES - INJURIES UNRELATED TO THE ACCIDENT
AN "INDEPENDENT RADIOLOGY REPORT" OF MRI IMAGES OF A BODY PART THAT WAS ALLEGEDLY INJURED WHICH STATES THAT THE INJURY WAS NOT CAUSALLY RELATED TO THE ACCIDENT IS SUFFICIENT TO CREATE A TRIABLE ISSUE OF FACT AS TO WHETHER THE BODY PART WAS INJURED IN THE ACCIDENT.

***Stephen Fealy, M.D., P.C. v. State Farm Mut. Auto Ins. Co.*, 28 Misc.3d 136(A), 2010 N.Y. Slip Op. 51442(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover the sum of $25,000 in assigned first-party no-fault benefits, defendant insurance company moved for summary judgment dismissing the complaint on the ground that plaintiff's assignor's injuries were preexisting, chronic or progressive degenerative conditions which did not result from the subject accident. The occurrence which forms the subject matter of this action took place on March 20, 2007. On June 12, 2007, plaintiff, an orthopedic surgeon, performed "anterior cruciate ligament reconstruction with suprapateller pouch and tendon left knee partial debridement, medial meniscectomy [and] left medial arthroscopic patellofemoral condoplasty" on plaintiff's assignor at the Hospital for Special Surgery, for which he submitted a claim for $25,900. The claim was denied

based upon an independent peer review on July 11, 2007 advising that the left knee injury was unrelated to the accident.

In support of its motion for summary judgment, defendant submitted, among other things, affirmed peer review reports and an "independent radiology report" of the MRI images of the affected area, which identified degenerative processes accounting for the conditions treated by plaintiff. In opposition, plaintiff submitted an affidavit from plaintiff's president, a "board-certified" surgeon, who had performed the procedure. After defendant served reply papers in further support of the motion, plaintiff served a sur-reply, which contained a more detailed affidavit executed by the doctor. The Civil Court denied defendant's motion, finding that plaintiff had raised issues of fact. This appeal by defendant ensued. . . .

Although defendant's papers established, prima facie, based on objective medical evidence, that the assignor's injuries did not arise from the accident, we find that the affirmation in opposition, written by Dr. Fealy, the surgeon who actually performed the procedure on the assignor, read in conjunction with the other medical and hospital reports indicating that the assignor had complained of left knee pain within days of the accident, is sufficient to raise an issue of fact that must be resolved at trial.

DEFAULTS - ON STIPULATIONS

THE COURT NEED NOT CONSIDER OPPOSITION PAPERS FILED PAST A DEADLINES SET FORTH IN A BRIEFING STIPULATION AND MAY GRANT THE MOTION OF THE MOVING PARTY ON DEFAULT. TO VACATE AN ORDER GRANTING SUCH A MOTION, THE MOVING PARTY MUST DEMONSTRATE A REASONABLE EXCUSE FOR THE LATE SUBMISSION AND A MERITORIOUS DEFENSE.

***Manhattan Medical Imaging, P.C. v. Nationwide Ins. Co.*, 27 Misc.3d 127(A), 2010 N.Y. Slip Op. 50584(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff commenced four actions against defendant to recover assigned first-party no-fault benefits and, thereafter, moved for summary judgment in each action. In June 2007, the parties stipulated to adjourn the motions until November 30, 2007, and defendant agreed to serve its opposition papers by September 30, 2007. In July 2007, the parties stipulated to consolidate the four actions into one. Defendant served its opposition papers in November 2007, but the Civil Court would not consider them on the ground that they were untimely. By four separate orders dated November 30, 2007, the court granted plaintiff's motions for summary judgment on default, finding that plaintiff had established its prima facie entitlement to summary judgment with respect to each motion. In December 2007, defendant moved to, among other things, vacate its default and/or for leave to renew/reargue the prior motions. Defendant's motion was denied by order entered June 19, 2008, and the instant appeal by defendant ensued.

A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a meritorious defense to the

action (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141 [1986]; *Mora v. Scarpitta*, 52 A.D.3d 663 [2008]). In the exercise of its discretion, a court can accept a claim of law office failure as an excuse (*see* CPLR 2005) if the facts submitted in support thereof are in evidentiary form and sufficient to justify the default (*see Incorporated Vil. of Hempstead v. Jablonsky*, 283 A.D.2d 553, 554 [2001]). By its June 19, 2008 order, the Civil Court correctly found defendant's law office failure excuse to be disingenuous and insufficient to justify the default. Consequently, so much of the order as denied the branch of defendant's motion seeking to vacate its default is affirmed.

DEFAULT JUDGMENTS - PLAINTIFF'S BURDEN

TO OBTAIN A DEFAULT JUDGMENT, PLAINTIFF'S MOTION PAPERS MUST DEMONSTRATE A PRIMA FACIE ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW.

***Balance Chiropractic, P.C. v. Property and Casualty Ins. Co. of Hartford*, 27 Misc.3d 138(A), 2010 N.Y. Slip Op. 50889(U) [App Term, 2nd, 11th & 13th Jud Dists].**

ORDERED that the order is modified by providing that plaintiff's motion is denied with leave to renew upon proper papers; as so modified, the order is affirmed without costs.

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff moved for leave to enter a default judgment based upon defendant's failure to appear or answer the complaint or, in the alternative, for an order finding for all purposes in the action that plaintiff had established a prima facie case. The motion was unopposed. The Civil Court denied the motion, and this appeal by plaintiff ensued.

In support of its motion, plaintiff proffered neither an affidavit nor a verified complaint by a party with personal knowledge setting forth the factual basis for the claim, as is required by CPLR 3215(f). Rather, plaintiff submitted a complaint verified by counsel, who did not demonstrate personal knowledge of the facts, and an affidavit of the president of a third-party billing company, which affidavit did not establish that the documents annexed to plaintiff's motion were admissible pursuant to CPLR 4518 (*see Art of Healing Medicine, P.C. v. Travelers Home & Mar. Ins. Co.*, 55 AD3d 644 [2008]; *Andrew Carothers, M.D., P.C. v. Geico Indem. Co.*, 24 Misc.3d 19 [App Term, 2d, 11th & 13th Jud Dists 2009]; *Dan Med., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 14 Misc.3d 44 [App Term, 2d & 11th Jud Dists 2006]).

Since plaintiff's motion papers did not demonstrate a prima facie entitlement to judgment as a matter of law, the Civil Court properly denied the motion (*see All Mental Care Medicine, P.C. v. Allstate Ins. Co.*, 15 Misc.3d 129 [A], 2007 N.Y. Slip Op 50612[U] [App Term, 2d & 11th Jud Dists 2007]). Furthermore, plaintiff is not entitled to the alternative relief it sought, a finding for all purposes in the action that it had established its prima facie case (*see e.g. B.Y., M.D., P.C. v. Government Empls. Ins. Co.*, 26 Misc.3d 95 [App Term, 9th & 10th Jud Dists 2010]). However, in the circumstances presented, we modify the order to provide that plaintiff's motion is denied with

leave to renew upon proper papers.

DENIALS - ADMISSIBILITY

WHEN A DENIAL OF CLAIM FORM IS NOT OFFERED FOR A HEARSAY PURPOSE, IT DOES NOT HAVE TO BE QUALIFIED AS A BUSINESS RECORD.

***Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50991(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff also argues that defendant's motion should have been denied because defendant failed to establish that its denial of claim forms constituted evidence in admissible form pursuant to the business records exception to the rule against hearsay as set forth in CPLR 4518. This argument is unavailing. Defendant did not offer the denial of claim forms to establish the truth of the matters asserted therein, such as plaintiff's assignor's failure to appear for scheduled examinations under oath (EUOs), but rather to show that such denials were sent and that, therefore, the claims were denied. As the denial of claim forms were not offered for a hearsay purpose, they did not need to qualify as business records (*see e.g. Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.*, 197 A.D.2d 479 [1993]).

DENIALS - ADMISSIBILITY

AS A DENIAL OF CLAIM FORM IS NOT GENERALLY OFFERED FOR A HEARSAY PURPOSE. HENCE, THEY DO NOT NEED TO QUALIFY AS BUSINESS RECORDS.

***Quality Health Products, Inc. v. N.Y. Cent. Mut. Fire Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50990(U) [App Term, 2nd, 11th & 13th Jud Dists].** Plaintiff argues, among other things, that defendant's motion should have been denied because defendant failed to establish that its denial of claim forms constituted evidence in admissible form pursuant to the business records exception to the rule against hearsay as set forth in CPLR 4518. This argument is unavailing. Defendant did not offer the denial of claim forms to establish the truth of the matters asserted therein, such as the lack of medical necessity of the services rendered, but rather to show that such denials were sent, and that, therefore, the claims were denied. As the denial of claim forms were not offered for a hearsay purpose, they did not need to qualify as business records (*see e.g. Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.*, 197 A.D.2d 479 [1993]).

Plaintiff raises the same argument regarding the notice of cancellation offered by defendant with respect to the insurance policy issued to Manuel Espinal which defendant had canceled. Again, since this document was not being offered for a hearsay purpose, it did not need to qualify as a business record. As plaintiff's remaining contentions are meritless, the order is affirmed.

DENIALS - FORM

DENIALS MUST BE ISSUED IN DUPLICATE AND ON A FORM APPROVED BY THE DEPARTMENT OF INSURANCE.

***Excel Imaging, P.C. v. MVAIC*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50998(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Upon a review of the record, we agree with the Civil Court's determination that MVAIC is not entitled to summary judgment. In *New York Univ. Hosp. Rusk Inst. v. Hartford Acc. & Indem. Co.* (32 AD3d 458, 460 [2006]), the Appellate Division, Second Department, held, in relevant part:

"Here, the defendants' September 28, 2004, letter adequately conveyed the information mandated by the prescribed form including, but not limited to, the precise ground on which the partial denial was predicated. *However, the defendants failed to establish that the letter had been issued in duplicate* and approved by the Department of Insurance (*see* 11 NYCRR 65-3.8[c][1], *supra*). *Accordingly, having failed to pay or properly deny that portion of the hospital's claim within the statutory time frame, the defendants were precluded from interposing a defense* (*Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.,* 90 N.Y.2d 274, 286 [1997]; *Nyack Hosp. v. State Farm Mut. Auto. Ins. Co., supra*), and the Supreme Court should have granted the plaintiff's motion for summary judgment on the second cause of action" (emphasis added).

In view of the foregoing, the order, insofar as appealed from, is affirmed, as issues of fact exist (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8[c][1]; *New York Univ. Hosp. Rusk Inst.* (32 AD3d at 460).

DENIALS - SERVICES THAT ARE PART OF ANOTHER SERVICES

IS PROOF OF A TIMELY DENIAL, WHICH ASSERTS THAT THE SERVICES FOR WHICH PAYMENT IS SOUGHT WERE PART OF ANOTHER SERVICE AND THUS NOT SEPARATELY REIMBURSABLE, SUFFICIENT TO DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 144(A), 2010 N.Y. Slip Op. 50444(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant also established that it had timely denied the two $365 .68 claims (plaintiff's fourth and seventh causes of action) on the ground that the services for which payment was sought were part of another service and, thus, were not separately reimbursable. Consequently, defendant raised a triable issue of fact with respect to the fourth and seventh causes of action (*see St. Vincent's Med. Care, P.C. v. Country-Wide Ins. Co.*, --- Misc.3d ----, 2009 N.Y. Slip Op 29508 [App Term, 2d, 11th & 13th Jud Dists 2009]).

Accordingly, the judgment is reversed, the portions of the order entered June 20, 2008 which

granted plaintiff's motion for summary judgment and which denied the branches of defendant's cross motion seeking summary judgment dismissing the first, second, third, fifth, sixth, eighth and ninth causes of action are vacated, plaintiff's motion for summary judgment is denied, the branches of defendant's cross motion seeking summary judgment dismissing the first, second, third, fifth, sixth, eighth and ninth causes of action are granted, and the matter is remitted to the Civil Court for all further proceedings on the fourth and seventh causes of action.

DISCOVERY - CONDITIONAL ORDERS OF PRECLUSION

IN ORDER TO AVOID THE ADVERSE IMPACT OF A CONDITIONAL ORDER OF PRECLUSION, A PARTY IS REQUIRED TO DEMONSTRATE AN EXCUSABLE DEFAULT AND A MERITORIOUS CAUSE OF ACTION.

***Kimball Medical, P.C. v. Travelers Ins. Co.*, 27 Misc.3d 130(A), 2010 N.Y. Slip Op. 50639(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff failed to serve complete responses to defendant's discovery demands within 45 days, as required by a so-ordered stipulation which, among other things, provided that if plaintiff failed to do so, plaintiff would be precluded from offering any evidence in any subsequent motion or at trial. As a result, the so-ordered stipulation was a conditional order of preclusion, which became absolute upon plaintiff's failure to comply (*see Panagiotou v. Samaritan Vil., Inc.*, 66 AD3d 979 [2009]; *Calder v. Cofta*, 49 AD3d 484 [2008]; *Callaghan v. Curtis*, 48 AD3d 501 [2008]; *Michaud v. City of New York*, 242 A.D.2d 369 [1997]; *Saavedra v. Aiken*, 25 Misc.3d 133[A], 2009 N.Y. Slip Op 52207[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). In order to avoid the adverse impact of the conditional order of preclusion, plaintiff was required to demonstrate an excusable default and a meritorious cause of action (*see Panagiotou*, 66 AD3d 979; *Calder*, 49 AD3d 484; *Callaghan*, 48 AD3d 501; *Michaud* at 370). Since plaintiff failed to do so, plaintiff is precluded from establishing a prima facie case. Accordingly, the Civil Court should have granted defendant's motion for summary judgment dismissing the complaint (*see Panagiotou*, 66 AD3d 979; *Calder*, 49 AD3d 484; *Callaghan*, 48 AD3d 501; Michaud, 242 A.D.2d 369; *Saavedra*, 25 Misc.3d 133[A], 2009 N.Y. Slip Op 52207[U]).

DISCOVERY - CONDITIONAL ORDERS OF PRECLUSION

IN ORDER TO AVOID THE ADVERSE IMPACT OF THE CONDITIONAL ORDER OF PRECLUSION, A PARTY IS REQUIRED TO DEMONSTRATE AN EXCUSABLE DEFAULT AND A MERITORIOUS CAUSE OF ACTION.

***Nordique Medical Services, P.C. v. Travelers Ins. Co.*, 27 Misc.3d 131(A), 2010 N.Y. Slip Op. 50648(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff failed to serve complete responses to defendant's discovery demands within 45 days as required by a conditional order of preclusion which, among other things, provided that if plaintiff failed to do so, plaintiff would be precluded from offering any evidence

in any subsequent motion or at trial. As a result, the conditional order of preclusion became absolute upon plaintiff's failure to comply (*see Panagiotou v. Samaritan Vil., Inc.*, 66 AD3d 979 [2009]; *Calder v. Cofta*, 49 AD3d 484 [2008]; *Callaghan v. Curtis*, 48 AD3d 501 [2008]; *Michaud v. City of New York*, 242 A.D.2d 369 [1997]; *Saavedra v. Aiken*, 25 Misc.3d 133[A], 2009 N.Y. Slip Op 52207[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). In order to avoid the adverse impact of the conditional order of preclusion, plaintiff was required to demonstrate an excusable default and a meritorious cause of action (*see Panagiotou*, 66 AD3d 979; *Calder*, 49 AD3d 484; *Callaghan*, 48 AD3d 501; *Michaud* at 370). Since plaintiff failed to do so, plaintiff is precluded from establishing a prima facie case. Accordingly, the Civil Court should have granted defendant's motion for summary judgment dismissing the complaint (*see Panagiotou*, 66 AD3d 979; *Calder*, 49 AD3d 484; *Callaghan*, 48 AD3d 501; *Michaud*, 242 A.D.2d 369; *Saavedra*, 25 Misc.3d 133[A], 2009 N.Y. Slip Op 52207[U]).

DISCOVERY - DISMISSALS PURSUANT TO CPLR 3216[A]

AN ORDER DISMISSING AN ACTION PURSUANT TO CPLR 3216[A] IS NOT A DISMISSAL ON THE MERITS UNLESS THE ORDER SO STATES.

***Roman Chiropractic, P.C. v. Lumbermens Mut. Cas. Co.*, 27 Misc.3d 142(A), 2010 N.Y. Slip Op. 51000(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Since the dismissal order did not "specif[y] otherwise" (CPLR 3216[a]), the dismissal was not "on the merits" or "with prejudice" (*Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 380 [1999]; *e.g. Gallo v. Teplitz Tri-State Recycling*, 254 A.D.2d 253, 254 [1998]) and does not preclude, on res judicata grounds, a new action between the same parties for the same causes of action (*e.g. Greenberg v. De Hart*, 4 N.Y.2d 511, 516-517 [1958]; *San Filippo v. Adler*, 278 A.D.2d 402 [2000]; *see also Mudry v. Giannattasio*, 8 AD3d 455, 456 [2004]; *Morales v. New York City Hous. Auth.*, 302 A.D.2d 571 [2003]; *Mays v. Whitfield*, 282 A.D.2d 721 [2001]). Consequently, the Civil Court erred to the extent that it dismissed the instant action because the Queens County action had been dismissed on default.

Nevertheless, the alternate ground upon which defendant relied in moving for summary judgment-that the action is barred by the statute of limitations-warrants the granting of defendant's motion, at least in part. This action is untimely with respect to the causes of action which were based on services rendered prior to January 10, 2002 (CPLR 213[2]). Only the claims for services subsequently provided, namely the two claims for $235.90, and so much of the claim for $404.40 as was for services provided on or after January 10, 2002, are timely (CPLR 213[2]) and should not have been dismissed.

Accordingly, the order is modified by providing that the branches of defendant's motion seeking summary judgment dismissing the two claims for $235.90 and so much of the claim for $404.40 as was for services provided on or after January 10, 2002 are denied.

DISCOVERY - EBTS - PHYSICIANS

PLAINTIFF'S FAILURE TO PRODUCE DOCTORS UNDER ITS CONTROL FOR

EBTS MAY RESULT IN DISMISSAL.

***Audubon Physical Med and Rehab, P.C. v. State Farm Ins. Co.*, 26 Misc.3d 141(A), 2010 N.Y. Slip Op. 50374(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, defendant moved for an order compelling plaintiff to produce for depositions Dr. Levin, an owner of plaintiff, and Dr. Livchits, a physician associated with plaintiff who had allegedly treated plaintiff's assignor. By order entered October 31, 2008, the Civil Court granted defendant's motion and ordered plaintiff to produce Drs. Livchits and Levin for depositions within 60 days. The court further stated that if Dr. Livchits was no longer under the control of plaintiff, plaintiff must submit an affidavit to defendant so stating. Plaintiff appeals from this order. Thereafter, defendant moved to strike plaintiff's complaint based on plaintiff's failure to comply with the October 31, 2008 order. Plaintiff submitted opposition papers, in which it conceded that it had not produced a witness for a deposition. By order entered February 23, 2009, the Civil Court granted defendant's motion to strike plaintiff's complaint. Plaintiff also appeals from this order. The notice of appeal from the February 23, 2009 order is deemed to be a premature notice of appeal from the judgment entered on February 26, 2009 dismissing plaintiff's complaint (*see* CPLR 5520[c]).

The appeal from the order entered October 31, 2008 must be dismissed as the right of direct appeal therefrom terminated with the entry of judgment (*see Matter of Aho,* 39 N.Y.2d 241 [1976]). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

CPLR 3101(a) states that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by ... a party, or the officer, director, member, agent or employee of a party." Consequently, the court properly ordered plaintiff to produce Drs. Livchits and Levin for depositions (*see* CPLR 3101[a][1]; *see also* 7 Carmody-Wait 2d § 42:56, at 100-102; *cf.* CPLR 3106[b]; *Doomes v. Best Tr. Corp.,* 303 A.D.2d 322 [2003]; *A.M. Med. Servs ., P.C. v. Allstate Ins. Co.,* 14 Misc.3d 143[A], 2007 N.Y. Slip Op 50384[U] [App Term, 2d & 11th Jud Dists 2007]).

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 for failing to comply with an order compelling discovery lie within the discretion of the motion court (*see Kihl v. Pfeffer,* 94 N.Y.2d 118 [1999]; *Zletz v. Wetanson,* 67 N.Y.2d 711 [1986]; *Morano v. Westchester Paving & Sealing Corp.,* 7 AD3d 495 [2004]). Although striking a pleading is a drastic remedy, it is appropriate where there is a clear showing that the failure to comply with discovery demands was willful or contumacious (*see Frias v. Fortini,* 240 A.D.2d 467 [1997]). It can be inferred that a party's conduct is willful and contumacious when the party repeatedly fails to comply with discovery demands and court orders compelling disclosure, without providing a reasonable excuse for noncompliance (*see Mei Yan Zhang v. Santana,* 52 AD3d 484 [2008]; *Dinstber v. Geico Ins. Co.,* 32 AD3d 893 [2006]; *Kroll v.*

Parkway Plaza Joint Venture, 10 AD3d 633 [2004]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl,* 94 N.Y.2d at 123).

In the case at bar, plaintiff did not produce witnesses for depositions despite three motions by defendant seeking to compel plaintiff to produce such witnesses. Moreover, plaintiff failed to offer a reasonable excuse for failing to comply with the October 31, 2008 order compelling plaintiff to produce Drs. Livchits and Levin for depositions. Plaintiff belatedly stated that Dr. Livchits was no longer under its control and that it did not have to comply with the October 31, 2008 order because there was an appeal pending. However, in its order, the Civil Court specifically stated that if Dr. Livchits was no longer under the control of plaintiff, plaintiff need only provide an affidavit stating same. Not only did plaintiff not produce Drs. Livchits or Levin for depositions as required by the order, it failed to provide an affidavit stating that Dr. Livchits was no longer under its control and did not even offer a reason why it did not submit such affidavit. In addition, insofar as plaintiff asserts that it did not need to comply with the October 31, 2008 order because there was an appeal pending therefrom, since plaintiff did not move for a stay of the order pending the determination of the appeal, plaintiff was required to comply with the order (*see generally Fair Price Med. Supply Corp. v. ELRAC Inc* ., 13 Misc.3d 33 [App Term, 2d & 11th Jud Dists 2006]).

Plaintiff's remaining contention lacks merit.

In light of the foregoing, we find that the Civil Court did not improvidently exercise its discretion in striking the complaint for plaintiff's willful and contumacious failure to comply with the court's order compelling depositions of Drs. Livchits and Levin.

DISCOVERY - *MALLELA* DISCOVERY

WHERE THE PLAINTIFF FAILS TO CHALLENGE THE PROPRIETY OF DEFENDANT'S DISCOVERY DEMANDS FOR *MALLELA* MATERIAL, THE CIVIL COURT SHOULD GRANT DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO PROVIDE THE MATERIALS WITH THE EXCEPTION OF REQUESTS WHICH ARE PALPABLY IMPROPER OR WHICH SEEK INFORMATION OR DOCUMENTS WHICH ARE PRIVILEGED.

***First Aid Occupational Therapy, PLLC v. Country Wide Ins. Co.*, 27 Misc.3d 128(A), 2010 N.Y. Slip Op. 50594(U) [App Term, 2nd, 11th & 13th Jud Dists].**

As plaintiff failed to challenge the propriety of defendant's discovery demands, the Civil Court should have granted defendant's cross motion to compel plaintiff to provide the information sought in defendant's interrogatories and notice for discovery and inspection with the exception of requests which were palpably improper or which sought information or documents which were privileged (*see Fausto v. City of New York,* 17 AD3d 520 [2005]; *Midwood Acupuncture, P.C. v. State Farm Fire and Cas. Co.,* 21 Misc.3d 144[A], 2008 N.Y. Slip Op 52468[U] [App Term, 2d & 11th Jud Dists 2008]; *Great Wall Acupuncture v. State Farm Mut. Auto. Ins. Co.,* 20 Misc.3d 136[A],

2008 N.Y. Slip Op 51529[U] [App Term, 2d & 11th Jud Dists 2008]). Defendant further established its entitlement to depose plaintiff's owner, Dr. Ronald Collins (*see* CPLR 3101[a]; *Sharma Med. Servs., P.C. v. Progressive Cas. Ins. Co .,* 24 Misc.3d 139[A], 2009 N.Y. Slip Op 51591[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Midwood Acupuncture, P.C.,* 21 Misc.3d 144[A], 2008 N.Y. Slip Op 52468[U]; *Great Wall Acupuncture,* 20 Misc.3d 136[A], 2008 N.Y. Slip Op 51529[U]).

DISCOVERY - *MALLELA* DISCOVERY

WHERE THE PLAINTIFF FAILS TO CHALLENGE THE PROPRIETY OF DEFENDANT'S DISCOVERY DEMANDS FOR *MALLELA* MATERIAL, THE CIVIL COURT SHOULD GRANT DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO PROVIDE THE MATERIALS WITH THE EXCEPTION OF REQUESTS WHICH ARE PALPABLY IMPROPER OR WHICH SEEK INFORMATION OR DOCUMENTS WHICH ARE PRIVILEGED.

***Five Boro Psychological Services, P.C. v. Autoone Ins. Co.*, 27 Misc.3d 89, 902 N.Y.S.2d 768, 2010 N.Y. Slip Op. 20131 [App Term, 2nd, 11th & 13th Jud Dists].**

As plaintiff failed to challenge the propriety of defendant's discovery demands, the Civil Court should have granted defendant's cross motion to compel plaintiff to provide the information sought in defendant's interrogatories and notice for discovery and inspection with the exception of requests which were palpably improper or which sought information or documents which were privileged (*see Fausto v. City of New York,* 17 A.D.3d 520, 793 N.Y.S.2d 165 [2005]; *Midwood Acupuncture, P.C. v. State Farm Fire and Cas. Co.,* 21 Misc.3d 144[A], 2008 N.Y. Slip Op. 52468[U], 2008 WL 5146892 [App. Term, 2d & 11th Jud. Dists. 2008]; *Great Wall Acupuncture v. State Farm Mut. Auto. Ins. Co.,* 20 Misc.3d 136[A], 2008 N.Y. Slip Op. 51529[U], 2008 WL 2814818 [App. Term, 2d & 11th Jud. Dists. 2008]). Defendant is also entitled to examinations before trial (*see* CPLR 3101[a]; *Sharma Med. Servs., P.C. v. Progressive Cas. Ins. Co.,* 24 Misc.3d 139[A], 2009 N.Y. Slip Op. 51591[U], 2009 WL 2178049 [App. Term, 2d, 11th & 13th Jud. Dists. 2009]; *Midwood Acupuncture, P.C. v. State Farm Fire & Cas. Co.,* 21 Misc.3d 144[A], 2008 N.Y. Slip Op. 52468[U], 2008 WL 5146892; *Great Wall Acupuncture v. State Farm Mut. Auto. Ins. Co.,* 20 Misc.3d 136[A], 2008 N.Y. Slip Op. 51529[U], 2008 WL 2814818).

EUO - ATTORNEYS AS AGENTS

THE FACT THAT A LAW FIRM HIRED TO CONDUCT AN EUO WAS CONTACTED BY THE ASSIGNOR'S ATTORNEY TO RESCHEDULE OR TO CONFIRM THE EUOS INDICATES THAT THE ASSIGNOR'S ATTORNEY HAD COMMUNICATED WITH THE ASSIGNOR AND WAS ACTING ON HER BEHALF.

***Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50991(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant established both that the notices which scheduled the EUOs of plaintiff's

assignor were properly mailed by the law firm retained by defendant to schedule and conduct said EUOs (*see Residential Holding Corp.*, 286 A.D.2d at 680) and that the assignor failed to appear (*see Crotona Hgts. Med., P.C. v. Farm Family Cas. Ins. Co.*, 27 Misc.3d 134[A], 2010 N.Y. Slip Op 50716[U] [App Term, 2d, 11th & 13th Jud Dists 2010]; *W & Z Acupuncture, P.C. v. Amex Assur. Co.*, 24 Misc.3d 142[A], 2009 N.Y. Slip Op 51732[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720 [2006]). The fact that said law firm was contacted by the assignor's attorney to reschedule or to confirm the EUOs indicates that the attorney had communicated with the assignor and was acting on her behalf (*see generally St. Vincent's Hosp. of Richmond v. American Tr. Ins. Co.*, 299 A.D.2d 338 [2002]).

In view of the foregoing, and as the appearance of plaintiff's assignor at an EUO was a condition precedent to defendant insurer's liability on the policy (*see* Insurance Department Regulations [11 NYCRR] § 65-1.1; *Stephen Fogel Psychological, P.C.*, 35 AD3d at 722; *W & Z Acupuncture, P.C.*, 24 Misc.3d 142[A], 2009 N.Y. Slip Op 51732[U]), defendant's motion for summary judgment dismissing the complaint was properly granted, and plaintiff's cross motion was properly denied.

EUO - PROVING A NO SHOW

THE AFFIRMATION OF A PARTNER IN A LAW FIRM RETAINED BY THE DEFENDANT TO CONDUCT PLAINTIFF'S EUO IS SUFFICIENT TO ESTABLISH THAT PLAINTIFF HAD FAILED TO APPEAR AT COUNSEL'S LAW OFFICE FOR A DULY SCHEDULED EUO.

***Crotona Heights Medical, P.C. v. Farm Family Cas. Ins. Co.*, 27 Misc.3d 134(A), 2010 N.Y. Slip Op. 50716(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff moved for summary judgment and defendant cross-moved for summary judgment dismissing the complaint. The Civil Court denied both the motion and the cross motion. Insofar as is relevant to this appeal, the Civil Court found that defendant had established that it had timely and properly denied the claims at issue after requesting that plaintiff appear for an examination under oath (EUO), and held that "the sole issue remaining to be determined at trial is the EUO no-show as a proper basis of denial" (*see* CPLR 3212[g]). Defendant appeals from so much of the order as denied its cross motion for summary judgment.

In opposition to plaintiff's motion and in support of its cross motion for summary judgment, defendant submitted the affirmation of a partner in the law firm retained by defendant to conduct plaintiff's EUO. Counsel alleged facts sufficient to establish that plaintiff had failed to appear at counsel's law office for duly scheduled EUOs (*see W & Z Acupuncture, P.C. v. Amex Assur. Co.*, 24 Misc.3d 142[A], 2009 N.Y. Slip Op 51732[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720 [2006]). The appearance of the eligible injured person's assignee at an EUO upon a proper request is a condition precedent to the insurer's liability on the policy (*see* Insurance

Department Regulations [11 NYCRR] § 65-1.1; *Stephen Fogel Psychological, P.C.*, 35 AD3d at 722; *W & Z Acupuncture, P.C.*, 24 Misc.3d 142[A], 2009 N.Y. Slip Op 51732[U]).

In light of the foregoing, and the Civil Court's CPLR 3212(g) findings that the EUO requests were mailed and that the claims were timely denied, from which no appeal has been taken by plaintiff, the Civil Court should have granted defendant's cross motion for summary judgment dismissing the complaint.

EUO'S - SCHEDULING LETTERS

AN EUO SCHEDULING LETTER WHICH CLEARLY APPRISES THE ASSIGNOR THAT IT WAS SENT BY THE ATTORNEYS HIRED BY THE CARRIER TO CONDUCT THE EUO IS NOT A NULLITY.

***Eagle Surgical Supply, Inc. v. Utica Mut. Ins. Co.*, 27 Misc.3d 142(A), 2010 N.Y. Slip Op. 51057(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment. The Civil Court granted defendant's motion and denied plaintiff's cross motion, finding that there was no coverage for the claims at issue because the assignor had breached a condition precedent to coverage by failing to appear for two properly scheduled examinations under oath (EUOs). Plaintiff appeals from that order, and we affirm.

On appeal, plaintiff's only contention is that the EUO scheduling letters were "nullities" because they were sent by defendant's counsel on behalf of defendant, not by defendant directly. Plaintiff's argument lacks merit. The letters clearly apprised the assignor that counsel had been retained by defendant and that the letters were being sent on defendant's behalf. Accordingly, the Civil Court properly found that the assignor had breached a condition precedent to coverage, and the order is affirmed.

EUO - TIMELINESS

WHILE AN EUO NEED NOT BE SCHEDULED TO BE HELD WITHIN 30 DAYS OF THE RECEIPT OF THE CLAIM FORM, AN EUO SCHEDULING LETTER MAILED 52 DAYS AFTER RECEIPT OF THE BILL IS UNTIMELY AND DOES NOT TOLL DEFENDANT'S TIME TO PAY OR DENY THOSE BILLS.

***St. Vincent Medical Care, P.C. v. Travelers Ins. Co.*, 26 Misc.3d 144(A), 2010 N.Y. Slip Op. 50446(U) [App Term, 2nd, 11th & 13th Jud Dists].**

While defendant properly argues that an EUO need not be scheduled to be held within 30 days of the receipt of the claim form (*see Eagle Surgical Supply, Inc. v. Progressive Cas. Ins. Co.*, 21 Misc.3d 49 [App Term, 2d & 11th Jud Dists 2008]), defendant nevertheless failed to demonstrate that the EUO scheduling letters were timely mailed. Defendant admits that it received the three subject bills on October 27, 2006. As the EUO scheduling letters were mailed on December 18, 2006, 52 days after receipt of the bills, they were untimely and did not toll defendant's time to pay or

deny those bills (*see* Insurance Department Regulations [11 NYCRR] § 65-3.5[b]; § 65-3.6[b]; § 65-3.8[j]; *see also Eagle Surgical Supply, Inc.*, 21 Misc.3d at 51).

Accordingly, the Civil Court properly found that defendant had failed to demonstrate that it had properly tolled its time to pay or deny the subject bills and that, therefore, defendant had failed to raise a triable issue of fact. As a result, the order, insofar as appealed from, is affirmed.

JOINT TRIAL

A SITUATION WHEN A JOINT TRIAL IS APPROPRIATE.

***Anthony M. Palumbo, D.C., P.C. v. Tristate Consumer Co.*, 26 Misc.3d 144(A), 2010 N.Y. Slip Op. 50443(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff commenced the instant action to recover assigned first-party no-fault benefits for services rendered to its assignor on March 26, 2008 and March 27, 2008 at Boulevard Surgical Center. Defendant has demonstrated that two other providers have commenced two separate actions for the same services rendered on the same date at the same location. "Where common issues of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Perini Corp. v. WDF, Inc* ., 33 AD3d 605, 606 [2006]). Here, the interests of justice and judicial economy would be served by a joint trial of the actions since defendant intends to defend all three actions on the ground that the services rendered were not medically necessary. Moreover, the papers submitted in opposition to the motion failed to establish that a joint trial would prejudice a substantial right (*see Mas-Edwards v. Ultimate Services, Inc.*, 45 AD3d 540 [2007]). Venue for the joint trial should be placed in Queens County since the first action was commenced in that county (*see id.*).

MAILING - PROOF OF MAILING

WHETHER A PARTY HAS ESTABLISHED MAILING CONTINUES TO BE A DIFFICULT ISSUE.

***Ortho-Med Surgical Supply, Inc. v. MVAIC*, 28 Misc.3d 139(A), 2010 N.Y. Slip Op. 51526(U) [App Term, 2nd, 11th & 13th Jud Dists].**

DISSENT: RIOS, J.

The issue on appeal is whether a timely denial was mailed to plaintiff.

Defendant presented an affidavit from a claims representative attesting to a procedure wherein a denial is placed in an addressed envelope and then dropped in the claims department's "outgoing mail basket." According to the claims representative, the contents of the mail basket are collected daily by a mailroom employee, who then affixes postage to the envelopes and "puts it in the mailbox" for delivery by the U.S. postal service. In my opinion, such an affidavit is insufficient to demonstrate mailing, for it merely concludes that the mail is sent. Defendant's affiant

did not demonstrate firsthand knowledge of the procedures of the mailroom to establish that the denial had been mailed to plaintiff (*see Hospital for Joint Diseases v. Nationwide Mut. Ins. Co.*, 284 A.D.2d 374 [2001]; *Clark v. Columbian Mut. Life Ins. Co.*, 221 A.D.2d 227 [1995]). Consequently, defendant's motion for summary judgment dismissing the complaint should have been denied.

MEDICAL NECESSITY - CONFLICTING PROOF

WHERE A DEFENDANT SUBMITS CONFLICTING PROOF AS TO WHETHER MEDICAL SERVICES WERE MEDICALLY NECESSARY, SUMMARY JUDGMENT SHOULD BE DENIED.

***Hillcrest Radiology Associates v. State Farm Mut. Auto. Ins. Co.*, 28 Misc.3d 138(A), 2010 N.Y. Slip Op. 51467(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In support of its motion for summary judgment, defendant annexed to its papers an affirmed peer review report, which found the MRIs in question to be medically unnecessary. However, also annexed to the moving papers were defendant's independent medical examination report, which found one of the MRIs to be medically necessary, and other reports that contradicted facts set forth in the peer review report. Since defendant's moving papers are contradictory as to whether there was a lack of medical necessity for the services at issue, defendant failed to establish its prima facie entitlement to summary judgment as a matter of law (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Accordingly, defendant's motion was properly denied (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]).

MEDICAL NECESSITY - ESTABLISHING LACK OF MEDICAL NECESSITY AS A MATTER OF LAW

WHERE DEFENDANT SUBMITS A PEER REVIEW REPORT WHICH SETS FORTH A FACTUAL BASIS AND MEDICAL RATIONALE FOR THE PEER REVIEWER'S OPINION THAT THE MEDICAL SERVICES AT ISSUE WERE NOT MEDICALLY NECESSARY AND PLAINTIFF FAILS TO REBUT SAID SHOWING, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT MUST BE GRANTED.

***Laperla Supply, Inc. v. Progressive Northwestern Ins. Co.*, 27 Misc.3d 128(A), 2010 N.Y. Slip Op. 50586(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In addition, annexed to the cross motion papers was an affirmed peer review report which set forth a factual basis and medical rationale for the peer reviewer's opinion that the supplies provided to plaintiff's assignor were not medically necessary (*see Med Tech Prods., Inc. v. Geico Ins. Co.*, 25 Misc.3d 129[A], 2009 N.Y. Slip Op 52111[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Complete Orthopedic Supplies, Inc. v. State Farm Mut. Ins. Co.*, 23 Misc.3d 5, 877 N.Y.S.2d 597 [App Term, 2d, 11th & 13th Jud Dists 2009]). Since plaintiff failed to rebut said showing, defendant's cross motion for summary judgment dismissing the complaint is granted

(*see Complete Orthopedic Supplies, Inc. v. State Farm Mut. Ins. Co.*, 23 Misc.3d at 7, 877 N.Y.S.2d 597; *Delta Diagnostic Radiology, P.C. v. American Tr. Ins. Co.*, 18 Misc.3d 128[A], 2007 N.Y. Slip Op 52455[U] [App Term, 2d & 11th Jud Dists 2007]; *A. Khodadadi Radiology, P.C. v. N.Y. Cent. Mut Fire Ins. Co.*, 16 Misc.3d 131[A], 2007 N.Y. Slip Op 51342[U] [App Term, 2d & 11th Jud Dists 2007]). We pass on no other issue.

MEDICAL NECESSITY - ESTABLISHING LACK OF MEDICAL NECESSITY AS A MATTER OF LAW

AN UNREBUTTED AFFIDAVIT FROM A PEER REVIEW CHIROPRACTOR WHICH SETS FORTH A FACTUAL BASIS AND MEDICAL RATIONALE FOR THE CONCLUSION THAT THERE WAS A LACK OF MEDICAL NECESSITY FOR THE SERVICES AT ISSUE ENTITLES DEFENDANT TO SUMMARY JUDGMENT.

***Innovative Chiropractic, P.C. v. Travelers Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50994(U) [App Term, 2nd, 11th & 13th Jud Dists].** Defendant established that it had timely mailed (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]) the denial of claim forms, which denied the claims at issue on the ground of lack of medical necessity. In support of its cross motion for summary judgment, defendant also submitted, among other things, an affidavit from its peer review chiropractor and a peer review report, which set forth a factual basis and medical rationale for the conclusion that there was a lack of medical necessity for the services at issue (*see Delta Diagnostic Radiology, P.C. v. Integon Natl. Ins. Co.*, 24 Misc.3d 136[A], 2009 N.Y. Slip Op 51502 [U] [App Term, 2d, 11th & 13th Jud Dists 2009]). Defendant's showing that the services were not medically necessary was unrebutted by plaintiff. Consequently, defendant established its prima facie entitlement to summary judgment and plaintiff failed to raise a triable issue of fact.

Accordingly, defendant's cross motion for summary judgment dismissing the complaint should have been granted.

MEDICAL NECESSITY - UNDERLYING MEDICAL RECORDS

AN ASSERTION BY PLAINTIFF THAT IT WAS NOT IN POSSESSION OF ALL THE INFORMATION AND DOCUMENTS RELIED UPON BY DEFENDANT'S PEER REVIEWER WILL NOT DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE PLAINTIFF FAILS TO DEMONSTRATE THAT IT NEEDED SAID DOCUMENTS IN ORDER TO RAISE A TRIABLE ISSUE OF FACT AS TO WHETHER THE SERVICES AT ISSUE WERE MEDICALLY NECESSARY WHEN THEY WERE RENDERED AND WHEN SUFFICIENT TIME HAS TRANSPIRED AND SAID DOCUMENTS WERE NOT REQUESTED IN DISCOVERY.

***Mega Supply & Billing, Inc. v. Larendon Nat. Ins. Co.*, 28 Misc.3d 137(A), 2010 N.Y. Slip Op. 51452(U) [App Term, 2nd, 11th & 13th Jud Dists].**

While plaintiff stated that it was not in possession of all the information and documents relied upon by defendant's peer reviewer, plaintiff failed to demonstrate that it needed said documents in order to raise a triable issue of fact as to whether the services at issue were medically necessary when they were rendered (*see* CPLR 3212[f]; *Urban Radiology, P.C. v. Tri-State Consumer Ins. Co.,* 27 Misc.3d 140[A], 2010 N.Y. Slip Op 50987[U] [App Term, 2d, 11th & 13th Jud Dists 2010]; *GZ Med. & Diagnostic, P.C. v. Mercury Ins. Co.,* 26 Misc.3d 146[A], 2010 N.Y. Slip Op 50491[U] [App Term, 2d, 11th & 13th Jud Dists 2010]), and that it had served discovery demands during the ample opportunity that it had to commence discovery proceedings to obtain such records before the instant summary judgment motion was brought (*see Meath v. Mishrick,* 68 N.Y.2d 992 [1986]; *Urban Radiology, P.C.,* 27 Misc.3d 140[A], 2010 N.Y. Slip Op 50987[U]). Accordingly, the order granting defendant's motion for summary judgment dismissing the complaint is affirmed.

MEDICAL NECESSITY - REBUTTING DEFENDANT'S PEER REVIEW

AN AFFIRMATION OF PLAINTIFF'S DOCTOR THAT DOES NOT MEANINGFULLY REFER TO, LET ALONE REBUT, THE CONCLUSIONS SET FORTH IN DEFENDANT'S PEER REVIEW REPORT IS INSUFFICIENT TO RAISE A TRIABLE ISSUE OF FACT AS TO MEDICAL NECESSITY.

***GZ Medical and Diagnostic, P.C. v. Mercury Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. 50491(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Contrary to the finding of the Civil Court, the affirmation of plaintiff's doctor did not meaningfully refer to, let alone rebut, the conclusions set forth in the peer review report (*id.; see also Innovative Chiropractic, P.C. v. Mercury Ins. Co.,* 25 Misc.3d 137[A], 2009 N.Y. Slip Op 52321[U] [App Term, 2d, 11th & 13th Jud Dists 2009]).

MEDICAL NECESSITY - REBUTTING DEFENDANT'S PEER REVIEW

A STATEMENT BY PLAINTIFF THAT IT IS NOT IN POSSESSION OF ALL THE INFORMATION AND DOCUMENTS RELIED UPON BY DEFENDANT'S PEER REVIEWER AND THAT SAID DOCUMENTS ARE "ESSENTIAL TO JUSTIFY OPPOSITION" TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (*SEE* CPLR 3212[F]) IS INSUFFICIENT TO DEFEAT DEFENDANT'S MOTION. PLAINTIFF MUST DEMONSTRATE THAT DISCOVERY IS NEEDED IN ORDER TO SHOW THE EXISTENCE OF A TRIABLE ISSUE OF FACT.

***GZ Medical and Diagnostic, P.C. v. Mercury Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. 50491(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Although plaintiff stated that it was not in possession of all the information and documents relied upon by defendant's peer reviewer, and that said documents were "essential to justify opposition" to defendant's motion (*see* CPLR 3212[f]), plaintiff, in this case, "failed to demonstrate that discovery was needed in order to show the

existence of a triable issue of fact" (*Delta Diagnostic Radiology, P.C. v. Interboro Ins. Co.*, 25 Misc.3d 134[A], 2009 N.Y. Slip Op 52222[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Corwin v. Heart Share Human Servs. of NY*, 66 A.D.3d 814 [2009]).

MEDICAL NECESSITY - REBUTTING DEFENDANT'S PEER REVIEW REPORT

AN AFFIRMATION SUBMITTED BY PLAINTIFF THAT DOES NOT MEANINGFULLY REFER TO, LET ALONE REBUT, THE CONCLUSIONS SET FORTH IN DEFENDANT'S PEER REVIEW REPORT IS INSUFFICIENT TO CREATE A TRIABLE ISSUE OF FACT AS TO WHETHER SERVICES WERE MEDICALLY NECESSARY.

Prime Psychological Services, P.C. v. Mercury Ins. Group, 27 Misc.3d 127(A), 2010 N.Y. Slip Op. 50585(U) **[App Term, 2nd, 11th & 13th Jud Dists].**

In opposition to the motion, plaintiff failed to raise a triable issue of fact, as the psychologist's affirmation submitted by plaintiff did not meaningfully refer to, let alone rebut, the conclusions set forth in the peer review report (*id.; see also Innovative Chiropractic, P.C. v. Mercury Ins. Co.*, 25 Misc.3d 137[A], 2009 N.Y. Slip Op 52321[U] [App Term, 2d, 11th & 13th Jud Dists 2009]).

MEDICAL NECESSITY - REBUTTING DEFENDANT'S PEER REVIEW REPORT

AN AFFIDAVIT FROM THE DOCTOR WHO HAD PROVIDED TREATMENTS REAFFIRMING HIS OPINION THAT THE DISPUTED SERVICES WERE MEDICALLY NECESSARY THAT DOES NOT REFER TO, OR DISCUSS, THE DETERMINATION OF DEFENDANT'S PEER REVIEW FAILS TO DEMONSTRATE THE EXISTENCE OF AN ISSUE OF FACT WITH RESPECT TO MEDICAL NECESSITY.

Innovative Chiropractic, P.C. v. New York Cent. Mut. Fire Ins. Co., 27 Misc.3d 137(A), 2010 N.Y. Slip Op. 50884(U) **[App Term, 2nd, 11th & 13th Jud Dists].**

The affidavit submitted by plaintiff in opposition to defendant's motion was insufficient to raise a triable issue of fact, as it merely consisted of a conclusory statement by the affiant, the doctor who had provided the treatments, that he reaffirmed his opinion that the disputed services were medically necessary. The affiant did not refer to, or discuss, the determination of defendant's chiropractors. Consequently, plaintiff failed to demonstrate the existence of an issue of fact with respect to medical necessity (*see Pan Chiropractic, P.C. v. Mercury Ins. Co.*, 24 Misc.3d 136 [A], 2009 N.Y. Slip Op 51495[U] [App Term, 2d, 11th & 13th Jud Dists 2009]), and defendant's motion for summary judgment should have been granted.

Accordingly, the judgment is reversed, the order entered March 18, 2009 is vacated, defendant's motion for summary judgment dismissing the complaint is granted and plaintiff's cross motion for summary judgment is denied.

MVAIC - KNOWLEDGE OF IDENTITY OF OWNER OF OTHER VEHICLE

WHERE PLAINTIFF AND ITS ASSIGNOR ARE AWARE OF THE IDENTITY OF THE OWNER OF THE VEHICLE WHICH STRUCK PLAINTIFF'S ASSIGNOR, PLAINTIFF, AS ASSIGNEE, MUST EXHAUST ITS REMEDIES AGAINST THE VEHICLE'S OWNER BEFORE SEEKING RELIEF FROM MVAIC.

***Five Boro Psychological Services, P.C. v. MVAIC,* 27 Misc.3d 130(A), 2010 N.Y. Slip Op. 50641(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Since plaintiff and its assignor were aware of the identity of the owner of the vehicle that plaintiff's assignor was driving at the time of the accident, plaintiff, as assignee, was required to exhaust its remedies against the vehicle's owner before seeking relief from MVAIC (*Hauswirth v. American Home Assur. Co.,* 244 A.D.2d 528 [1997]; *Modern Art Med., P.C. v. MVAIC,* 22 Misc.3d 126[A], 2008 N.Y. Slip Op 52586[U] [App Term, 2d & 11th Jud Dists 2008]; *Doctor Liliya Med., P.C. v. MVAIC,* 21 Misc.3d 143[A], 2008 N.Y. Slip Op 52453[U] [App Term, 2d & 11th Jud Dists 2008]; *Dr. Abakin, D.C., P.C. v. MVAIC,* 21 Misc.3d 134[A], 2008 N.Y. Slip Op 52186[U] [App Term, 2d & 11th Jud Dists 2008]; *Complete Med. Servs. of NY, P.C. v. MVAIC,* 20 Misc.3d 137[A], 2008 N.Y. Slip Op 51541[U] [App Term, 2d & 11th Dists 2008]). As a result, plaintiff's contention that the order appealed from placed an improper burden on plaintiff lacks merit. Accordingly, the order is affirmed.

MVAIC - KNOWLEDGE OF IDENTITY OF OWNER OF OTHER VEHICLE

WHERE PLAINTIFF AND ITS ASSIGNOR ARE AWARE OF THE IDENTITY OF THE OWNER OF THE VEHICLE WHICH STRUCK PLAINTIFF'S ASSIGNOR, PLAINTIFF, AS ASSIGNEE, MUST EXHAUST ITS REMEDIES AGAINST THE VEHICLE'S OWNER BEFORE SEEKING RELIEF FROM MVAIC.

***Staten Island Chiropractic Associates, PLLC v. MVAIC*, 27 Misc.3d 132(A), 2010 N.Y. Slip Op. 50698(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Since plaintiff and its assignor were aware of the identity of the owner of the vehicle which struck plaintiff's assignor, plaintiff, as assignee, was required to exhaust its remedies against the vehicle's owner before seeking relief from MVAIC (*Hauswirth v. American Home Assur. Co.,* 244 A.D.2d 528 [1997]; *Modern Art Med., P.C. v. MVAIC,* 22 Misc.3d 126[A], 2008 N.Y. Slip Op 52586[U] [App Term, 2d & 11th Jud Dists 2008]; *Doctor Liliya Med., P.C. v. MVAIC,* 21 Misc.3d 143[A], 2008 N.Y. Slip Op 52453[U] [App Term, 2d & 11th Jud Dists 2008]; *Dr. Abakin, D.C., P.C. v. MVAIC,* 21 Misc.3d 134[A], 2008 N.Y. Slip Op 52186[U] [App Term, 2d & 11th Jud Dists 2008]; *Complete Med.Servs. of NY, P.C. v. MVAIC,* 20 Misc.3d 137[A], 2008 N.Y. Slip Op 51541 [U] [App Term, 2d & 11th Dists 2008]). Until plaintiff exhausts its remedies, its claim against MVAIC is premature (*Complete Med. Servs. of NY, P.C. v. MVAIC,* 20 Misc.3d 137[A], 2008 N.Y. Slip Op 51541[U]). Accordingly, the judgment is affirmed.

MVAIC - NOTICE OF CLAIM

MVAIC ESTABLISHES ITS PRIMA FACIE ENTITLEMENT TO SUMMARY JUDGMENT BY DEMONSTRATING THAT PLAINTIFF'S ASSIGNOR DID NOT

FILE A TIMELY NOTICE OF CLAIM.

***Parkway Anesthesia Associates, PLLC v. MVAIC*, 27 Misc.3d 133(A), 2010 N.Y. Slip Op. 50713(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The filing of a timely notice of claim is a condition precedent to the right to apply for payment from MVAIC (*see* Insurance Law § 5208[a]; *Bell Air Med. Supply, LLC v. MVAIC,* 16 Misc.3d 135[A], 2007 N.Y. Slip Op 51607[U] [App Term, 2d & 11th Jud Dists 2007]). Compliance with the statutory requirement of timely filing a notice of claim must be established in order to demonstrate that the claimant is a "covered person" who is entitled to recover no-fault benefits from MVAIC (*see* Insurance Law § 5221[b][2]; *Ocean Diagnostic Imaging v. Motor Veh. Acc. Indem. Corp.*, 8 Misc.3d 137[A], 2005 N.Y. Slip Op 51271[U] [App Term, 2d & 11th Jud Dists 2005]).

MVAIC's submissions in support of its motion for summary judgment made a prima facie showing that plaintiff's assignor had failed to timely file a notice of claim (*see* Insurance Law § 5208[a]). Plaintiff failed to demonstrate that there has been a timely filing of a notice of claim, a filing of the notice of claim as soon as it was reasonably possible do so, or that leave was sought to file a late notice of claim (*see* Insurance Law § 5208[b], [c]). As a result, the Civil Court should have granted MVAIC's motion for summary judgment dismissing the complaint. Accordingly, the judgment is reversed, the order entered January 15, 2009 is vacated, defendant's motion for summary judgment dismissing the complaint is granted and plaintiff's cross motion for summary judgment is denied.

MVAIC - NOTICE OF CLAIM

MVAIC IS ENTITLED TO SUMMARY JUDGMENT WHERE IT ESTABLISHES BY ADMISSIBLE PROOF THAT A TIMELY NOTICE OF CLAIM WAS NOT FILED.

***Five Boro Psychological Services, P.C. v. MVAIC*, 27 Misc.3d 131(A), 2010 N.Y. Slip Op. 50647(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Since MVAIC established that there was no timely filing of a notice of claim and that leave was not sought to file a late notice of claim (*see* Insurance Law § 5208[a], [c]), the assignor is not a covered person (*see* Insurance Law § 5221[b][2]), and a condition precedent to the right to apply for payment of no-fault benefits from MVAIC was not satisfied (*M.N.M. Med. Health Care, P.C. v. MVAIC,* 22 Misc.3d 128[A], 2009 N.Y. Slip Op 50041[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Bell Air Med. Supply, LLC v.. MVAIC,* 16 Misc.3d 135[A], 2007 N.Y. Slip Op 51607[U] [App Term, 2d & 11th Jud Dists 2007]; *Ocean Diagnostic Imaging v. Motor Veh. Acc. Indem. Corp.,* 8 Misc.3d 137 [A], 2005 N.Y. Slip Op 51271[U] [App Term, 2d & 11th Jud Dists 2005]). Moreover, MVAIC established that it was not provided with proof that plaintiff's assignor was a resident of the State of New York (*see RAZ Acupuncture, P.C. v. MVAIC,* 25 Misc.3d 138[A], 2009 N.Y. Slip Op 52362[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). Accordingly, MVAIC's motion for summary judgment dismissing the complaint was properly granted.

MVAIC - NOTICE OF INTENTION TO FILE A CLAIM

THE FAILURE TO FILE A TIMELY AFFIDAVIT PROVIDING MVAIC WITH NOTICE OF INTENTION TO FILE A CLAIM, WHICH IS A CONDITION PRECEDENT TO THE RIGHT TO APPLY TO MVAIC FOR PAYMENT, IS A COMPLETE DEFENSE.

***Central Radiology Services, P.C. v. MVAIC*, 28 Misc.3d 137(A),2010 N.Y. Slip Op. 51454(U) [App Term, 2nd, 11th & 13th Jud Dists].**

"The filing of a timely affidavit providing the MVAIC with notice of intention to file a claim is a condition precedent to the right to apply for payment from [MVAIC]" (*A.B. Med. Servs. PLLC v. Motor Veh. Acc. Indem. Corp.,* 10 Misc.3d 145[A], 2006 N.Y. Slip Op 50139[U] [App Term, 2d & 11th Jud Dists 2006] [citations and internal quotation marks omitted]; *see* Insurance Law § 5208[a]; *M.N.M. Med. Health Care, P.C. v. MVAIC,* 22 Misc.3d 128[A], 2009 N.Y. Slip Op 50041[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Bell Air Med. Supply, LLC v. MVAIC,* 16 Misc.3d 135[A], 2007 N.Y. Slip Op 51607[U] [App Term, 2d & 11th Jud Dists 2007]). Compliance with the statutory requirement of timely filing a notice of claim must be established in order to demonstrate that plaintiff's assignor is a "covered person" who is entitled to recover no-fault benefits from MVAIC (*see* Insurance Law § 5221[b][2]; *M.N.M. Med. Health Care, P.C.,* 22 Misc.3d 128[A], 2009 N.Y. Slip Op 50041 [U]; *Bell Air Med. Supply, LLC,* 16 Misc.3d 135[A], 2007 N.Y. Slip Op 51607[U]; *A.B. Med. Servs. PLLC,* 10 Misc.3d 145[A], 2006 N.Y. Slip Op 50139[U]; *Ocean Diagnostic Imaging v. Motor Veh. Acc. Indem. Corp.,* 8 Misc.3d 137[A], 2005 N.Y. Slip Op 51271[U] [App Term, 2d & 11th Jud Dists 2005]).

PEER REVIEW REPORTS - STAMPED SIGNATURES

A PLAINTIFF'S MERE ASSERTION THAT A PEER REVIEW REPORT CONTAINS A STAMPED FACSIMILE SIGNATURE, WITHOUT ANY INDICATION AS TO WHY THE SIGNATURE IS BELIEVED TO BE A STAMPED FACSIMILE SIGNATURE, IS INSUFFICIENT TO RAISE AN ISSUE OF FACT.

***Eden Medical, P.C. v. Eveready Ins. Co.*, 26 Misc.3d 140(A), 2010 N.Y. Slip Op. 50265(U) [App Term, 2nd, 11th & 13th Jud Dists].**

When an allegation that a peer review report contains a stamped signature of the peer reviewer is properly asserted, it generally cannot be resolved solely by an examination of the papers submitted on a motion for summary judgment, because an issue of fact exists (*see Seoulbank, N.Y. Agency v. D & J Export & Import Corp.,* 270 A.D.2d 193 [2000]; *Dyckman v. Barrett,* 187 A.D.2d 553 [1992]; *Mani Med., P.C. v. Eveready Ins. Co.,* 25 Misc.3d 132[A], 2008 N.Y. Slip Op 52697[U] [App Term, 2d & 11th Jud Dists 2008]; *see also James v.. Albank,* 307 A.D.2d 1024 [2003]). However, in the instant case, plaintiff's mere assertion that the peer review report contained a stamped facsimile signature, without any indication as to why it believes the signature is a stamped facsimile signature, is insufficient to raise an issue of fact. In any event, in reply, defendant submitted an affidavit from the peer reviewer in which she stated that she had "personally applied the signature on the peer review

report." In light of the foregoing, the order, insofar as appealed from, is affirmed.

PIP ENDORSEMENT - DEDUCTIBLES

WHERE THE PIP ENDORSEMENT CONTAINS A DEDUCTIBLE, THE AMOUNT OF THE DEDUCTIBLE CAN BE USED TO OFFSET A CLAIM.

***Innovative Chiropractic, P.C. v. Progressive Ins. Co.*, 26 Misc.3d 135(A), 2010 N.Y. Slip Op. 50148(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In contrast, defendant did demonstrate that the applicable insurance policy contained a $200 deductible (*see* Insurance Department Regulations [11 NYCRR] § 65-1.6) and that defendant timely denied $200 of the claim at issue due to said deductible (*see* Insurance Law § 5102[b][3]). Consequently, under the circumstances presented herein, it is appropriate for this court to search the record and grant summary judgment to defendant dismissing the complaint with respect to the bills totaling $200, which bills defendant had denied based upon the $200 deductible (*see Merritt Hill Vineyards v. Windy Hgts. Vineyard,* 61 N.Y.2d 106 [1984]; *Great Wall Acupuncture v. GEICO Gen. Ins. Co.,* 16 Misc.3d 23 [App Term, 2d & 11th Jud Dists 2007]).

PRELIMINARY INJUNCTIONS

A PRELIMINARY INJUNCTION STAYING ALL PENDING AND FUTURE ACTIONS MUST BE OBEYED.

***AJS Chiropractic, P.C. v. New York Central Mut. Fire Ins. Co.*, 27 Misc.3d 129(A), 2010 N.Y. Slip Op. 50610(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action to recover assigned first-party no-fault benefits, plaintiff moved for summary judgment and defendant cross-moved for summary judgment. While said motions were pending in the Civil Court, the Supreme Court, Queens County (James J. Golia, J.), in a declaratory judgment action brought by the instant defendant against, among others, the instant plaintiff and plaintiff's assignor, issued a preliminary injunction staying "all pending and future actions" in "New York Civil and District Courts" involving, inter alia, said plaintiff and assignor. Thereafter, the Civil Court granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint. This appeal by defendant ensued. In light of the preliminary injunction issued by the Supreme Court, the parties herein were foreclosed from proceeding any further in this action. Accordingly, the appeal could not properly be perfected and must be stricken from the general calendar.

PROCEDURE - 90 DAY NOTICE

A DISMISSAL FOR FAILURE TO PROSECUTE FOLLOWING THE SERVICE OF A 90 DAY NOTICE IS, UNLESS OTHERWISE STATED, IS NOT A DISMISSAL ON

THE MERITS.

***Ema Acupuncture, P.C. v. Lumbermens Mut. Cas. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50995(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff commenced an action in Civil Court, Queens County, to recover assigned first-party no-fault benefits for services provided to its assignor between February 5, 2002 and April 12, 2002. Issue was joined in July 2003. In August 2007, defendant served plaintiff with a 90-day demand pursuant to CPLR 3216(b)(3). On papers dated January 9, 2008 and returnable February 4, 2008, defendant moved to dismiss the Queens County action for want of prosecution (CPLR 3216[a]). On January 23, 2008, plaintiff, without responding to the motion to dismiss, commenced the instant action by filing a summons and complaint (*see* CCA 400), subsequently amended, in Civil Court, Kings County, based on the same cause of action. On February 4, 2008, the court (Diane A. Lebedeff, J.) granted the motion to dismiss the Queens County action, on default, but without any indication that the dismissal was on the merits (*see* CPLR 3216[a]). Defendant subsequently moved for summary judgment dismissing the complaint in the instant action on the ground of res judicata, citing the Queens County dismissal order. The Civil Court granted the motion, and plaintiff appeals.

Since the dismissal order did not "specif[y] otherwise" (CPLR 3216[a]), the dismissal was not "on the merits" or "with prejudice" (*Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 380 [1999]; *e.g. Gallo v. Teplitz Tri-State Recycling*, 254 A.D.2d 253, 254 [1998]) and does not preclude, on res judicata grounds, a new action between the same parties for the same cause of action (*e.g. Greenberg v. De Hart*, 4 N.Y.2d 511, 516-517 [1958]; *San Filippo v. Adler*, 278 A.D.2d 402 [2000]; *see also Mudry v. Giannattasio*, 8 AD3d 455, 456 [2004]; *Morales v. New York City Hous. Auth.*, 302 A.D.2d 571 [2003]; *Mays v. Whitfield*, 282 A.D.2d 721 [2001]). Accordingly, the order granting defendant's motion for summary judgment dismissing the complaint is reversed and the motion denied.

PROCEDURE - FAILURE TO COMPLY WITH 22 NYCRR § 208.4.

A DE MINIMIS VIOLATION OF THE UNIFORM RULES FOR THE CIVIL COURT 22 NYCRR § 208.4 DOES NOT RENDER AN AFFIDAVIT INADMISSIBLE.

***Central Radiology Services, P.C. v. MVAIC*, 28 Misc.3d 137(A),2010 N.Y. Slip Op. 51454(U) [App Term, 2nd, 11th & 13th Jud Dists].**

"The filing of a timely affidavit providing the MVAIC with notice of intention to file a claim is a condition precedent to the right to apply for payment from [MVAIC]" (*A.B. Med. Servs. PLLC v. Motor Veh. Acc. Indem. Corp.*, 10 Misc.3d 145[A], 2006 N.Y. Slip Op 50139[U] [App Term, 2d & 11th Jud Dists 2006] [citations and internal quotation marks omitted]; *see* Insurance Law § 5208[a]; *M.N.M. Med. Health Care, P.C. v. MVAIC*, 22 Misc.3d 128[A], 2009 N.Y. Slip Op 50041[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Bell Air Med. Supply, LLC v. MVAIC*, 16 Misc.3d 135[A], 2007 N.Y. Slip Op 51607[U] [App Term, 2d & 11th Jud Dists 2007]). Compliance

with the statutory requirement of timely filing a notice of claim must be established in order to demonstrate that plaintiff's assignor is a "covered person" who is entitled to recover no-fault benefits from MVAIC (*see* Insurance Law § 5221[b][2]; *M.N.M. Med. Health Care, P.C.,* 22 Misc.3d 128[A], 2009 N.Y. Slip Op 50041 [U]; *Bell Air Med. Supply, LLC,* 16 Misc.3d 135[A], 2007 N.Y. Slip Op 51607[U]; *A.B. Med. Servs. PLLC,* 10 Misc.3d 145[A], 2006 N.Y. Slip Op 50139[U]; *Ocean Diagnostic Imaging v. Motor Veh. Acc. Indem. Corp.,* 8 Misc.3d 137[A], 2005 N.Y. Slip Op 51271[U] [App Term, 2d & 11th Jud Dists 2005]).

Under the circumstances presented, the Civil Court should have considered the affidavit submitted by MVAIC's claim representative rather than sua sponte rejecting it due to a de minimis violation of Uniform Rules for the Civil Court (22 NYCRR) § 208.4. The submissions in support of MVAIC's motion for summary judgment made a prima facie showing that plaintiff's assignor had failed to timely file a notice of claim (*see* Insurance Law § 5208[a]), and plaintiff failed to demonstrate that its assignor had timely filed a notice of claim or sought leave to file a late notice of claim (*see* Insurance Law § 5208[b], [c]). Consequently, defendant's motion for summary judgment should have been granted. Accordingly, the judgment is reversed, the order entered February 20, 2009 is vacated, defendant's motion for summary judgment dismissing the complaint is granted and plaintiff's cross motion for summary judgment is denied.

PROCEDURE - FAILURE TO PROSECUTE

UNLESS OTHERWISE STATED, A DISMISSAL FOR FAILURE TO PROSECUTE IS NOT ON THE MERITS

***Magnezit Medical Care, P.C. v. Lumbermens Mut. Cas. Co.*, 27 Misc.3d 142(A), 2010 N.Y. Slip Op. 51054(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff commenced an action in Civil Court, Queens County, to recover assigned first-party no-fault benefits for services provided to its assignor from November 12, 2001 through March 29, 2002. Issue was joined on July 23, 2003. In August 2007, defendant served plaintiff with a 90-day demand pursuant to CPLR 3216(b)(3). On papers dated January 9, 2008 and returnable February 4, 2008, defendant moved to dismiss the Queens County action for want of prosecution (CPLR 3216[a]). On January 10, 2008, plaintiff, without responding to the motion to dismiss, commenced the instant action by filing a summons and complaint (*see* CCA 400) in Civil Court, Kings County, based on the same cause of action, and for additional relief. On February 4, 2008, the court (Diane A. Lebedeff, J.) granted the motion to dismiss the Queens County action, on default, but without any indication that the dismissal was on the merits (*see* CPLR 3216[a]). Defendant subsequently moved to dismiss the complaint in the instant action on the ground of res judicata, citing the Queens County dismissal order. The Civil Court granted the motion based upon plaintiff's failure to have timely filed a note of issue in the first action and for "forum shopping," and plaintiff appeals.

Since the dismissal order did not "specif[y] otherwise" (CPLR 3216[a]), the dismissal

was not "on the merits" or "with prejudice" (*Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 380 [1999]; *e.g. Gallo v. Teplitz Tri-State Recycling,* 254 A.D.2d 253, 254 [1998]) and does not preclude, on res judicata grounds, a new action between the same parties for the same cause of action (*e.g. Greenberg v. De Hart,* 4 N.Y.2d 511, 516-517 [1958]; *San Filippo v. Adler,* 278 A.D.2d 402 [2000]; *see also Mudry v. Giannattasio,* 8 AD3d 455, 456 [2004]; *Morales v. New York City Hous. Auth.*, 302 A.D.2d 571 [2003]; *Mays v. Whitfield,* 282 A.D.2d 721 [2001]). Although issues regarding the applicability of the statute of limitations (CPLR 213 [2]) are addressed by the parties on appeal, as they were not raised in the Civil Court, they are not properly before us (*e.g. 45-02 Food Corp. v. 45-02 43rd Realty LLC,* 37 AD3d 522, 526 [2007]; *DeLeonardis v. Brown,* 15 AD3d 525, 526 [2005]; *Davidson v. Public Adm'r,* 283 A.D.2d 538, 540 [2001]).

Accordingly, the order granting defendant's motion to dismiss the complaint is reversed and the motion denied.

PROCEDURE - MOTIONS TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

UNDER CERTAIN CIRCUMSTANCES, THE COURT MAY TREAT A MOTION PURSUANT TO CPLR 3211(A)(7) AS A MOTION FOR SUMMARY JUDGMENT PURSUANT TO CPLR 3212.

***Crossbay Acupuncture, P.C. v. Hartford Cas. Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. 50487(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover first-party no-fault benefits assigned to it by a pedestrian who was allegedly injured after having been hit by the insured's car, the Civil Court granted a motion denominated by both defendant and the court as one seeking to dismiss the complaint pursuant to CPLR 3211(a)(7). However, in support of the motion, defendant did not argue that the allegations in the complaint failed to set forth a cause of action (*see Andre Strishak & Assoc. v. Hewlett Packard Co.,* 300 A.D.2d 608, 609 [2002]) or that plaintiff does not have a cause of action (*see Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.,* 46 A.D.3d 530 [2007]), and the court did not so find. Rather, defendant sought to establish an affirmative defense, set forth in its answer, that the injuries did not arise from an insured incident, and sought dismissal on that ground (*see* CPLR 3212[b]). Indeed, in opposition to the motion, plaintiff argued that defendant's submissions were insufficient to establish defendant's entitlement to summary judgment based on its defense. The Civil Court addressed itself to the merits of defendant's defense, finding that "defendant has sustained its burden of proof of lack of coverage and therefore plaintiff's complaint is dismissed." Accordingly, we find that the court properly treated defendant's motion, denominated as one pursuant to CPLR 3211(a)(7), as a motion for summary judgment pursuant to CPLR 3212 (*cf. Hopper v. McCollum,* 65 A.D.3d 669 [2009]).

We further find that the affidavit of the insured, submitted by defendant in support of its motion, was sufficient to demonstrate, prima facie, that "the alleged injur[ies] do[ ]

not arise out of an insured incident" (*Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 199 [1997]). Since plaintiff failed to raise a triable issue of fact, the Civil Court properly granted defendant summary judgment dismissing the complaint (*see Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]). Accordingly, we affirm the order.

We note that in addition to arguing that the order appealed from should be reversed, plaintiff contends that an order dated February 25, 2008, which was subsequently sua sponte vacated by order dated May 14, 2008, should be reinstated. As no appeal has been taken from either of these orders, we may not review them. We further note that no appeal lies as of right from the order dated May 14, 2008.

SERVICE OF PROCESS - CPLR 317

A DEFENDANT MEETS ITS BURDEN OF SHOWING THAT IT DID NOT RECEIVE ACTUAL NOTICE OF A SUMMONS, SUMMONS AND COMPLAINT OR MOTION FOR A DEFAULT JUDGMENT IN TIME TO DEFEND THE ACTION BY SUBMITTING AN AFFIDAVIT OF A NO-FAULT LITIGATION EXAMINER WHO HAD PERSONAL KNOWLEDGE OF DEFENDANT'S PRACTICES AND PROCEDURES IN RETRIEVING, OPENING AND FILING ITS MAIL AND IN MAINTAINING ITS FILES ON EXISTING CLAIMS STATING THAT DEFENDANT HAD NEVER RECEIVED A SUMMONS, SUMMONS AND COMPLAINT OR MOTION .

***Nursing Personnel Homecare v. New York Cent. Mut. Fire Ins. Co.*, 2010 WL 963461, 1 [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff's affidavit of service established that plaintiff had effectuated service upon defendant through the delivery of the summons and complaint to the Superintendent of Insurance (*see* Insurance Law § 1212; *Hospital for Joint Diseases v. Lincoln Gen. Ins. Co.*, 55 AD3d 543 [2008]; *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 AD3d 968 [2006]; *Kaperonis v. Aetna Cas. & Sur. Co.*, 254 A.D.2d 334 [1998]; *see also* CPLR 311[a][1]). In support of defendant's motion to vacate the default judgment, there was more than a "mere denial" of receipt of the summons and complaint (*see Montefiore Med. Ctr. v. Auto One Ins. Co.*, 57 AD3d 958, 959 [2008]). Defendant submitted an affidavit from one of its no-fault litigation examiners, who had personal knowledge regarding defendant's practices and procedures in retrieving, opening and filing its mail and in maintaining its files on existing claims. In said affidavit, the no-fault litigation examiner stated that defendant had never received the summons, the complaint or the motion for a default judgment (*cf. Westchester Med. Ctr. v. Philadelphia Indem. Ins. Co.*, 69 AD3d 613 [2010]). Accordingly, pursuant to CPLR 317, defendant met its burden of showing that it did not receive actual notice of the summons in time to defend the action.

SUBJECT MATTER JURISDICTION - MALLELA DEFENSE

THE CIVIL COURT HAS SUBJECT MATTER JURISDICTION TO ADDRESS A DEFENSE PREDICATED UPON *MALLELA* .

***Five Boro Psychological Services, P.C. v. Autoone Ins. Co.*, 27 Misc.3d 89, 902 N.Y.S.2d 768, 2010 N.Y. Slip Op. 20131 [App Term, 2nd, 11th & 13th Jud Dists].**

Furthermore, there is no merit to plaintiff's contention that the Civil Court lacks subject matter jurisdiction to address a defense predicated upon *Mallela* because it would amount to a declaratory judgment over which only the Supreme Court has jurisdiction pursuant to CPLR 3001. Defendant is clearly not seeking a declaratory judgment. Rather, defendant seeks a determination as to whether plaintiff established its prima facie entitlement to summary judgment. In any event, the Civil Court would have subject matter jurisdiction in a declaratory judgment involving an obligation of an insurer in which the underlying amount sought to be recovered did not exceed $25,000 (*see Rivera v. Buck*, 25 Misc.3d 27, 887 N.Y.S.2d 747 [App. Term, 2d, 11th & 13th Jud. Dists. 2009]).

SUMMARY JUDGEMENT - ADMISSIBLE PROOF - BUSINESS RECORDS EXCEPTION.

AN EMPLOYEE OF A THIRD-PARTY BILLING COMPANY MUST DEMONSTRATE THAT HE OR SHE POSSESSES PERSONAL KNOWLEDGE OF PLAINTIFF'S BUSINESS PRACTICES AND PROCEDURES TO ESTABLISH THAT THE CLAIM FORMS ANNEXED TO HIS OR HER AFFIDAVIT ARE ADMISSIBLE PURSUANT TO CPLR 4518.

***Raz Acupuncture, P.C. v. Travelers Property Cas. Ins. Co.*, 26 Misc.3d 132(A), 2010 N.Y. Slip Op. 50065(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff's cross motion for summary judgment was supported by an affidavit of an employee of a third-party billing company who did not demonstrate that he possessed personal knowledge of plaintiff's business practices and procedures to establish that the annexed documents were admissible pursuant to CPLR 4518. As a result, plaintiff failed to make a prima facie showing of its entitlement to summary judgment (*see Psychology YM, P.C. v. Nationwide Mut. Ins. Co.*, 24 Misc.3d 140[A], 2009 N.Y. Slip Op 51634[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Andrew Carothers, M.D., P.C. v. GEICO Indem. Co.*, 24 Misc.3d 19 [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Art of Healing Medicine, P.C. v. Travelers Home & Mar. Ins. Co.*, 15 Misc.3d 144 [A], 2007 N.Y. Slip Op 51161[U] [App Term, 2d & 11th Jud Dists 2007], *affd* 55 AD3d 644 [2008]; *Dan Med., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 14 Misc.3d 44 [App Term, 2d & 11th Jud Dists 2006]). Accordingly, the judgment is reversed, so much of the April 23, 2007 order as granted plaintiff's cross motion for summary judgment is vacated and plaintiff's cross motion for summary judgment is denied.

In light of the foregoing, we reach no other issue.

SUMMARY JUDGMENT - ADMISSIBLE PROOF - PLAINTIFF'S OWN RECORDS

DEFENDANT IS NOT REQUIRED TO LAY A FOUNDATION FOR PLAINTIFF'S OWN RECORDS.

***Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*,**

27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50991(U) [App Term, 2nd, 11th & 13th Jud Dists].

Furthermore, contrary to plaintiff's contention, defendant was not required to lay a foundation for plaintiff's own records. Defendant was only required to demonstrate, as it did, that it had timely and properly denied the claim forms which are the subject of the action.

SUMMARY JUDGMENT - ADMISSIBLE PROOF - STAMPED SIGNATURES

WHERE THERE IS AN ISSUE OF FACT AS TO WHETHER A DOCTOR'S SIGNATURE ON AN AFFIRMATION IS "STAMPED", INSTEAD OF DENYING A MOTION FOR SUMAMRY JUDGMENT, THE BETTER PRACTICE IS FOR THE COURT TO HOLD A HEARING PURSUANT TO CPLR 2218 ON THE LIMITED ISSUE OF THE VALIDITY OF THE SIGNATURE UPON PLAINTIFF'S DOCTOR'S "AFFIRMATION," WHICH WILL DETERMINE WHETHER THE "AFFIRMATION" WAS IN ADMISSIBLE FORM.

***Park Slope Medical and Surgical Supply, Inc. v. GEICO Ins. Co.*, 27 Misc.3d 131(A), 2010 N.Y. Slip Op. 50650(U) [App Term, 2nd, 11th & 13th Jud Dists].**

We find that plaintiff's doctor's "affirmation" submitted in opposition to defendant's cross motion, if admissible, is sufficient to demonstrate a triable issue of fact as to medical necessity. However, defendant argued, before the Civil Court and on appeal, that plaintiff's doctor's "affirmation" is not admissible because it impermissibly bears a stamped facsimile of the doctor's signature. We recognize that such an allegation, when properly asserted, ordinarily raises an issue of fact that cannot be resolved solely by an examination of the papers submitted on a motion for summary judgment (*see Seoulbank, N.Y. Agency v. D & J Export & Import Corp.*, 270 A.D.2d 193 [2000]; *Dyckman v. Barrett*, 187 A.D.2d 553 [1992]; *Mani Med., P.C. v. Eveready Ins. Co.*, 25 Misc.3d 132[A], 2008 N.Y. Slip Op 52697[U] [App Term, 2d & 11th Jud Dists 2008]; *see also James v. Albank*, 307 A.D.2d 1024 [2003]). While the motion for summary judgment could simply be denied due to the existence of such an issue of fact, we are of the opinion, under the circumstances presented, that the better practice would be for the Civil Court to hold a hearing pursuant to CPLR 2218 on the limited issue of the validity of the signature upon plaintiff's doctor's "affirmation," which will determine whether the "affirmation" was in admissible form (*see also* Uniform Rules for Civ Ct [22 NYCRR] § 208.11[b][4]) and, thus, whether defendant's prima facie showing upon its cross motion was rebutted.

Accordingly, the order, insofar as appealed from, is reversed and the matter is remitted to the Civil Court for a framed issue hearing (*see* CPLR 2218) to determine the admissibility of plaintiff's doctor's affirmation and for a new determination thereafter of defendant's cross motion.

SUMMARY JUDGMENT - ADMISSIBLE PROOF - UNSIGNED AFFIDAVITS

AN UNSIGNED AFFIDAVIT WILL NOT SUPPORT A MOTION FOR SUMMARY JUDGMENT.

***WJJ Acupuncture, P.C. v. Liberty Mut. Fire Ins. Co.*, 26 Misc.3d 135(A), 2010 N.Y. Slip Op. 50146(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Since the "affidavit" was not signed by the purported affiant, it did not constitute evidence in admissible form (*see Hargrove v. Baltic Estates,* 278 A.D.2d 278 [2000]; *Huntington Crescent Country Club v. M & M Auto & Mar. Upholstery,* 256 A.D.2d 551 [1998]; *New Dorp Ch. 2712 of AARP, Inc. v. A.A.W. Travel, Inc.,* 22 Misc.3d 141[A], 2009 N.Y. Slip Op 50442[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Comprehensive Mental Assessment & Med. Care v. Merchants & Businessmen's Mut. Ins. Co.,* 196 Misc.2d 134 [2003]). As the affirmation of plaintiff's counsel was insufficient to establish plaintiff's prima facie case (*Midborough Acupuncture, P.C. v. New York Cent. Mut. Fire Ins. Co.,* 13 Misc.3d 132[A], 2006 N.Y. Slip Op 51879[U] [App Term, 2d & 11th Jud Dists 2006]), plaintiff's motion for summary judgment was properly denied.

SUMMARY JUDGMENT - CPLR 3212(f)

WHERE PLAINTIFF DOES NOT DEMONSTRATE THAT IT NEEDED THE RECORDS FROM THE OTHER PROVIDERS IN ORDER TO RAISE A TRIABLE ISSUE OF FACT AS TO WHETHER THE SERVICES AT ISSUE WERE MEDICALLY NECESSARY WHEN THEY WERE RENDERED AND DID NOT SERVE DISCOVERY DEMANDS DURING THE AMPLE OPPORTUNITY THAT IT HAD TO COMMENCE DISCOVERY PROCEEDINGS TO OBTAIN SUCH RECORDS BEFORE THE INSTANT SUMMARY JUDGMENT MOTION WAS BROUGHT, CPLR 3212[F] CAN NOT BE INVOKED.

***Urban Radiology, P.C. v. Tri-State Consumer Ins. Co.*, 27 Misc.3d 140(A), 2010 N.Y. Slip Op. 50987(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Furthermore, plaintiff did not demonstrate that it needed the records from the other providers in order to raise a triable issue of fact as to whether the services at issue were medically necessary when they were rendered (*see* CPLR 3212[f]; *GZ Med. & Diagnostic, P.C. v. Mercury Ins. Co.,* 26 Misc.3d 146[A], 2010 N.Y. Slip Op 50491[U] [App Term, 2d, 11th & 13th Jud Dists 2010]), and that it had served discovery demands during the ample opportunity that it had to commence discovery proceedings to obtain such records before the instant summary judgment motion was brought (*see Meath v. Mishrick,* 68 N.Y.2d 992 [1986]). Consequently, plaintiff failed to establish a basis to defeat defendant's motion for summary judgment. In view of the foregoing, and as plaintiff's remaining contentions lack merit or are unpreserved for appellate review, the branch of defendant's motion seeking summary judgment dismissing the third and fourth causes of action should also have been granted (*see PLP Acupuncture, P.C. v. Progressive Cas. Ins. Co.,* 22 Misc.3d at 142[A] 2009 N.Y. Slip Op 50491[U]).

SUMMARY JUDGMENT - CPLR 3212(f)

A DEFENDANT ESTABLISHES THAT FACTS MAY EXIST THAT ARE ESSENTIAL TO JUSTIFY THE DENIAL OF PLAINTIFF'S SUMMARY JUDGMENT MOTION, I.E.

THAT PLAINTIFF IS FRAUDULENTLY INCORPORATED, WHERE DEFENDANT FAILED TO COMPLY WITH DEFENDANT'S DISCOVERY DEMANDS FOR MALLELA MATERIAL.

***Five Boro Psychological Services, P.C. v. Autoone Ins. Co.*, 27 Misc.3d 89, 902 N.Y.S.2d 768, 2010 N.Y. Slip Op. 20131 [App Term, 2nd, 11th & 13th Jud Dists].**

In opposition to plaintiff's motion and in support of its cross motion to, among other things, compel discovery, defendant established that while facts may exist that are essential to justify the denial of plaintiff's summary judgment motion, defendant was unable to set forth sufficient facts to establish one of its defenses, to wit, plaintiff's alleged fraudulent incorporation (*see* Insurance Department Regulations [11 NYCRR] § 65-3.16[a] [12]; *State Farm Mut. Auto. Ins. Co. v. Mallela,* 4 N.Y.3d 313, 794 N.Y.S.2d 700, 827 N.E.2d 758 [2005]), since such information was within plaintiff's possession and plaintiff had not complied with defendant's discovery demands therefor (*see* CPLR 3212[f]).

SUMMARY JUDGMENT - CPLR 3212(f)

A DEFENDANT ESTABLISHES THAT FACTS MAY EXIST THAT ARE ESSENTIAL TO JUSTIFY THE DENIAL OF PLAINTIFF'S SUMMARY JUDGMENT MOTION, I.E. THAT PLAINTIFF IS FRAUDULENTLY INCORPORATED, WHERE DEFENDANT FAILED TO COMPLY WITH DEFENDANT'S DISCOVERY DEMANDS FOR MALLELA MATERIAL.

RLC *Medical, P.C. v. Allstate Ins. Co.*, 27 Misc.3d 130(A), 2010 N.Y. Slip Op. 50642(U) [App Term, 2nd, 11th & 13th Jud Dists].

In opposition to plaintiff's motion and in support of its cross motion to compel discovery, defendant established that while facts may exist that are essential to justify the denial of plaintiff's summary judgment motion, defendant was unable to set forth sufficient facts to establish one of its defenses, to wit, plaintiff's alleged fraudulent incorporation (*see* Insurance Department Regulations [11 NYCRR] § 65-3.16[a][12]; *State Farm Mut. Auto. Ins. Co. v. Mallela,* 4 NY3d 313 [2005]), since such information was within plaintiff's possession and plaintiff had not complied with defendant's discovery demands therefor (*see* CPLR 3212[f]).

Accordingly, plaintiff's motion for summary judgment is denied without prejudice to renewal pending the completion of the aforementioned discovery, and defendant's cross motion for an order compelling plaintiff to provide discovery is granted to the extent set forth above.

SUMMARY JUDGMENT - CPLR 3212(f)

WHERE PLAINTIFF DOES NOT DEMONSTRATE THAT IT NEEDED THE RECORDS FROM THE OTHER PROVIDERS IN ORDER TO RAISE A TRIABLE ISSUE OF FACT AS TO WHETHER THE SERVICES AT ISSUE WERE MEDICALLY NECESSARY WHEN THEY WERE RENDERED AND DID NOT SERVE DISCOVERY DEMANDS DURING THE AMPLE OPPORTUNITY THAT IT

HAD TO COMMENCE DISCOVERY PROCEEDINGS TO OBTAIN SUCH RECORDS BEFORE THE INSTANT SUMMARY JUDGMENT MOTION WAS BROUGHT, CPLR 3212[F] CAN NOT BE INVOKED.

***Ortho-Med Surgical Supply, Inc. v. Progressive Cas. Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50997(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant made a prima facie showing of its entitlement to summary judgment dismissing the complaint by establishing the timely mailing of the claim denial form (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]) and by submitting an affirmed peer review report of its doctor, which set forth a factual basis and medical rationale for his conclusion that there was a lack of medical necessity for the supplies provided (*see A. Khodadadi Radiology, P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 16 Misc.3d 131[A], 2007 N.Y. Slip Op 51342[U] [App Term, 2d & 11th Jud Dists 2007]).

Although plaintiff stated that it was not in possession of all the information and documents relied upon by defendant's peer reviewer, and that said documents were needed in order to oppose defendant's motion (*see* CPLR 3212[f]), plaintiff, in this case, "failed to demonstrate that discovery was needed in order to show the existence of a triable issue of fact" (*Delta Diagnostic Radiology, P.C. v. Interboro Ins. Co.*, 25 Misc.3d 134[A], 2009 N.Y. Slip Op 52222[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Corwin v. Heart Share Human Servs. of NY*, 66 AD3d 814 [2009]; *GZ Med. & Diagnostic, P.C. v. Mercury Ins. Co.*, 26 Misc.3d 146[A], 2010 N.Y. Slip Op 50491[U] [App Term, 2d, 11th & 13th Jud Dists 2010]).

SUMMARY JUDGMENT - PRECLUSION ORDERS

A PRECLUSION ORDER CAN BE THE BASIS OF A SUMMARY JUDGMENT MOTION BY DEFENDANT. TO AVOID THE ADVERSE IMPACT OF THE CONDITIONAL ORDER OF PRECLUSION, PLAINTIFF IS REQUIRED TO DEMONSTRATE A REASONABLE EXCUSE FOR THE FAILURE TO TIMELY COMPLY WITH THE STIPULATION AND THE EXISTENCE OF A MERITORIOUS CAUSE OF ACTION.

***Boris Kleyman, P.C. v. General Cas. Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50992(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The so-ordered stipulation functioned as a conditional order of preclusion, which became absolute upon plaintiff's failure to sufficiently and timely comply (*see e.g. Panagiotou v. Samaritan Vil., Inc.*, 66 AD3d 979 [2009]; *State Farm Mut. Auto. Ins. Co. v. Hertz Corp.*, 43 AD3d 907 [2007]; *Siltan v. City of New York*, 300 A.D.2d 298 [2002]). To avoid the adverse impact of the conditional order of preclusion, plaintiff was required to demonstrate a reasonable excuse for the failure to timely comply with the stipulation and the existence of a meritorious cause of action (*see e.g. Panagiotou*, 66 AD3d at 980; *State Farm Mut. Auto. Ins. Co.*, 43 AD3d at 908). Plaintiff failed to meet this burden. Consequently, as the order of preclusion

prevented plaintiff from making out a prima facie case, the Civil Court properly granted defendant's motion seeking to dismiss the complaint. Accordingly, the judgment is affirmed.

SUMMARY JUDGMENT - ADMISSIBLE PROOF

AN AFFIRMATION OF A DOCTOR WHO IS AN OWNER OF A PLAINTIFF PROFESSIONAL CORPORATION IS INADMISSIBLE AND SHOULD NOT BE CONSIDERED.

***Doshi Diagnostic Imaging Services, P.C. v. Mercury Ins. Group*, 26 Misc.3d 142(A), 2010 N.Y. Slip Op. 50384(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant, through the submission of the affidavit of its claims representative and the affirmed independent medical examination report of its examining doctor, made a prima facie showing that it had properly and timely denied plaintiff's claim based on lack of medical necessity (*see Ortho-Med Surgical Supply, Inc. v. Mercury Cas. Co.*, 23 Misc.3d 132[A], 2009 N.Y. Slip Op 50731[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). The burden then shifted to plaintiff to raise a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

In opposition to defendant's motion, plaintiff submitted an affirmation executed by Dr. Leena Doshi, who described herself as the "owner and medical director of plaintiff." Defendant objected to the submission of said affirmation in its reply papers, citing CPLR 2106. Since Dr. Doshi was a principal of plaintiff professional corporation, a party to the action, the submission of her affirmation was improper, and the Civil Court should not have considered any facts set forth in said affirmation (*see* CPLR 2106; *St. Vincent Med. Care, P.C. v. Mercury Cas. Co.*, 23 Misc.3d 135[A], 2009 N.Y. Slip Op 50810[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *see also Samuel & Weininger v. Belovin & Franzblau*, 5 AD3d 466 [2004]; *Pisacreta v. Minniti*, 265 A.D.2d 540 [1999]; *Richard M. Gordon & Assoc., P.C. v. Rascio*, 12 Misc.3d 131[A], 2006 N.Y. Slip Op 51055[U] [App Term, 2d & 11th Jud Dists 2006]). As plaintiff failed to proffer any evidence in admissible form to raise an issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]), defendant was entitled to summary judgment. Accordingly, the order, insofar as appealed from, is reversed and defendant's motion for summary judgment dismissing the complaint is granted.

SUMMARY JUDGMENT - ADMISSIBLE PROOF

DEFENDANT'S PEER REVIEW DOCTOR MAY RELY ON TREATMENT RECORDS OF PLAINTIFF'S ASSIGNOR EVEN THOUGH THE RECORDS WERE NOT GENERATED BY THE PLAINTIFF.

***Urban Radiology, P.C. v. Tri-State Consumer Ins. Co.*, 27 Misc.3d 140(A), 2010 N.Y. Slip Op. 50987(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant's denial of claim form, which denied the claims pertaining to assignor Rafailova on, among other grounds, a lack of medical necessity, together with defendant's affirmed peer review report, established, prima facie, that there was no

medical necessity for the services at issue. The fact that defendant's peer reviewer considered medical records from plaintiff, as well as from other providers who treated the assignor, in forming his opinion as to the medical necessity of the relevant services, does not warrant a contrary result. Plaintiff may not challenge the reliability of its own medical records (*see PLP Acupuncture, P.C. v. Progressive Cas. Ins. Co.,* 22 Misc.3d 142[A], 2009 N.Y. Slip Op 50491[U] [App Term, 2d, 11th & 13th Jud Dists 2009]; *Cross Cont. Med., P.C. v. Allstate Ins. Co.,* 13 Misc.3d 10 [App Term, 1st Dept 2006]). With respect to the medical records of other providers who had rendered treatment to this assignor, it is noted the plaintiff stands in the shoes of its assignor and acquires no greater rights than its assignor (*see Zeldin v. Interboro Mut. Indem. Ins. Co.,* 44 AD3d 652 [2007]; *Long Is. Radiology v. Allstate Ins. Co.,* 36 AD3d 763 [2007]; *West Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.,* 13 Misc.3d 131[A], 2006 N.Y. Slip Op 51871[U] [App Term, 2d & 11th Jud Dists 2006]; *see generally East Acupuncture, P.C. v. Allstate Ins. Co.,* 61 AD3d 202, 210 [2009] [in some instances, (the) regulations use the term applicant' as a generic reference to both provider/assignees and injured persons"]). As a result, plaintiff's contention that defendant must consider plaintiff's bills in a vacuum and ignore medical records which defendant received either from the assignor or from another provider who had submitted such records on behalf of the assignor, lacks merit.

Moreover, we note that, while defendant's peer review doctor may have considered medical records received from other providers who had rendered treatment to the assignor, defendant was not seeking to use such records to establish the truth of the facts set forth therein. Defendant was not attempting to prove that Rafailova was injured as documented in her medical records, or that she was treated as set forth in those records. Instead, defendant's peer review doctor simply opined that, assuming the facts set forth in Rafailova's records were true, the treatment allegedly provided was not medically necessary. Therefore, as defendant was not using the underlying medical records for their truth, such records were not being used for a hearsay purpose (*see e.g. Dawson v. Raimon Realty Corp.,* 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.,* 197 A.D.2d 479 [1993]). This is distinguishable from a situation in which a medical expert relies upon medical records to establish the fact of an injury (*see e.g. Hambsch v. New York City Tr. Auth.,* 63 N.Y.2d 723 [1984]; *Wagman v. Bradshaw,* 292 A.D.2d 84 [2002]). Consequently, plaintiff's argument that defendant failed to establish the reliability of the underlying medical records in support of its claim that the treatment provided was not medically necessary is irrelevant.

SUMMARY JUDGMENT - ADMISSIBLE PROOF - BUSINESS RECORD EXCEPTION

AN AFFIDAVIT SUBMITTED BY THE EMPLOYEE OF THE COMPANY PROVIDING BILLING SERVICES FOR THE PLAINTIFF IS INSUFFICIENT TO ESTABLISH THAT SAID EMPLOYEE HAS PERSONAL KNOWLEDGE OF PLAINTIFF'S PRACTICES AND PROCEDURES SO AS TO LAY A FOUNDATION FOR THE ADMISSION, AS BUSINESS RECORDS, OF THE DOCUMENTS ANNEXED TO PLAINTIFF'S MOVING PAPERS .

***563 Grand Medical, P.C. v. Kemper Auto and Home Ins. Co.,* 27 Misc.3d 127(A),**

2010 N.Y. Slip Op. 50582(U) [App Term, 2nd, 11th & 13th Jud Dists].

A review of the record indicates that plaintiff failed to establish its prima facie entitlement to summary judgment. The affidavit in support of plaintiff's motion, submitted by the "employee of the company providing billing services for the plaintiff," was insufficient to establish said employee's personal knowledge of plaintiff's practices and procedures so as to lay a foundation for the admission, as business records, of the documents annexed to plaintiff's moving papers (*see Andrew Carothers, M.D., P.C. v. GEICO Indem. Co.*, 24 Misc.3d 19, 882 N.Y.S.2d 802 [App Term, 2d, 11th & 13th Jud Dists 2009]; *Dan Med., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 14 Misc.3d 44, 829 N.Y.S.2d 404 [App Term, 2d & 11th Jud Dists 2006]). Consequently, plaintiff's motion for summary judgment was properly denied.

SUMMARY JUDGMENT - ADMISSIBLE PROOF - STAMPED SIGNATURES

PLAINTIFF'S MERE CONCLUSORY ASSERTION THAT THE PEER REVIEW REPORT CONTAINED A STAMPED OR FACSIMILE SIGNATURE, WITHOUT ANY INDICATION AS TO WHY PLAINTIFF HELD SUCH BELIEF, IS INSUFFICIENT TO RAISE AN ISSUE OF FACT.

***Ortho-Med Surgical Supply, Inc. v. Mercury Cas. Co.*, 27 Misc.3d 128(A), 2010 N.Y. Slip Op. 50587(U) [App Term, 2nd, 11th & 13th Jud Dists].**

When an allegation that a peer review report contains a stamped signature of the peer reviewer is properly asserted, it generally cannot be resolved solely by an examination of the papers submitted on a motion for summary judgment, because an issue of fact exists (*see Seoulbank, N.Y. Agency v. D & J Export & Import Corp.*, 270 A.D.2d 193 [2000]; *Dyckman v. Barrett,* 187 A.D.2d 553 [1992]; *Mani Med., P.C. v. Eveready Ins. Co.,* 25 Misc.3d 132[A], 2008 N.Y. Slip Op 52697[U] [App Term, 2d & 11th Jud Dists 2008]; *see also James v. Albank,* 307 A.D.2d 1024 [2003]). However, in the instant case, plaintiff's mere conclusory assertion that the peer review report contained a stamped or facsimile signature; without any indication as to why plaintiff held such belief, was insufficient to raise an issue of fact (*see Eden Med., P.C. v. Eveready Ins. Co.*, 26 Misc.3d 140[A], 2010 N.Y. Slip Op 50265[U] [App Term, 2d, 11th & 13th Jud Dists 2010]). In view of the foregoing, we need not consider any issues raised in defendant's reply papers. Accordingly, we find that the Civil Court properly granted defendant's motion for summary judgment, and the judgment is therefore affirmed.

SUMMARY JUDGMENT - PRECLUSION ORDERS

A PRECLUSION ORDER CAN BE THE BASIS OF A SUMMARY JUDGMENT MOTION BY DEFENDANT. TO AVOID THE ADVERSE IMPACT OF THE CONDITIONAL ORDER OF PRECLUSION, PLAINTIFF IS REQUIRED TO DEMONSTRATE A REASONABLE EXCUSE FOR THE FAILURE TO TIMELY COMPLY WITH THE STIPULATION AND THE EXISTENCE OF A MERITORIOUS CAUSE OF ACTION

***Midisland Medical, PLLC v. N.Y. Cent. Mut. Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50993(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The so-ordered stipulation functioned as a conditional order of preclusion, which became absolute upon plaintiff's failure to sufficiently and timely comply (*see e.g. Panagiotou v. Samaritan Vil., Inc.*, 66 AD3d 979 [2009]; *State Farm Mut. Auto. Ins. Co. v. Hertz Corp.*, 43 AD3d 907 [2007]; *Siltan v. City of New York*, 300 A.D.2d 298 [2002]). To avoid the adverse impact of the conditional order of preclusion, plaintiff was required to demonstrate a reasonable excuse for the failure to timely comply with the stipulation and the existence of a meritorious cause of action (*see e.g. Panagiotou*, 66 AD3d at 980; *State Farm Mut. Auto. Ins. Co.*, 43 AD3d at 908). Plaintiff failed to meet this burden. Consequently, as the order of preclusion prevented plaintiff from making out a prima facie case, the Civil Court properly granted defendant's motion for summary judgment. Accordingly, the judgment is affirmed.

STATUTE OF LIMITATIONS - ACCRUAL OF ACTIONS FOR NO-FAULT BENEFITS.

AN ACTION FOR FIRST-PARTY NO-FAULT BENEFITS ACCRUES 30 DAYS AFTER THE CARRIER'S RECEIPT OF THE CLAIM.

***Acupuncture Works, P.C. v. MVAIC*, 27 Misc.3d 131(A), 2010 N.Y. Slip Op. 50646(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff moved for summary judgment and defendant Motor Vehicle Accident Indemnification Corporation (sued herein as MVAIC) cross-moved for summary judgment dismissing the complaint on the ground that the action was barred by the statute of limitations. In support of its motion for summary judgment, plaintiff submitted an affidavit in which its owner alleged that defendant's denial of claim form, which plaintiff annexed to its moving papers, was a formal admission of receipt of the bills at issue by May 21, 2002, at the latest. Accordingly, the payment due date, as implicitly alleged by plaintiff in its motion, was no later than June 20, 2002, that is, 30 days after receipt of the claim (*see* Insurance Law § 5106[a]; Insurance Department Regulations [11 NYCRR] § 65.15[g], now Insurance Department Regulations [11 NYCRR] § 65-3.8; *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169, 175 [1986]). While a review of the record reveals that defendant may have initially tolled its time to pay or deny the claim by the issuance of a request for verification on June 10, 2002 (*see* Insurance Department Regulations [11 NYCRR] § 65-3.5[b]; § 65-3.8[j]), the record does not contain any indication that defendant timely issued a follow-up verification request (*see* Insurance Department Regulations [11 NYCRR] § 65-3.6[b]). Furthermore, contrary to plaintiff's contention, MVAIC's denial of claim forms, dated April 30, 2003 and April 5, 2005, did not postpone the payment due date (*see Kings Highway Diagnostic Imaging, P.C. v. MVAIC*, 19 Misc.3d 69 [App Term, 2d & 11th Jud Dists 2008]; *see also Linden Med., P.C. v. MVAIC*, 21 Misc.3d 134[A], 2008 N.Y. Slip Op 52188[U] [App Term, 2d & 11th Jud Dists 2008]).

Since plaintiff did not commence this action until April of 2006, it was barred by the three-year statute of limitations set forth in CPLR 214(2) (*see Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 214 [1996]; *Kings Highway Diagnostic Imaging, P.C.*, 19 Misc.3d 69; *Boulevard Multispec Medical, P.C. v. MVAIC*, 19 Misc.3d 138[A], 2008 N.Y. Slip Op 50872[U] [App Term, 2d & 11th Jud Dists 2008]). Accordingly, defendant's cross motion for summary judgment dismissing the complaint was properly granted (*Kings Highway Diagnostic Imaging, P.C.*, 19 Misc.3d 69). In light of the foregoing, we need not reach plaintiff's contentions regarding its motion for summary judgment.

TRIAL PROCEDURE - TRIALS ON STIPULATED FACTS

WHERE THE ABSENCE OF RELEVANT INFORMATION PRECLUDES A DETERMINATION OF THE ACTION UPON THE SUBMISSION OF AGREED UPON FACTS, THE SUBMISSION SHOULD BE DISMISSED AS INADEQUATE, AND THE PARTIES SHOULD BE DIRECTED TO SUBMIT A MORE DEFINITE STATEMENT OF FACTS OR PROCEED TO A TRIAL ON THE DISPUTED ISSUE.

***Habif v. Kemper Auto & Home Ins.*, 28 Misc.3d 55, 906 N.Y.S.2d [App Term, 2nd, 11th & 13th Jud Dists].**

After issue was joined in this action by a provider to recover assigned first-party no-fault benefits, the parties submitted an agreed statement of facts to the court for a determination (*see Bhutta Realty Corp. v. Sangetti*, 165 A.D.2d 852, 853, 560 N.Y.S.2d 315 [1990] [invoking CPLR 3222]; *Coccio v. Parisi*, 151 A.D.2d 817, 542 N.Y.S.2d 405 [1989] [same]). The sole legal issue presented by the submission was whether it was ascertainable, within one year of the subject accident, "that further expenses may be incurred as a result of the injury" (Insurance Law § 5102[a][1]). The Civil Court concluded that, because plaintiff's assignor had submitted an application for no-fault benefits within two months of the subject accident, the injuries that would possibly require treatment were ascertainable, with minimal investigation or a simple inquiry, within a year of the date of the accident. A judgment was entered in plaintiff's favor.

Insurance Law § 5102(a)(1) provides for the payment of necessary medical and other expenses "all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury." The No-Fault Regulations state that "an insurer shall not be liable for the payment of medical and other benefits enumerated in section 5102(a)(1) if, during a period of one year from the date of the accident, no such expenses have been incurred by the applicant" (Insurance Department Regulations [11 NYCRR] § 65-3.16[a][3]). No-fault expenses are incurred at the time treatment is received (*see Todaro v. GEICO Gen. Ins. Co.*, 46 A.D.3d 1086, 1088, 848 N.Y.S.2d 393 [2007]).

While the parties stipulated that plaintiff's assignor had been involved in an accident on December 12, 2005, that plaintiff's assignor had submitted an application for no-fault

benefits on February 1, 2006, that plaintiff had provided services between January 3, 2007 and May 14, 2007, that plaintiff had established its prima facie case, and that defendant had not received any no-fault claims on plaintiff's assignor's behalf until January 18, 2007, the stipulation is silent as to whether plaintiff's assignor had received any relevant treatment from any provider, and therefore incurred any relevant expenses, within the one-year period following the accident. "It is well established that a stipulation of facts pursuant to CPLR 3222 must cover all points in dispute" (*Bhutta Realty Corp.,* 165 A.D.2d at 853, 560 N.Y.S.2d 315; *see also* CPLR 3222[b][5]; *Coccio,* 151 A.D.2d 817, 542 N.Y.S.2d 405). In our opinion, the absence of this relevant information precludes a determination of the action upon the submission of agreed upon facts. The submission should have been dismissed as inadequate, and the parties permitted to submit a more definite statement of facts or proceed to a trial on the disputed issue (*see Bhutta Realty Corp.,* 165 A.D.2d 852, 560 N.Y.S.2d 315; *Coccio,* 151 A.D.2d 817, 542 N.Y.S.2d 405).

VERIFICATION - FOLLOWUP REQUESTS

AN INITIAL REQUEST FOR ADDITIONAL VERIFICATION WHICH IS STAMPED "SECOND NOTICE" AND THEN MAILED IS A VALID SECOND REQUEST FOR ADDITIONAL VERIFICATION.

Tracy Ambrister, D.D.S. v. Integon Nat. Ins. Co., 26 Misc.3d 146(A), 2010 N.Y. Slip Op. 50489(U) [App Term, 2nd, 11th & 13th Jud Dists].

On appeal, plaintiff's sole argument is that defendant failed to prove that it had properly requested verification pursuant to Insurance Department Regulations (11 NYCRR) § 65-3.5(b) and § 65-3.6(b), because it had only annexed its follow-up verification request as an exhibit to its cross motion and had failed to submit a copy of its initial verification request. We disagree. Defendant's claims examiner explained that when a provider fails to comply with a verification request, defendant's regular course of business is to stamp the original request with the words "second notice" and insert the date of the second notice. The verification request annexed as an exhibit was dated December 24, 2007 and bore a stamp of the words "second notice" and the date, January 28, 2008. Therefore, without reaching the question of whether defendant was even required in the first instance to annex its verification requests to its cross motion papers, we reject plaintiff's argument that defendant failed to annex a copy of its initial verification request. Accordingly, the judgment is affirmed.

VERIFICATION - FAILURE TO PROVIDE

WHERE VERIFICATION IS PROPERLY REQUESTED, PLAINTIFF'S FAILURE TO DEMONSTRATE THAT IT HAD PROVIDED DEFENDANT WITH THE VERIFICATION PRIOR TO THE COMMENCEMENT OF THE ACTION, THE ACTION MUST BE DISMISSED AS PREMATURE.

***Quality Rehab and P.T., P.C. v. GEICO Ins. Co.*, 26 Misc.3d 132(A), 2010 N.Y. Slip Op. 50067(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff moved for summary judgment. Defendant opposed the motion and cross-moved for summary judgment dismissing the complaint on the ground that the action was premature, because it had been commenced before defendant had received responses to its outstanding verification requests. . . .

Contrary to the finding of the Civil Court, the affidavit of defendant's claim representative sufficiently established that defendant had timely mailed its request and follow-up request for verification to plaintiff (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16, 18 [App Term, 2d & 11th Jud Dists 2007]). Since plaintiff did not demonstrate that it had provided defendant, prior to the commencement of the action, with the verification, the 30-day period within which defendant was required to pay or deny the claims did not commence to run (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8[a][1]; *Central Suffolk Hosp. v. New York Cent. Mut. Fire Ins. Co.*, 24 AD3d 492 [2005]; *Hospital for Joint Diseases v. State Farm Mut. Auto. Ins. Co.*, 8 AD3d 533 [2004]; *Vista Surgical Supplies, Inc. v. General Assur. Co.*, 12 Misc.3d 129[A], 2006 N.Y. Slip Op 51034[U] [App Term, 2d & 11th Jud Dists 2006]). Thus, plaintiff's action is premature (*Hospital for Joint Diseases v. New York Cent. Mut. Fire Ins. Co.*, 44 AD3d 903 [2007]).

VERIFICATION - FAILURE TO PROVIDE

TO PREVAIL ON THE DEFENSE THAT THE PLAINTIFF FAILED TO PROVIDE REQUESTED VERIFICATION, THE DEFENDANT MUST ESTABLISH BY ADMISSIBLE PROOF THAT THE REQUESTED VERIFICATION WAS NOT PROVIDED.

***Eagle Surgical Supply, Inc. v. Travelers Indem. Co.*, 28 Misc.3d 137(A), 2010 N.Y. Slip Op. 51456(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Although defendant demonstrated that it had timely requested verification of the claim (*see* Insurance Department Regulations [11 NYCRR] § 65-3.5[b]; *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]), defendant failed to establish that plaintiff did not provide the requested verification. Defendant's litigation examiner did not even allege that the requested verification was outstanding, and defendant's attorney failed to demonstrate that she had personal knowledge to support her assertion of defendant's non-receipt of such documents (*see Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2006]; *Feratovic v. Lun Wah, Inc.*, 284 A.D.2d 368, 368 [2001]; *V.S. Med. Servs., P.C. v. New York Cent. Mut. Ins.*, 20 Misc.3d 134[A], 2008 N.Y. Slip Op 51473 [U] [App Term, 2d & 11th Jud Dists 2008]). Accordingly, the order is reversed and defendant's motion for

summary judgment dismissing the complaint is denied.

VERIFICATION - FAILURE TO PROVIDE

WHERE DEFENDANT TIMELY MAILS A REQUEST AND FOLLOW-UP REQUEST FOR VERIFICATION TO PLAINTIFF AND PLAINTIFF FAILS TO PROVIDE THE REQUESTED VERIFICATION, THE 30-DAY PERIOD WITHIN WHICH THE DEFENDANT IS REQUIRED TO PAY OR DENY THE CLAIMS DOES NOT COMMENCE TO RUN. UNDER SUCH CIRCUMSTANCES, ANY ACTION COMMENCED BY PLAINTIFF BEFORE THE VERIFICATION IS PROVIDED IS PREMATURE AND MUST BE DISMISSED.

***Triangle R, Inc. v. GEICO Ins. Co.*, 27 Misc.3d 137(A), 2010 N.Y. Slip Op. 50885(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The affidavit of defendant's claims representative established that defendant had timely mailed its request and follow-up request for verification to plaintiff (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 18 [App Term, 2d & 11th Jud Dists 2007]) and that plaintiff had failed to provide the requested verification. In opposition to defendant's cross motion, plaintiff did not demonstrate that it had provided defendant, prior to the commencement of the action, with the requested verification. Consequently, under the circumstances presented, the 30-day period within which defendant was required to pay or deny the claims did not commence to run (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8[a]; *Central Suffolk Hosp. v. New York Cent. Mut. Fire Ins. Co.*, 24 AD3d 492 [2005]; *Hospital for Joint Diseases v. State Farm Mut. Auto. Ins. Co.*, 8 AD3d 533 [2004]; *Vista Surgical Supplies, Inc. v. General Assur. Co.*, 12 Misc.3d 129[A], 2006 N.Y. Slip Op 51034[U] [App Term, 2d & 11th Jud Dists 2006]), and plaintiff's action is premature (*Hospital for Joint Diseases v. New York Cent. Mut. Fire Ins. Co.*, 44 AD3d 903 [2007]). We do not reach any other issue.

Accordingly, the judgment is reversed, the order entered March 17, 2009 is vacated, plaintiff's motion for summary judgment is denied, and defendant's cross motion for summary judgment dismissing the complaint is granted without prejudice to plaintiff's commencement of a new action.

VERIFICATION - FOLLOWUP REQUESTS

THE FOLLOWUP PROTOCOLS FOR REQUESTING ADDITIONAL VERIFICATION DO NOT HAVE TO BE STRICTLY COMPLIED WITH.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. [App Term, 2nd, 11th & 13th Jud Dists].**

Furthermore, defendant argues that it tolled the 30-day statutory time period within which it had to pay or deny plaintiff's claims regarding the bills sought to be recovered in plaintiff's first through sixth, eighth and ninth causes of action. It is undisputed that defendant timely mailed its initial request for verification and that

plaintiff failed to provide the information requested. Plaintiff also did not provide the information requested in defendant's follow-up verification request, which was mailed on the 30th day after the initial verification request, but prior to the expiration of the full 30-day period within which plaintiff was supposed to respond to defendant's initial request for verification. As the foregoing facts are nearly identical to those in *Infinity Health Prods., Ltd. v. Eveready Ins. Co.* (67 A.D.3d 862 [2009]), "the 30-day period within which the defendant was required to pay or deny the claim did not commence to run ... [and] plaintiff's action is premature" (*id.* at 865, 890 N.Y.S.2d 545).

VERIFICATION - IME's

AN IME SCHEDULING LETTER ADDRESSED TO A DEFENDANT CARRIER AND NOT TO PLAINTIFF'S ASSIGNOR IS NOT A PROPER REQUEST FOR VERIFICATION EVEN IF A COPY WAS SENT TO PLAINTIFF'S ASSIGNOR.

***Central Radiology Services, P.C. v. MVAIC*, 27 Misc.3d 137(A), 2010 N.Y. Slip Op. 50887(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, defendant Motor Vehicle Accident Indemnification Corporation (sued herein as MVAIC) moved for summary judgment dismissing the complaint on the ground that plaintiff's assignor had failed to appear for scheduled independent medical examinations (IMEs). Plaintiff opposed defendant's motion and cross-moved for summary judgment. During oral argument, the Civil Court granted defendant leave to submit a supplemental affidavit with respect to the mailing of defendant's denial of claim form. By order entered April 1, 2009, the court granted defendant's motion for summary judgment and denied plaintiff's cross motion. This appeal by plaintiff ensued. A judgment was subsequently entered, from which the appeal is deemed to be taken (*see* CPLR 5501[c]).

Defendant did not send IME scheduling letters to plaintiff's assignor. Rather, defendant utilized a third party, Medical Consultants Network (MCN), to schedule IMEs on behalf of defendant. The letters upon which defendant relies were sent by MCN and addressed to defendant, not plaintiff's assignor, and stated that the purpose of the letters was to "confirm" that defendant had requested examinations of plaintiff's assignor on specified dates. MCN's customer service representative averred that MCN had sent a "carbon copy" of this letter to plaintiff's assignor. Contrary to defendant's contention, such letters were not proper requests for verification which tolled defendant's time to pay or deny plaintiff's claim (Insurance Department Regulation [11 NYCRR] § 65-3 .8). Consequently, based upon the record before us, defendant is precluded from interposing its defense predicated upon the failure of plaintiff's assignor to appear for properly scheduled IMEs. Accordingly, and as defendant has raised no issue in the Civil Court or on appeal with respect to plaintiff's prima facie case, the judgment is reversed, the order entered April 1, 2009 is vacated, defendant's motion for summary judgment is denied, plaintiff's cross motion for summary judgment is granted, and the matter is remitted to the Civil Court for the calculation of statutory interest and an assessment

of attorney's fees pursuant to Insurance Law § 5106(a) and the regulations promulgated thereunder.

VERIFICATION - IMPROPER PARTY

WHEN A PROVIDER RECEIVES A REQUEST FOR VERIFICATION ASKING FOR MATERIALS THAT IT DOES NOT POSSESS, FAILURE TO PROVIDE THE MATERIALS WILL STILL TOLL THE TIME IN WHICH A CARRIER HAS TO PAY OR DENY THE CLAIM UNLESS THE PROVIDER INFORMS THE DEFENDANT THAT THE REQUESTS SHOULD BE SENT ELSEWHERE.

***Urban Radiology, P.C. v. Tri-State Consumer Ins. Co.*, 27 Misc.3d 140(A), 2010 N.Y. Slip Op. 50987(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In regard to the two $990.48 claims for services rendered to assignor Avez, it is undisputed that plaintiff failed to respond to defendant's verification requests. While plaintiff argues that the requests should have been sent to the referring physician, inaction was, in this case, not a proper response (*see Westchester Med. Ctr. v. New York Cent. Mut. Fire Ins. Co.*, 262 A.D.2d 553, 555 [1999]). Plaintiff should have informed defendant that the requests should be sent elsewhere. Consequently, the time in which defendant had to pay or deny the claims was tolled, and the branch of defendant's motion seeking summary judgment dismissing the first and second causes of action, on the ground that they were premature, should have been granted (*Alur Med. Supply, Inc. v. Eveready Ins. Co.*, 24 Misc.3d 135 [A], 2009 N.Y. Slip Op 51492[U] [App Term, 2d, 11th & 13th Jud Dists 2009]).

VERIFICATION - PREMATURE FOLLOW UP REQUESTS

A PREMATURE FOLLOW-UP REQUEST FOR ADDITIONAL VERIFICATION IS NOT NECESSARILY FATAL.

***First Aid Occupational Therapy, PLLC v. Country Wide Ins. Co.*, 26 Misc.3d 135(A), 2010 N.Y. Slip Op. 50149(U) [App Term, 2nd, 11th & 13th Jud Dists].**

It is undisputed that defendant timely mailed its initial requests for verification and that plaintiff failed to provide the information requested. Plaintiff also did not provide the information requested in defendant's follow-up verification requests, which were mailed on the 30th day after the initial verification requests but prior to the expiration of the full 30-day period within which plaintiff was supposed to respond to defendant's initial requests for verification. As the foregoing facts are nearly identical to those in *Infinity Health Prods., Ltd. v. Eveready Ins. Co.* (67 AD3d 862 [2009]), "the 30-day period within which the defendant was required to pay or deny the claim did not commence to run ... [and] plaintiff's action is premature" (*id.* at 865).

While defendant denied the claims underlying plaintiff's first and fifth causes of action on the ground that plaintiff sought to recover in excess of the fee schedule by "unbundling' the service[s] into ... separate bill[s]" even though such services "are considered part of the initial medical evaluation," defendant did not submit an

affidavit from someone with sufficient expertise to establish that ground as a matter of law or even to demonstrate the existence of a triable issue of fact with respect to the billing for such services (*see Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]; *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.,* 61 AD3d 13 [2009]). As a result, defendant "failed to raise a triable issue of fact in admissible evidentiary form sufficient to warrant denial of summary judgment in favor of [plaintiff] on the [first and fifth] cause[s] of action" (*Kingsbrook Jewish Med. Ctr.,* 61 AD3d at 23).

WORKERS' COMPENSATION BOARD - PRIMARY JURISDICTION

THE WORKERS' COMPENSATION BOARD HAS PRIMARY JURISDICTION TO DETERMINE FACTUAL ISSUES CONCERNING COVERAGE UNDER THE WORKERS' COMPENSATION LAW .

***AR Medical Rehabilitation, P.C. v. American Transit Ins. Co.*, 27 Misc.3d 133(A), 2010 N.Y. Slip Op. 50708(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The Workers' Compensation Board (Board) has primary jurisdiction to determine factual issues concerning coverage under the Workers' Compensation Law (*see Botwinick v. Ogden,* 59 N.Y.2d 909 [1983]; *LMK Psychological Serv., P.C. v. American Tr. Ins. Co.,* 64 AD3d 752 [2009]; *Santigate v. Linsalata,* 304 A.D.2d 639 [2003]). Where a plaintiff fails to litigate the issue of the availability of workers' compensation coverage before the Board, "the court should not express an opinion as to the availability of compensation but remit the matter to the Board" (*Liss v. Trans Auto Sys.,* 68 N.Y.2d 15, 21 [1986]; *see also O'Hurley-Pitts v. Diocese of Rockville Ctr.,* 57 AD3d 633, 634 [2008]).

In the instant case, contrary to plaintiff's contention, defendant proffered sufficient evidence in admissible form of the alleged facts which gave rise to its contention that plaintiff's assignor was acting as an employee at the time of the accident and that therefore workers' compensation benefits were available (*see e.g. Response Equip., Inc. v. American Tr. Ins. Co.,* 15 Misc.3d 145[A], 2007 N.Y. Slip Op 51176[U] [App Term, 2d & 11th Jud Dists 2007]; *see also A.B. Med. Servs., PLLC v. American Tr. Ins. Co.,* 24 Misc.3d 75 [App Term, 9th & 10th Jud Dists 2009]; *cf. Westchester Med. Ctr. v. American Tr. Ins. Co.,* 60 AD3d 848 [2009]). This issue must be resolved in the first instance by the Board (*see O'Rourke v. Long,* 41 N.Y.2d 219, 225 [1976]; *see also Infinity Health Prods., Ltd. v. New York City Tr. Auth.,* 21 Misc.3d 136[A], 2008 N.Y. Slip Op 52218[U] [App Term, 2d & 11th Jud Dists 2008]; *Response Equip., Inc. v. American Tr. Ins. Co.,* 15 Misc.3d 145[A], 2007 N.Y. Slip Op 51176[U]).

Defendant's motion should not have been denied without prejudice but, rather, should have been held in abeyance pending Board resolution. A prompt application to the Board, as set forth above, is required in order to determine the parties' rights under the Workers' Compensation Law (*see LMK Psychological Serv., P.C. v. American Tr. Ins. Co.,* 64 AD3d 752). Accordingly, we reverse the order, insofar as appealed from.

WORKERS' COMPENSATION FEE SCHEDULE - ACUPUNCTURE

IT WAS PROPER FOR DEFENDANT TO USE THE WORKERS' COMPENSATION FEE SCHEDULE FOR ACUPUNCTURE SERVICES PERFORMED BY CHIROPRACTORS TO DETERMINE THE AMOUNT WHICH PLAINTIFF WAS ENTITLED TO RECEIVE FOR THE ACUPUNCTURE SERVICES RENDERED BY ITS LICENSED ACUPUNCTURIST. FURTHER, WHERE IT IS UNDISPUTED THAT DEFENDANT HAS FULLY PAID PLAINTIFF THE AMOUNT TO WHICH PLAINTIFF IS ENTITLED UNDER THE WORKERS' COMPENSATION FEE SCHEDULE FOR ACUPUNCTURE SERVICES PERFORMED BY CHIROPRACTORS, IT IS APPROPRIATE FOR THE APPELLATE TERM TO SEARCH THE RECORD AND GRANT SUMMARY JUDGMENT TO DEFENDANT DISMISSING THE ACTION.

***Amercure Acupuncture, P.C. v. GEICO Ins. Co.*, 26 Misc.3d 132(A), 2010 N.Y. Slip Op. 50068(U) [App Term, 2nd, 11th & 13th Jud Dists].**

For the reasons stated in *Great Wall Acupuncture, P.C. v. GEICO Ins. Co.* (--- Misc.3d ----, 2009 N.Y. Slip Op 29467 [App Term, 2d, 11th & 13th Jud Dists 2009]), it was proper for defendant to use the workers' compensation fee schedule for acupuncture services performed by chiropractors to determine the amount which plaintiff was entitled to receive for the acupuncture services rendered by its licensed acupuncturist. Furthermore, since it is undisputed that defendant has fully paid plaintiff the amount to which plaintiff is entitled under the workers' compensation fee schedule for acupuncture services performed by chiropractors, it is appropriate for this court to search the record and grant summary judgment to defendant dismissing the action (*see Merritt Hill Vineyards v. Windy Hgts. Vineyard,* 61 N.Y.2d 106 [1984]; *AVA Acupuncture, P.C. v. GEICO Gen. Ins. Co.,* 17 Misc.3d 41, 43 [App Term, 2d & 11th Jud Dists 2007]).

WORKERS' COMPENSATION FEE SCHEDULE - EXCESSIVE BILLING

THE DEFENDANT HAS THE BURDEN OF ESTABLISHING BY ADMISSIBLE PROOF THAT THE FEES CHARGED BY THE PLAINTIFF WERE IN EXCESS OF THE WORKERS' COMPENSATION FEE SCHEDULE.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. [App Term, 2nd, 11th & 13th Jud Dists].**

While defendant argues that the Civil Court improperly awarded plaintiff summary judgment as to its seventh cause of action since defendant timely denied that bill on the ground that the fees charged were excessive and not in accordance with the Workers' Compensation fee schedule, defendant did not annex any proof to establish said defense. Consequently, defendant failed to establish the existence of an issue of fact with respect to this cause of action.