

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED DISPOSED OF

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

APPELLATE DIVISION

CASE NO.: 16-47 AP
LOWER CASE NO.: 14-11988

DORAL MEDICAL REHAB CENTER, INC.,
a/a/o FERNANDO PEREZ,

Appellant,

vs.

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Appellee.

Opinion Filed: March 18, 2019

An appeal from the County Court, Civil Division, Miami-Dade County, Florida,
Teretha Lundy Thomas, Judge.

Virginia M. Best, Esq., of Lopez & Best, for the Appellant.

Douglas H. Stein, Esq., of Association Law Group, P.L., for the Appellee.

Before Jose Rodriguez, Angelica Zayas and Maria Elena Verde, JJ.

PER CURIAM

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On October 4, 2013, Fernando Perez was involved in an automobile accident. At the time of the accident, Perez was insured for Personal Injury Protection (PIP) benefits by the Appellee, Progressive Express Insurance Company ("Progressive"). From October 8, 2013 through November 15, 2013, Perez received medical treatment from the Appellant, Doral Medical Rehab Center, Inc. ("Doral Medical"), and assigned his rights under the Progressive policy to Doral Medical.

Doral Medical submitted bills to Progressive for its services rendered from October 8, 2013 through November 15, 2013. These bills included specific bills for services purportedly performed by Ramiro J. Abaunza from November 5, 2013 through November 15, 2013. On the HCFA Form CMS 1500 submitted to Progressive, Doral Medical indicated, in box 24J, that these services were provided by Abaunza, indicating his provider identification number as 116480646.

However, at the time the Abaunza bills were submitted, Abaunza had voluntarily relinquished his license to practice medicine. Abaunza had relinquished his license on April 30, 2012, and the State of Florida Board of Medicine officially accepted his relinquishment on August 17, 2012. As such, Abaunza had not been licensed to practice medicine over a year prior to the dates of the services for which Doral Medical submitted to Progressive for payment.

On June 20, 2014, Doral Medical sued Progressive, alleging that Progressive failed to pay the full amount of benefits due under the policy. On August 18, 2014, Progressive filed an Answer and Affirmative Defenses, pleading

that the policy was limited to \$2500.00 which had been exhausted. However, nearly eight months later, on April 15, 2015, Progressive filed an Amended Answer and Affirmative Defenses. In its Defenses, Progressive maintained that Doral Medical was not entitled to PIP benefits because either: (1) the services provided to Fernandez were performed by a person without a valid license to perform such services in violation of Florida Statute Section 627.736(5)(d)¹; or (2) Doral Medical violated Florida Statute Section 627.736(5)(b)1c² by submitting a bill containing a false and misleading statement that the services were performed by an individual who actually did not perform those services.

Based on the defenses cited above, Progressive moved for summary judgment. Along with the motion, Progressive filed the affidavit of an adjuster, Grace Torres, who testified regarding the receipt and review of the subject bills, as well as the overall information regarding Abaunza's license relinquishment. On November 10, 2015, the trial court granted summary judgment to Progressive, finding that the Abaunza charges submitted by Doral Medical were either unlawful in violation of Section 627.736(5)(b)1b or were knowingly false and

¹ In pertinent part: "A statement of medical services may not include charges for medical services of a person or entity that performed such services without possessing the valid licenses required to perform such services."

² In pertinent part: "(b) 1. An insurer or insured is not required to pay a claim or charges:

a. Made by a broker or by a person making a claim on behalf of a broker;
b. For any service or treatment that was not lawful at the time rendered;
c. To any person who knowingly submits a false or misleading statement relating to the claim or charges[.]"

misleading when made, in violation of Section 627.736(5)(b)1c, and invalidated Doral Medical's entire claim. Notably, Doral Medical did not file a response to Progressive's summary judgment motion, although prior to the suit being filed by Doral Medical, Progressive, on February 11, 2014, had received a demand letter with corrected HCFA forms reflecting the correct treating physician and his license number.

On November 20, 2015, Doral Medical filed a motion for rehearing, admitting that the subject services were not performed by Abaunza, but by one, Carlos Blanco. On November 30, 2015, the trial court denied Doral Medical's motion. On December 4, 2015, Doral Medical filed a second motion for rehearing. In this motion, Doral Medical again stated that it was Carlos Blanco who performed the subject services, but it included an affidavit from Doral Medical's billing manager who testified that the Abaunza billing had been done by mistake caused by billing software. The manager attested that she did not know of the error and that had she known, she would have corrected it before it was sent to Progressive for payment. The trial court denied Doral Medical's second motion on December 15, 2015, and on January 13, 2016, it entered a final summary judgment for Progressive.

Doral Medical appeals the grant of summary judgment to Progressive. Preliminarily, Doral Medical asserts that it was not required to file a response to Progressive's motion for summary judgment because the motion was legally insufficient on its face and, therefore, the burden never shifted to it to file one.

Secondly, Doral Medical argues that the evidence presented in its motions for rehearing presented genuine issues of material fact, and thus the summary judgment should not ultimately have been granted. Lastly, Doral Medical argues that Progressive waived any defense with respect to the initial HCFA forms when it received the revised forms with Carlos Blanco's name and license number on them as the treating physician, as well as when it remitted partial payment under the policy prior to the suit being filed.

We review de novo. *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000).

We affirm.

It is axiomatic that on a motion for summary judgment, the movant has the burden to demonstrate the non-existence of any material issue of fact, and that it is entitled to a judgment as a matter of law. *See generally Moore v. Morris*, 475 So. 2d 666 (Fla. 1985). In *DeMesme v. Stephenson*, 498 So. 2d 673 (Fla. 1st DCA 1986), the court explained the relative burdens of the parties in a motion for summary judgment:

The initial burden, in summary judgment proceedings, is upon the movant. When he tenders evidence sufficient to support his motion, then the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. *The movant, however, does not initially carry the burden of exhausting the evidence pro and con, or even examining all of his opponent's witnesses.* To fulfill his burden, the movant must offer sufficient admissible evidence to support his claim of the nonexistence of a genuine issue. If he fails to do this his motion is lost. If he succeeds, then the opposing party must demonstrate the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented. If he fails in

this, he must suffer a summary judgment against him. *See, Harvey Building, Inc. v. Haley*, 175 So. 2d 780 (Fla. 1965).

(emphasis supplied).

Doral Medical posits that Progressive's summary judgment motion was legally insufficient essentially because it addressed alternative factual scenarios regarding the behavior of Doral Medical in submitting the Abaunza bills. Doral Medical argues that this created issues of fact on the face of the motion, and thus it was not required to respond. We disagree.

Progressive's motion was based on its entitlement to judgment under Section 627.736(5)(d) or Section 627.736(5)(b)1c, alternative scenarios. This pleading did not create a factual issue in and of itself. The essential fact underlying both scenarios is that bills were submitted for services purportedly performed by Abaunza when they in fact were not. From this fact, Progressive can refuse payment by asserting that the bills were unlawful or were knowingly false when submitted, as the statutes allow. Accordingly, Progressive met its initial burden and Doral Medical was required to respond. Indeed, the trial court granted summary judgment to Progressive pursuant to Section 627.736(5)(b)1b as well as Section 627.736(5)(b)1c.

After the trial court granted summary judgment to Progressive, Doral Medical filed two motions for rehearing and presented new evidence: acknowledgement that Carlos Blanco, and not Abaunza, performed the services; and an affidavit of the billing manager detailing the circumstances surrounding the

subject billing.³ A motion for rehearing based on new evidence should be granted when: 1) it appears that the new evidence is such that it will probably change the result of the proceedings; 2) the evidence has been discovered since the trial; 3) the evidence could not have been discovered before the trial by the exercise of due diligence; 4) the evidence is material to the issue and 5) the evidence is not merely cumulative or impeaching. *See Whitley v. Warren*, 884 So. 2d 431, 432 (Fla. 4th DCA 2004). Further, an appellate court reviews the denial of a motion for rehearing when new evidence is presented under an abuse of discretion standard. *Id.*

Review of the rehearing motions in the record, and as pointed out by Progressive here on appeal, however, do not indicate that Doral Medical could not have discovered this evidence prior to the summary judgment hearing, and submitted it at same, Doral Medical being required to file a response to Progressive's legally sufficient motion because the burden had shifted. As a result, we cannot find that the trial court abused its discretion in denying the motions for rehearing.

Finally, we do not agree that Progressive waived its rights to deny the claim under the policy because corrected HCFA Forms were later sent and Progressive had previously made payment under the policy. First, the corrected forms were received on February 11, 2014, 87 days after the treatment, and thus were not

³ This evidence is "new" in the sense that no evidence was presented at the hearing because Doral Medical did not respond at all to original motion.

compensable as untimely for services performed by Carlos Blanco from November 5—15, 2013. *See* Section 627.736(5)(c), Fla. Stat. (35 days (75 at most) to submit claims). Secondly, the fact that Progressive made some payment under the policy does not foreclose it from later denying the claim when the claim is found to be false as submitted and thus, by definition, unreasonable. *See generally Chiropractic One, Inc. v. State Farm Mut. Auto.*, 92 So. 2d 871, 874 (Fla. 5th DCA 2012); Section 627.736(4)(b), Florida Statute.

Affirmed.

Rodriguez, Zayas and Verde, JJ, concur.

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