

District Court, Suffolk County, New York.

MZ DENTAL, P.C., a/a/o Henry Maldanodo,
Plaintiff,

v.

PROGRESSIVE NORTHEASTERN INSURANCE
COMPANY, Defendant.

Olmecs Medical Supplies Inc., a/a/o Semone Hector,
Plaintiff,

v.

Progressive Northeastern Insurance Company,
Defendant.

Olmecs Medical Supplies Inc., a/a/o Raymond
Martin, Plaintiff,

v.

Progressive Northeastern Insurance Company,
Defendant.

Olmecs Medical Supplies Inc., a/a/o Jean Andre
Noel, Plaintiff,

v.

Progressive Northeastern Insurance Company,
Defendant.

Olmecs Medical Supplies Inc., a/a/o Gabriel Alcin,
Jr., Plaintiff,

v.

General Assurance Co., Defendant.

Olmecs Medical Supplies Inc., a/a/o Angelina Garcia,
Plaintiff,

v.

General Assurance Co., Defendant.

Freedom Medical Diagnostic, P.C., a/a/o Freddie
Estrella, Plaintiff,

v.

General Assurance Co., Defendant.

No. HUC 1835/003.

Dec. 23, 2004.

Edward Shapiro, P.C., Jason A. Moroff, Esq.,
Wantagh, attorney for plaintiffs.

Carman, Callahan & Ingham, Atten: Craig M.
Stabenau, Esq., Farmingdale, attorney for defendants.

TONI A. BEAN, J.

*1 A hearing was held on November 19, 2004 to address certain ethical concerns raised by irregularities in the papers submitted by plaintiffs' counsel in the above-captioned actions, as set forth in this court's interim memorandum decision and order

dated October 28, 2004. Edward Shapiro and his associate Jason Moroff appeared at the hearing as directed, as well as counsel for the defendants.

The plaintiffs, represented by Edward Shapiro and his law firm, have moved for summary judgment in each of these seven actions for assigned first-party no-fault benefits. Each of the plaintiffs' motions for summary judgment contains an Affirmation by Edward Shapiro in which Mr. Shapiro affirms that the plaintiffs' "bills" were mailed on a particular date by "Edward Shapiro, Attorney at Law." This Affirmation has been offered to establish the timely mailing of each plaintiff's no-fault claim as part of that plaintiff's prima facie case.

In response to Mr. Shapiro's Affirmation, defendants Progressive Northeastern Insurance Company and General Assurance Co. have cross-moved for summary judgment and to disqualify Edward Shapiro as attorney for the plaintiffs under the witness-advocate rule, set forth at Disciplinary Rule 5-102 of the Code of Professional Responsibility (22 NYCRR 1200.21), on the ground that Mr. Shapiro's testimony is necessary to establish a material element of each plaintiff's cause of action.

The matter was set down for a hearing after it was noted that there were obvious differences in the signatures of Mr. Shapiro and his associate, Mr. Moroff, in papers filed with the court, and that affirmations submitted by Mr. Shapiro and Mr. Moroff contained patently contradictory and misleading language. Specifically, Mr. Shapiro's affirmations in support of summary judgment indicated that he personally mailed each plaintiff's no-fault claim, while Mr. Moroff's affirmations opposing disqualification stated that a non-lawyer employee of the law firm submitted the claims and that "at no time does an attorney submit the bills to the insurance carrier." These irregularities are of particular concern given the fact that Mr. Shapiro's law firm has commenced hundreds of actions in the Third District Court on behalf of medical providers for assigned first party no-fault benefits, and has brought similar motions for summary judgment in many of those actions. The stated purpose of the hearing was to determine whether counsels' actions constituted sanctionable conduct under 22 NYCRR 130-1.1(a).

At the hearing, both Mr. Shapiro and Mr. Moroff

stated that the plaintiffs' bills were not actually mailed by Mr. Shapiro, but by a representative of the firm. It was their contention that at the time the bills were mailed to the carriers, the name of the firm was "Edward Shapiro, Attorney at Law." In January of 2004, the firm's name was changed to "Edward Shapiro, P.C." Both maintained that the office inadvertently failed to change the template on the attorney's "Affirmation" of mailing to read "Bills were sent ... by Edward Shapiro, P.C." Counsels for the plaintiff contend that it was not their intent to deceive the court and expressed their apologies if that impression was given.

*2 Although it is Mr. Shapiro's assertion that it was not his intent to deceive the Court as to who actually mailed the claims to the carriers, after reviewing the testimony of both Mr. Moroff and Mr. Shapiro, this court is constrained to conclude otherwise. It is this Court's opinion that Mr. Shapiro engaged in a pattern of behavior which can only be characterized as a deliberate attempt to mislead the court. Each affirmation in support of the motions for summary judgment sets forth the elements for establishing a prima facie case for a no-fault claim. The inclusion of the Affirmation of Mailing in each of these cases conclusively establishes the awareness by counsel that such documentation was an important element in determining whether summary judgment was appropriate. Moreover, it is inconceivable that Mr. Shapiro, whose practice involves substantial work in the no-fault field, was unaware that an affirmation or affidavit of mailing must be submitted by the person who actually did the mailing. See, e.g., *Comprehensive Mental a/a/o Bostic v. Lumbermens Mutual Ins. Co.*, 4 Misc.3d 133(A) (App. Term, 9th & 10th Jud. Dists.2004); *Oceanside Medical Healthcare, P.C. v. Progressive Ins. Co.*, NYLJ 5/23/02 at 22,(Col.4); *Vinings Spinal Diagnostic, P.C. v. Liberty Mut. Ins. Co.*, 186 Misc.2d 287, 290-291 (2000).

The assertion that it was not their intent to deceive this court is further unbelievable upon this court's review of Mr. Moroff's Affirmation in *MZ Dental, Inc. a/a/o Maldonado v. Progressive Northeastern Ins. Co.* The Affirmation of Mailing by Mr. Shapiro states that the bills were mailed by "Edward Shapiro, Attorney at Law." Mr. Moroff in his Affirmation states "In this instance *Edward Shapiro, P.C.* did not submit the bill in question" (emphasis added). However, in paragraphs 12 and 13, it states that an employee of their office mailed the bill. In raising these arguments in opposition to disqualifying Edward Shapiro, Esq. as attorney for plaintiff, it

would stand to reason that his reference in paragraph 6 to "Edward Shapiro, P.C." is in fact Edward Shapiro, Esq.

Notwithstanding the protestations of Mr. Moroff and Mr. Shapiro to the contrary, the language utilized by Mr. Shapiro, i.e., that the bills were mailed by "Edward Shapiro, Attorney at Law," can only be construed as a representation that Mr. Shapiro personally mailed the bills. There can be no doubt that the statements purportedly made by Mr. Shapiro in these "affirmations" were deliberately false.

Equally disturbing to this court is Mr. Shapiro's admission that none of the documents purportedly executed by Mr. Shapiro were, in fact, executed by him. Clearly, Mr. Shapiro cannot once again contend that it was not his intent to deceive the court. Pursuant to the Rules of the Chief Administrator, all documents prepared by counsel that are "served on another party or filed or submitted to the court shall be signed by an attorney ..." [22 NYCRR § 130-1.1-a(a)]. There was not a single excuse or good cause offered by counsel for his failure to execute any of these documents. Mr. Moroff similarly admitted that on at least two occasions he instructed someone else to sign his name to documents submitted to the court even though he was present in the office.

*3 The original signature by counsel is intended to certify that the presentation of the papers or the contents contained therein are not frivolous. See, 22 NYCRR § 130-1.1-a(b). The purported unintended error in the Attorney Affirmation of Mailing may be considered a mistake or an inadvertent error on the first few submissions of these similar motions. However, had counsel reviewed the moving papers, the error would have or should have been detected and corrected. The acknowledgment that the error was only corrected most recently, after this hearing was ordered, demeans the integrity of this court and the profession. The methods practiced by Mr. Shapiro and Mr. Moroff strongly suggest a greater interest in their own monetary benefit than in the integrity of the documents submitted.

Finally, Mr. Moroff and Mr. Shapiro contend that whether the Affirmation of Mailing satisfies a requirement of their prima facie case is no longer at issue once the carrier acknowledges receipt of the bill on the NF-10 Denial of Claim form. In support of their argument reference is made to the case of *A.B. Medical Services a/a/o German v. N.Y. Central Mutual Fire Ins. Co.*, 3 Misc.3d 136(A)(App. Term 2nd & 11th Jud. Dists.2004).

Recognizing the court's holding in *A.B. Medical Services*, the finding therein is not applicable to at least three (3) of the seven (7) matters herein. In the case of *Olmecs a/a/o Hector v. Progressive, Olmecs a/a/o Alcin v. General Insurance Co.* and *Olmecs a/a/o Martin v. Progressive*, an NF-10 was not contained in the moving or opposing papers. Accordingly, the plaintiff was required to make out a prima facie case in the first instance. However, as admitted by counsel, the Affirmation of Mailing was not executed by the person who actually mailed the bills. The plaintiff has therefore not established a prima facie case in these matters. In addition, the supporting Affirmation of Mailing was not actually executed by counsel.

In any event, such arguments are not relevant to the court's concerns regarding counsels' pattern of misrepresentation. An attorney, as an officer of the court, has an ongoing professional duty to state the truth in papers filed with the court. See, CPLR 2106, Advisory Committee Notes (CLS 2004). In acknowledgment of the attorney's awareness of this duty and of the consequences for making a false statement, CPLR 2106 authorizes the attorney to simply sign his or her own statement and to affirm its truth subject to the penalties of perjury. Such affirmation has the same effect as an affidavit sworn to before a notary public. See, V. Alexander, Practice Commentaries to CPLR 2106 (McKinney's 2004).

An "affirmation" of an attorney which has not been signed by the attorney is of no force and effect. See, *American Security Ins. Co. v. Austin*, 110 A.D.2d 697 (2d Dept. 1985). Moreover, an affidavit purported to be that of one person, but signed by another is worthless and a nullity. See, *A.B. Medical Services a/a/o Kats*, 2 Misc.3d 138A (App Term, 2nd & 11th Jud. Dists. 2004); *Reboul, MacMurray, Hewitt, Maynard & Kristol v. Quasha*, 90 A.D.2d 466 (1st Dept. 1982), citing 1 N.Y. Jur 2d, Acknowledgments, Affidavits, Oaths, Notaries and Commissioners, § 58, at p 257. A falsely subscribed attorney's affirmation is not only worthless, but may be sanctionable as well. See, e.g., *Park Health Center v. Countrywide Insurance Company*, 1 Misc.3d 906(A) (Civil Ct., Queens Co. 2003).

*4 In the court's opinion, the failure of counsel to sign the affirmations filed with this court in each of these seven actions, without good cause shown, nullifies the motions. See, 22 NYCRR § 130-1.1-a. Plaintiffs' motions for summary judgment are accordingly denied.

Similarly, in each of the actions the original summons and complaint, as admitted by counsel, do not bear his true signature. The fraudulent signatures offered by counsel in feigned compliance with the requirements of 22 NYCRR § 130-1.1-a are part of the pattern of deceptive practices engaged in by Mr. Shapiro and Mr. Moroff which has prejudiced the defendants in these actions. The Court in its memorandum decision in these actions dated October 24, 2004 apprised Mr. Shapiro and Mr. Moroff of the differences in attorney signatures. This irregularity was one of the issues for which the hearing was scheduled. With full knowledge of the false signatures on the summons and complaints, there was never an attempt or offer to correct the signatures in each action. Consequently, the complaint in each action shall be dismissed without prejudice. See, 22 NYCRR § 130-1.1-a(a). The cross-motions are thereby moot.

Viewing the actions in totality, this court finds the actions of Mr. Shapiro and Mr. Moroff to be sanctionable under 22 NYCRR § 130-1.2. Despite the comments by Mr. Moroff and Mr. Shapiro, these actions demonstrate an intent to deceive the court and their adversaries. Material factual statements were falsely presented to this court. This conduct is deemed frivolous and sanctionable. The egregious actions by counsel cannot be ignored. A total fine of \$35,000 (\$5,000 for each action) is hereby assessed against counsel for the plaintiffs to be paid to the Lawyer's Fund For Client Protection, 119 Washington Ave., Albany, New York 11210.

This constitutes the order and decision of this court.

2004 WL 2973940 (N.Y. Dist. Ct.), 2004 N.Y. Slip Op. 24524

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