

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 2014AP000018
L.T. NO.: 2012SC009703

PRECISION DIAGNOSTICS OF
LAKE WORTH, LLC (a/a/o
Carmen Penrod),
Appellant,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,
Appellee.

Opinion filed: Feb. 07, 2017

Appeal from the County Court in and for Palm Beach County,
Judge Nancy Perez

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PER CURIAM.

Appellant, Precision Diagnostics of Lake Worth, LLC (“Precision Diagnostics”), appeals a Final Judgment entered in favor of Appellee, State Farm Mutual Automobile Insurance Company (“State Farm”), after the trial court granted State Farm’s Cross Motion for Summary Judgment. Precision Diagnostics argues that the trial court erred in entering summary judgment in favor of State Farm because (1) the trial court relied on inadmissible summary judgment evidence; (2) Precision Diagnostic’s pre-suit demand letter fully complied with the statutory requirements; (3) summary judgment was based on an unarticulated finding that an accord and satisfaction had occurred; and (4) State Farm failed to satisfy its burden on summary judgment. Because we find that State Farm failed to satisfy its burden on summary judgment, we will only address this single issue.

Background

Precision Diagnostics provided medical services to Carmen Penrod (“Insured”) after she was injured in an automobile accident. Insured had an insurance policy with State Farm and assigned the Personal Injury Protection (“PIP”) benefits under this policy to Precision Diagnostics.

Precision Diagnostics submitted a bill to State Farm for \$1,600.00 for the MRI performed on Insured. After adjusting the claim, State Farm determined that the amount submitted by Precision Diagnostics was an unreasonable charge and that a reasonable charge was \$1,075.38. State Farm sent Precision Diagnostics a check for \$860.30 (80% of the \$1,075.38 that State Farm determined to be a reasonable charge) and a written Explanation of Review. Precision Diagnostics posted the payment to the Insured’s account on January 4, 2012. That same day, Precision Diagnostics wrote off \$524.62 (\$1,600.00 billed amount minus the \$1,075.38 State Farm determined was reasonable), pursuant to a fee schedule adjustment, thus reducing the

Insured's account balance to \$215.08 (\$1,075.38 minus the \$860.30 actually paid by State Farm).

On April 19, 2012, Precision Diagnostic sent a pre-suit demand letter to State Farm demanding payment in the amount of \$419.70 (80% of the \$1,600.00 billed amount minus the \$860.30 payment). On May 9, 2012, State Farm responded to the pre-suit demand letter, asserting that Precision Diagnostic had been reimbursed a reasonable amount for the MRI and that no further payment was justified.

On May 10, 2012, Ruben Spinrad ("Spinrad"), the Insured's attorney, sent a letter to Precision Diagnostics requesting that it waive the remaining \$215.08 balance on the Insured's account. Anna Russo, a representative of Precision Diagnostics, agreed to the waiver.

On June 4, 2012, Precision Diagnostics sued State Farm for breach of contract for failing to pay PIP benefits totaling \$419.70. In its answer, State Farm raised an affirmative defense of failure to comply with the pre-suit notice requirements of section 627.736(10), Florida Statutes.

On January 28, 2014, Precision Diagnostics filed a Motion for Partial Summary Judgment, asserting that its pre-suit demand letter complied with the requirements of section 627.736(10), Florida Statutes. On February 14, 2014, State Farm filed a Cross Motion for Final Summary Judgment for Deficient and Misleading Pre-Suit Demand. In the Cross Motion, State Farm argued that the pre-suit demand letter was insufficient because the PIP statute required there to be an itemized statement specifying the exact amount claimed to be due, and although Precision Diagnostics specified \$419.70 as the amount due, State Farm learned that there was a \$0.00 balance on the Insured's account statement. Specifically, State Farm asserted that a patient ledger obtained from Spinrad revealed that the account balance was \$215.80 as of January 4, 2012, and that the balance was written off on May 11, 2012, several weeks before Precision Diagnostics filed suit.

On February 21, 2014, the trial court held a hearing on Precision Diagnostics' Motion for Partial Summary Judgment and State Farm's Cross Motion for Summary Judgment. At the hearing, Precision Diagnostics argued that the pre-suit demand letter satisfied the statutory requirements. In response, State Farm asserted that as of April 25, 2012, the total balance on the account was \$215.08, not the \$419.70 claimed in the pre-suit demand letter, and that Precision Diagnostics later entered into an agreement with the Insured to write off the remaining \$215.08 before filing suit against State Farm. State Farm argued that while the demand letter appeared to satisfy the statutory requirements at the time it was sent, "the facts changed" by the time Precision Diagnostics filed suit. In support of its argument, State Farm provided the deposition transcript of Adriana Constantinides, the office manager for Precision Diagnostics, as well as the exhibits attached to the transcript, including: (1) a patient ledger dated April 25, 2012, with an account balance of \$215.08, obtained from Spinrad pursuant to a subpoena duces tecum; (2) a patient ledger dated February 12, 2014, with an account balance of \$739.70; and (3) a signed letter between Spinrad and Precision Diagnostics waiving the Insured's remaining \$215.08 account balance.

Precision Diagnostics argued that the documents introduced by State Farm could not be authenticated and, further, that the only relevance of those documents was to show that the Insured's 20% co-pay was written off, which did not change State Farm's responsibility to pay what it owed. Precision Diagnostics introduced a letter from Spinrad clarifying that his May 10, 2012, letter was intended to obtain a waiver of the Insured's responsibility and not any payment obligation that State Farm had under its PIP coverage obligations.

On February 22, 2014, the trial court entered an order granting State Farm's Motion for Final Summary Judgment for Deficient and Misleading Pre-Suit Demand. The order stated:

Based on the exhibits presented this court finds the amount claimed varied from the amount listed as due on [Precision Diagnostic's] ledger. Therefore the demand was greater than the amount that was due and is therefore defective. Based on this ruling, the other motions are moot.

On March 13, 2014, the trial court entered Final Judgment in favor of State Farm pursuant to the Court's February 22, 2014 Order granting State Farm's Cross Motion for Summary Judgment.

Standard of Review

An order granting summary judgment is reviewed *de novo*. *Haber v. Deutsche Bank Nat. Trust. Co.*, 81 So. 3d 565, 566 (Fla. 4th DCA 2012).

Analysis and Legal Conclusions

Precision Diagnostics argues that the trial court erred in granting Final Judgment in favor of State Farm on the basis that its pre-suit demand letter was defective. State Farm essentially argues that the demand letter became defective when Precision Diagnostic waived the remaining \$215.08 on the Insured's account balance, prior to filing the lawsuit, thus bringing the account balance to \$0.00.

Section 627.736(10)(b)(3), Florida Statutes, provides that a demand letter must include "an itemized statement specifying each exact amount, the date of treatment, [and] . . . the type of benefit claimed to be due." § 627.736(10)(b)(3), Fla. Stat. (2016). In this case, Precision Diagnostic's demand letter claimed that the amount due was \$419.70. After the demand letter was sent and rejected, State Farm learned that Precision Diagnostic had written off \$524.62 pursuant to a fee schedule adjustment, thus bringing the account balance to \$215.08. State Farm also discovered that Precision Diagnostic waived the remaining \$215.08 on the Insured's account balance pursuant to an agreement between the Insured and Precision Diagnostic. Thus, State Farm argues that the amount demanded was greater than the amount shown on the patient ledger.

However, whether Precision Diagnostics wrote off and/or waived the account balance

owed by the Insured, and the relevance of such an adjustment, remains a genuine material issue preventing the entry of summary judgment at this stage in the proceeding. *See Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980) (stating that writing off debt is “strictly a bookkeeping or accounting procedure,” and “has nothing to do with . . . demanding the total debt be paid.”). As such, while State Farm’s evidence may show that the remaining account balance was written off or waived, this write off/waiver could be for accounting purposes, as Precision Diagnostics argues, and therefore does not by itself render the demand letter defective as a matter of law. As Precision Diagnostics sought the same \$419.70 that it did in the demand letter, the Court finds, based upon the summary judgment record, that State Farm did not establish that the demand was greater than the amount due from State Farm. Thus, the Court finds that State Farm failed to establish that it was entitled to judgment as a matter of law, and therefore the trial court erred in entering final summary judgment in favor of State Farm. Accordingly, we reverse the decision of the trial court.

Attorney’s Fees

Both parties have moved for appellate attorneys’ fees in this case. Precision Diagnostics seeks fees pursuant to section 627.428, Florida Statutes. This section allows for the recovery of fees “[u]pon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer.” § 627.428(1), Fla. Stat. (2016). Because this Court is reversing the decision of the trial court, the Court provisionally grants Precision Diagnostic’s Motion for Appellate Attorneys’ Fees conditioned upon its prevailing in the trial court.

State Farm seeks fees under section 768.79, Florida Statutes. Section 768.79 allows for the recovery of fees after a defendant files an offer of judgment that is rejected, but the defendant

ultimately obtains a judgment in its favor or the judgment obtained by the plaintiff is at least twenty-five percent less than such offer. However, the offer of judgment statute is not a prevailing party statute and instead awards *all* fees accrued after the offer of judgment. See *United Auto. Ins. Co. v. Comprehensive Health Center*, 173 So. 3d 1061 (Fla. 3d DCA 2015) (quoting *State Farm Fire & Cas. Co. v. Rembrandt Mobile Diagnostics, Inc.*, 93 So. 3d 1161, 1162 (Fla. 4th DCA 2012)) (“It is well settled that ‘[t]he plain and mandatory terms of the proposal for settlement statute encompass *all* costs and attorney’s fees incurred leading up to a final judgment,’ including fees incurred on appeal.”) (emphasis added). Thus, although we reverse the decision of the trial court, we provisionally grant State Farm’s Motion for Appellate Attorney’s Fees conditioned upon the trial court’s determination that the proposal for settlement entitles State Farm to fees under section 768.79, Florida Statutes.

Accordingly, the decision of the trial court is **REVERSED** and the case is **REMANDED** for further proceedings not inconsistent with this opinion. Precision Diagnostic’s Motion for Appellate Attorney’s fees is **GRANTED** conditioned upon its prevailing in the lower court. Additionally, State Farm’s Motion for Appellate Attorney’s Fees is **GRANTED** conditioned upon the trial court’s determination that the proposal for settlement entitles State Farm to fees under section 768.79, Florida Statutes.

SMALL, ARTAU, and G. KEYSER, JJ., concur.

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Opinion/Decision filed: *Feb. 07, 2017*

Appeal from the County Court in and for
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Judge Nancy Perez

Appealed: April 7, 2014

DATE OF PANEL: NOVEMBER 15, 2016

PANEL JUDGES: SMALL, ARTAU, G. KEYSER

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:)
	)	With/Without Opinion	)	With/Without Opinion)
<i>Edward L. Artau</i> <u>1-30-17</u>)))
J.	)	J.	)	J.)
<i>Lisa S. Small</i> <u>1-31-17</u>)))
J.	)	J.	)	J.)
<i>Gregory M. Keyser</i> <u>2-1-2017</u>)))
J.	)	J.	)	J.)