

Burkart v Allstate Ins. Co.

2007 NY Slip Op 31348(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0035302/2006

Judge: Emily Pines

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Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Original Motion Date: 03-16-2007
Motion Submit Date: 03-22-2007
Motion Sequence No('s): 001 MD
002 MG
CASEDISP

GRACE HENN BURKART,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant .
X

Attorney for Plaintiff

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Attorney for Defendant

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ORDERED, that the motion (motion sequence no. 001) by Plaintiff to strike Defendant's Answer, for summary judgment and a trial preference is denied; and it is further

ORDERED, that Defendant's cross-motion (motion sequence no. 002) to dismiss is granted and the action is dismissed.

Plaintiff commenced this action by filing a Summons and Complaint on or about December 19, 2006 and issue was joined by Defendant's service of an Answer on or about January 31, 2007. The Complaint seeks damages for an alleged breach of contract arising from an automobile liability insurance policy issued by Defendant to Plaintiff. The gravamen of the complaint is that Plaintiff was in an automobile accident on December 22, 2003, suffered serious physical injuries and the Defendant breached its agreement with Plaintiff by failing to afford sufficient medical treatments. Plaintiff seeks damages for pain and suffering and also punitive damages. The relevant facts, as they appear in the record before the Court, are as follows:

As a result of the December 22, 2003 motor vehicle accident,

Plaintiff suffered injuries including a fractured sternum, broken toe, bruised ribs, bulging and herniated discs in her cervical spine and lumbar spine. Consequently, Plaintiff was disabled from her employment as a school bus matron. Plaintiff applied for and received no-fault benefits from Defendant, including payment for medical care and lost wages. Plaintiff had an independent medical examination by an orthopedist on December 21, 2005 and as a result thereof, Plaintiff issued a Denial of Benefit form determining that "ALL ORTHOPEDIC, PHYS THERAPY, PMR, AND PAIN MGT CLAIM BENEFITS WILL BE DENIED EFFECTIVE 1/6/06."

Plaintiff filed for arbitration of the denial of benefits and a hearing was held before an arbitrator solely on the issue of the denial of benefits for lost wages from January 6, 2006 to the date of the hearing. By decision dated July 21, 2006, the arbitrator found, after the hearing, that Plaintiff was entitled to an award of lost earnings in the amount of \$11,408.74 plus interest, attorney and filing fees. Although the arbitrator's decision takes issue with some of the findings of the independent medical examiner, the sole issue in that proceeding was whether Plaintiff was entitled to recover for lost wages.

By letter dated September 8, 2006 however, Plaintiff rescinded the denial of orthopedic benefits.

Plaintiff thereafter commenced the instant action. The complaint sets forth three causes of action. The first cause of action alleges a breach of the insurance agreement by Defendant's purported failure to afford Plaintiff sufficient medical treatment and seeks a judgment against Defendant "to the extent that all necessary medical treatments and procedures required by Plaintiff as a result of the automobile accident described herein, be paid for by the Defendant as provided for in the automobile liability insurance policy in effect on December 22, 2003." **Complaint at ¶20.** In the second cause of action, Plaintiff alleges that defendant failed to comply with the arbitration award and seeks judgment against Defendant for "malicious infliction of unnecessary pain and suffering" in the amount of \$2,000,000.00. On the third cause of action, Plaintiff seeks punitive damages in the amount of \$5,000,000.00 for what she calls "Defendant's willfull, wanton, malicious, deliberate and vicious disregard of contractual and

arbitration obligations for the medical needs of Plaintiff...".
Complaint at ¶26.

Defendant served and filed a Verified Answer with Affirmative Defenses, including but not limited to that Defendant has acted within the scope of the No-Fault Regulation and has not breached its contract with Plaintiff; and that the Complaint fails to state a cause of action.

Plaintiff now moves to strike Defendant's Verified Answer on the ground that the Answer is unresponsive to the Complaint and a "boiler-plate" response and also for summary judgment and a trial preference. Essentially, Plaintiff takes issue with Defendant's responses in the Verified Answer in which it "denies knowledge or information sufficient to form a belief" as to certain allegations of the Complaint. On the issue of summary judgment, Plaintiff alleges that the issues raised in the instant action were litigated before the arbitrator and decided in Plaintiff's favor. Plaintiff alleges that her application to the arbitrator raised the issue of the denial of treatment of pain, as well as lost wages, that the arbitrator rejected the report of the independent medical examiner and granted her request for relief. Thus, Plaintiff argues that the decision of the arbitrator has *res judicata* and collateral estoppel effect in the instant action. Finally, Plaintiff seeks a trial preference pursuant to CPLR §3403 (a) (4), on the ground that she is over seventy years old, having been born on November 18, 1935.

Defendant opposes the motion and cross-moves to dismiss the complaint. In opposition to the motion, Defendant argues initially that the motion for summary judgment must be denied because Plaintiff has failed to comply with the mandates of CPLR §3212 (b) which requires that a copy of the pleadings be annexed. With regard to the issue of the responses in the Verified Answer in which Defendant "denies having knowledge or information sufficient to form a belief" as to certain allegations of the Complaint, Defendant's counsel had not received the claim file when a response to the Complaint was due and that rather than denying the allegations outright, he advised that it did not have sufficient information at the time.

Turning to the merits of the motion for summary judgment,

Defendant sharply disputes the characterization by Plaintiff's counsel of the effect of the decision of the Arbitrator. At the outset, Defendant alleges (and Plaintiff concedes) that it has paid the amount of the arbitration award. Defendant argues that the basis of the arbitration award is Plaintiff's entitlement to lost earnings and not the issue of medical treatment or medical bills or whether Defendant has improperly denied any medical services. Additionally, Defendant argues that Plaintiff has erroneously alleged that all medical benefits were denied. Rather, Defendant states that only orthopedic (which were subsequently reinstated as set forth above), physical therapy and pain management benefits were denied and Plaintiff had other benefits available to her, including neurology, physical therapy as a result of a neurological prescription, and pain management as a result of a neurological prescription.

On the motion to dismiss, Defendant argues that the complaint fails to state a cause of action for breach of contract in that there is no date when the contract was entered, no recitation of the terms and conditions of the contract and the services that were to be provided thereunder and no copy of the contract. Thus, Defendant argues that Plaintiff failed to state a cause of action. On the second cause of action, Defendant argues that it did not deny all benefits to Plaintiff, only those enumerated in the denial of benefits form. Finally, on the punitive damages claim, Defendant argues that Plaintiff has failed to state a cause of action because there is no evidence that Defendant engaged in willful or wanton conduct evincing a deliberate intent to harm or utter indifference or conscious disregard for the safety of others. Instead, Defendant argues that it has acted properly within the parameters of the **Insurance Law and Insurance Regulations** and that the Court should consider sanctions against Plaintiff for bringing a frivolous action.


Based upon the foregoing, Plaintiff's motion to strike Defendant's answer, for summary judgment and a trial preference is denied and the cross-motion to dismiss the complaint is granted for failure to state a cause of action. With regard to the claim for breach of contract, the complaint fails to state a cause of action in that it fails to plead the terms of the contract, when it was entered and the services to be provided by defendant under the contract. Moreover, Plaintiff has failed to even annex a copy of the contract to either the complaint or the moving papers. As to the second cause

of action, the complaint also fails to state a cause of action for personal injury based upon denial of medical treatment. Moreover, the documentary evidence submitted on the cross-motion demonstrates that Defendant did not deny Plaintiff all medical treatment, but in accordance with the **Insurance Law and Insurance Regulations** denied certain benefits based upon an independent medical evaluation. Although Plaintiff sought arbitration of the denial of her lost wages claim, a plain reading of the arbitration award demonstrates that there was no determination that Defendant improperly denied treatment. Thus, Plaintiff's arguments regarding collateral estoppel and/or *res judicata* are wholly without merit. Finally, Plaintiff has not demonstrated the willful or wanton conduct necessary to plead a cause of action for punitive damages. On the contrary, despite the fact that the arbitrator did not rule on the issue of denial of medical treatment, Defendant, on its own, reinstated Plaintiff's orthopedic benefits.

The cross-motion to dismiss the complaint is therefore granted and the action is dismissed. Defendant's request for sanctions is denied.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: May 21, 2007
Riverhead, New York


EMILY PINES
J. S. C.