Globe Surgical Supply v Allstate Ins. Co.
2009 NY Slip Op 33133(U)
December 15, 2009
Supreme Court, Nassau County
Docket Number: 9018/04
Judge: Michele M. Woodard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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GLOBE SURGICAL SUPPLY, as assignee of Charles Charlotin, on behalf of itself and all others similarly situated,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:9018/04
Motion Seq. Nos.: 04 & 05

DECISION AND ORDER

Papers Read on this Motion:

Defendant's Notice of Motion	04
Plaintiff's Amended Notice of Cross-Motion	05
Defendant's Reply	xx
Plaintiff's Memorandum of Law	xx

The Defendant moves for an order granting them summary judgment and dismissing the Plaintiff's complaint. Amer-A-Med Health Products and Meditek cross-move for permission to intervene in the matter.

This is an action for breach of contract. Plaintiff Globe Surgical Supply provided health care equipment to Charles Charlotin, who was injured in an automobile accident. Chalotin was covered by an automobile policy issued by Defendant Allstate Insurance Company and assigned his claim for no fault reimbursement to Plaintiff. After Allstate reduced the billed amount to a prevailing rate in Globe's geographic location, Plaintiff commenced the present action.

The no-fault reform law provides for prompt, uncontested first-party insurance benefits in order to partially eliminate common law personal injury suits arising from automobile accidents (*Presbyterian Hospital v Maryland Cas. Co.*, 90 N.Y.2d 274, 285 [1997]). Pursuant to Insurance Law § 5103, every automobile insurance policy must provide for payment for first party, or so-called "no fault," benefits to occupants of the covered vehicle who sustain loss through the use or operation of the vehicle. Sec. 5102(b) of the Insurance Law defines "first party benefits" as

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payment to reimburse the injured person for "basic economic loss," less certain deductions.[1] Under Insurance Law § 5102(a), "basic economic loss" means "all necessary expenses incurred for medical, hospital...surgical...and prosthetic services" and lost earnings up to $50,000.

Sec. 5102(a) further provides that the expenses shall be in accordance with the limitations of § 5108. Sec. 5108(b) in turn provides that the Superintendent of Insurance shall promulgate rules and regulations implementing the no fault law, including the establishment of schedules of charges for professional health services. Former Part E, the insurance regulation in effect prior to October 6, 2004, stated that, "for medical equipment and supplies...provided by a physician or medical equipment supplier, the maximum permissible charge is 150% of documented cost of the equipment to the provider."

The current regulation provides that the "maximum permissible charge for the purchase of durable medical equipment, medical/surgical supplies...is the fee payable for such equipment...under the New York State Medicaid program....If the New York State Medicaid program has not established a fee payable for the specific item, then the fee payable,...shall be the lesser of: (1) the acquisition cost...to the provider plus 50%; or (2) the ususal and customary price charged to the general public." (11 NYCRR Appx 17C). The claim upon which Plaintiff sues was covered by the former regulation.

On January 17, 2002, Globe, which is located in Valley Stream, submitted a claim to Allstate's Islandia office, which is located in Hauppauge, for various items of medical equipment provided to Chalotin to treat his injury in the automobile accident. Although the total amount billed was $880.50, Allstate reduced the billed amount to the prevailing rate in Globe's geographic location and paid only $234.62.[2] Allstate issued its payment on February 12, 2002, twenty-six (26) days after the claim was received.

In 2004, Plaintiff commenced the present action, alleging that Allstate had breached its policy by failing to pay 150% of the provider's documented cost. Plaintiff purported to bring the

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[1]The deductions include 20% of lost earnings, amounts recoverable under social security disability and workers compensation, and amounts deductible under the policy (Insurance Law § 5102[b]).

[2]Defendant's ex. B.

action as a class action on behalf of all health care providers whose no fault claims had been illegally reduced by Allstate. By order dated April 24, 2007, the court denied Plaintiff's motion for an order permitting the action to be maintained as a class action on the ground that Plaintiff had failed to satisfy the numerosity, common question, adequacy of representation, and superior method requirements (CPLR §901).

By order dated April 21, 2009, the Appellate Division modified this court's order to provide that class action certification was denied without prejudice to renewal of the motion (*Globe Surgical Supply v Allstate Ins. Co.*, 61 AD3d 821 [2d Dept 2009]). The Appellate Division held that Globe met all of the class certification prerequisites except adequacy of representation (see CPLR §901[a][4]). The court referred to its order in a similar action brought by Globe against GEICO Ins. Co. (*Globe Surgical Supply v GEICO*, 59 AD3d 129 [2d Dept 2008]). In *GEICO*, the Appellate Division determined that Globe's owner, Jean Francois, was not an adequate class representative because he had been charged with insurance fraud for attempting to stage accidents (Id at 144). The court also noted that Francois had engaged in "recycling invoices," or submitting the same documents for different durable medical claims. Finally, the court noted that GEICO had served a class action counterclaim against Francois, and defending the counterclaim was likely to detract from the adequacy of his class representation.

While Francois' failure to keep proper records disqualified him from serving as a class representative, GEICO was not be permitted to assert a defense of fraudulent billing or the inability of class members to establish "documented costs" (Id at 141-42). An insurance company must pay or deny a no fault claim within 30 calendar days after receipt of the proof of claim (Insurance Law § 5106[a]). However, the 30-day period may be extended where the insurer makes a request for additional information within 15 days of its receipt of the claim (11 NYCRR § 65-3.5; *Hospital for Joint Diseases v Central Mutual Fire Ins. Co.*, 44 Ad3d 903 [2d Dept 2007]). Since GEICO had failed to assert the fraud, or undocumented costs, defense within the required 30-day period, it was precluded from raising the fraud or undocumented costs defenses in the class action. Thus, the common question of GEICO's denial of medical equipment claims to the extent that they exceeded prevailing rates predominated over any questions affecting only individual class members (CPLR §901[a][2]).

Defendant Allstate moves for summary judgment dismissing the complaint. Allstate argues that, unlike GEICO, it timely asserted the undocumented costs defense and is entitled to raise the defense within the context of a class action. Defendant asserts that the undisputed evidence shows that Plaintiff failed to support its claim with documented costs.

Amer-A-Med Health Products, Inc. and Meditek, Inc. cross-move for leave to intervene pursuant to CPLR §1013. Amer-A-Med and Meditek also seek to intervene as of right pursuant to CPLR §1012(a)(2) on the ground that Globe's representation of their interest is inadequate and they may be bound by the judgment. Intervenors, who are based in New Jersey, provided medical equipment to automobile accident victims prior to October 6, 2004 and accepted assignments of no fault claims against Allstate. Intervenors allege that their claims were also adjusted by the insurer based upon prevailing rates in their geographic location. In the proposed intervention complaint, Amer-A-Med and Meditek seek to bring the action as a class action on behalf of consumers and providers of health care supplies who failed to receive full reimbursement from Allstate as provided by the Insurance Law. Proposed intervenors allege that, as to the specific claims set forth in the proposed complaint, Defendant's reimbursement did not equal their out-of-pocket cost.[3] Allstate consents to Amer-A-Med and Meditek's intervention but opposes their claims on the merits as well as their ability to represent the class.

"New York's class action statute has much in common with Federal Rule 23" (*Colt Industries Shareholder Litigation*, 77 NY2d 185, 194 [1991]). Thus, it is appropriate to look to federal authority to resolve motions for class certification and related procedural issues arising in a class action case. A court should not ordinarily conduct a preliminary inquiry into the merits of a suit in determining whether it may be maintained as a class action (*Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 177 [1974]). Nevertheless, a trial court has discretion to consider simultaneous motions for summary judgment and class certification, or even a motion for summary judgment before a motion for class certification is filed (*Christensen v Kiewit-Murdock Investment Corp.*, 815 F.2d 206, 214 [2d Cir. 1987]). Whether a motion for summary judgment is appropriate before a class action determination has been made will depend upon the "breadth

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[3]By way of illustration, Amer-A-Med provided a Tens Unit to Geraldine Carter which cost the supplier $189. Allstate's reimbursement on the assigned claim was only $77.80.

of the class" and the "complexity of the legal or factual issues raised by the motion to certify" (Id).

Since the Appellate Division denied Plaintiff's motion for class certification without prejudice to renewal, it would not be appropriate to consider Defendant's motion for summary judgment until another class representative has had an opportunity to come forward. However, because intervenors have submitted vigorous opposition to Defendant's motion for summary judgment, the court may consider the motion even though a motion for class certification has not yet been filed.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id).

On Defendant's motion for summary judgment, it is its burden to establish *prima facie* that it timely asserted the defense of undocumented costs or made a timely demand for additional information which was not responded to by the claimant. Allstate submits its "explanation of medical bill payment" form which states that the "based on available documentation, the billed amount has been adjusted to a prevailing rate in the geographic location of the provider."[4] The insurer's boilerplate disclaimer "based on available documentation" is not sufficient to assert the defense of undocumented costs. Moreover, because the explanation of payment form is dated 26 days after the claim was received, it did not operate as a timely request for additional information. Because Defendant has not established prima facie that it asserted the defense of undocumented costs or requested additional information in a timely manner, Defendant's motion for summary judgment dismissing the complaint is **denied**.

Class action judgments are *res judicata* as to class members who do not participate in the litigation (*Gowan v Tully*, 45 NY2d 32, 35, n. [1978]). Thus, members of a proposed class may intervene as of right, upon a showing that representation by the named Plaintiff may be

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[4]Defendant's ex. B.

inadequate and the class member may be bound by the judgment (CPLR §1012[a][2] and practice commentary C1012:3). In the present case, Plaintiff's representation has been determined to be inadequate and, if certification is granted, intervenors will be bound by the judgment. Accordingly, proposed intervenors' motion for permission to intervene as of right is **granted**. The proposed intervention complaint is deemed timely served, and Defendant shall serve its answer within 15 days of service of a copy of this order. It is hereby

ORDERED, that the Caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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GLOBE SURGICAL SUPPLY, as assignee of Charles Charlotin, on behalf of itself and all others similarly situated,

Plaintiff,

-and-

AMER-A-MED HEALTH PRODUCTS, INC., a/a/o Geraldine Carter, Jordan R. Dasch, and Jaime L. Pavanello; and MEDITEK, INC., a/a/o Gabriel Gaeta and Patricia McGaughey, on behalf of themselves and all others similarly situated,

Plaintiff-Intervenors,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant.

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This constitutes the Decision and Order of the Court.

DATED: December 15, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD

ENTERED

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DEC 21 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE