

Mercury Cas. Co. v Grant

2011 NY Slip Op 32590(U)

September 28, 2011

Supreme Court, Nassau County

Docket Number: 9265/11

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

MERCURY CASUALTY COMPANY,

Plaintiff,

ORIGINAL RETURN DATE: 08/10/11
SUBMISSION DATE: 08/10/11
Index No. 9265/11

-against-

INGER GRANT
LYNBROOK ADV ACUPUNCTURE, P.C.
HEALTHY LIFE CHIROPRACTIC, P.C.
IDK IMAGING, P.C.
PROHEALTH ACUPUNCTURE, P.C.
SHERYL TOMACK, PHYSICIAN, LLC
BTS MEDICAL, P.C.
ELEMAM PHYSICIAN, P.C.
GREENWAY MEDICAL SUPPLY, INC,
BIG APPLE CHIROPRACTIC, P.C.

MOTION SEQUENCE #1

Defendants.

The following papers read on this motion:

Order to Show Cause..... 1

Application by plaintiff pursuant to CPLR 6311 for a preliminary injunction enjoining defendants from commencing, prosecuting or proceeding in any lawsuits pending in any court of competent jurisdiction, pending the outcome and determination of this action, is denied. No opposition to the application has been submitted by defendants.

In this action, plaintiff, a no-fault insurance carrier, seeks a declaratory judgment that there is no no-fault coverage for Inger Grant and the provider defendants as a result of the motor vehicle accident that occurred on March 21, 2010, and that none of defendants or their assigns are entitled to first-party no-fault benefits.

Plaintiff seeks preliminary injunctive relief in an effort to stay any and all pending arbitrations and lawsuits. The arbitration scheduled for July 26, 2011, involving IDF MEDICAL DIAGNOSTICS, P.C. docketed under AAA# 412011011727 was stayed pending the hearing and determination of this motion. The court notes that the request for arbitration names this provider as IDF DIAGNOSTIC MEDICAL PC (Ex. 2).

The provider is named as a defendant in this action as IDK IMAGING, P.C., and that is the entity that was served with the order to show cause and supporting papers. Although counsel for IDF DIAGNOSTIC MEDICAL PC was served with a copy of the proposed order to show cause, they were not served with the signed order to show cause. The court at this juncture cannot determine the proper name for this provider.

The procedural device of a preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties. Rather it is to maintain the status quo (*City of Long Beach v Sterling American Capital, LLC*, 40 AD3d 902, 903 [2d Dept. 2007]). The decision whether to grant or deny such relief rests in the sound discretion of the court (*Dixon v Malouf*, 61 AD3d 630 [2d Dept. 2009]). In reaching that decision, the court is mindful that a preliminary injunction is a drastic remedy which should be used sparingly, with caution and only when required in urgent situations or grave necessity (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713 [2d Dept. 2011]).

In order to obtain a preliminary injunction, the movant must demonstrate 1) a likelihood of success on the merits; 2) irreparable injury absent the granting of the requested relief; and 3) a balancing of the equities in the movant's favor (*Rowland v Dushin*, 82 AD3d 738, 739 [2d Dept. 2011]). The injury sustained by plaintiff must be more burdensome to plaintiff than the harm which would be caused to defendants as a result of imposition of the injunction (*McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165, 174 [2d Dept. 1986] *app den.* 67 NY2d 606 [1986]). Proof establishing the necessary elements must be supported by affidavit and other competent proof buttressed by evidentiary detail (CPLR 6312(c)). Bare, conclusory allegations are insufficient to support the application (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [2d Dept. 2011]; *Neos v Lacy*, 291 AD2d 434, 435 [2d Dept. 2002]).

While the existence of factual issues alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert plaintiff's likelihood of success on the merits to such a degree that it cannot be said that plaintiff has established a clear right to the relief (*Milbrandt & Co. v Griffin*, 1 AD3d 327, 328 [2d Dept. 2003]).

Here, plaintiff has failed to meet its burden of demonstrating it would suffer irreparable harm if a preliminary injunction were not granted. In the context of a preliminary injunction, irreparable injury is one that cannot be redressed through a monetary award (*DiFabio v Omnipotent Communications, Inc.*, 66 AD3d 635 [2d Dept. 2009]; *Walsh v Design Concepts, Ltd.*, 221 AD2d 454, 455 [2d Dept. 1995]). Monetary loss will not amount to irreparable harm unless the movant provides evidence, not here present, of damage that cannot be rectified by financial compensation. The alleged harm must be shown by the moving party to be imminent, not remote or speculative (*Golden v Steam Heat, Inc.*, 216 AD2d 440, 442 [2d Dept. 1995]).

Under the circumstances presented here, even assuming, without deciding, that plaintiff has made a sufficient showing of a likelihood of success on the merits of the complaint, it has not demonstrated a sufficient prospect of irreparable harm so as to warrant issuance of a preliminary injunction.

Plaintiff has not demonstrated irreparable harm that rises to a level sufficient to justify the imposition of the requested injunctive relief. Plaintiff has failed to demonstrate that the alleged harm is imminent, not remote or speculative (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739-740 [2d Dept. 2010]).

All applications not specifically addressed herein are denied.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

All parties are directed to appear on October 28, 2011, at 9:30 a.m. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order. Movant is directed to serve a copy of this order

upon all parties forthwith upon receipt of a copy of same from any source and to thereafter provide proof of such service upon chambers.

As part of the Preliminary Conference, plaintiff shall specify if defendants have appeared and by whom, or if defendants are in default. In the event all of the defendants are in default, plaintiff may obviate its appearance at the Preliminary Conference by filing a motion for a default judgment prior to the date of the Preliminary Conference and notifying both chambers and the Preliminary Conference part that the motion has been filed.

This decision constitutes the order of the court.

Dated: 9-28-11

HON THOMAS P. PHELAN
Thomas P. Phelan
THOMAS P. PHELAN, J.S.C.

Attorneys/Parties of Record:

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Lynbrook Adv Acupuncture, P.C.
Defendant
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ENTERED
OCT 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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160 Long Beach Road
Island Park, NY 11558

Elemam Physician, P.C.
Defendant
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Dix Hills, NY 11746

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Greenway Medical Supply, Inc.

Defendant

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Brooklyn, NY 11214

Big Apple Chiropractic, P.C.

Defendant

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Brooklyn, NY 11229