

Matter of State Farm Mut. Auto. Ins. Co. v Perruc

2011 NY Slip Op 33535(U)

December 23, 2011

Sup Ct, Nassau County

Docket Number: 15287/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of

TRIAL/IAS PART 32
NASSAU COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Petitioner,

Index No.: 15287/11
Motion Seq. No.: 01
Motion Date: 11/16/11

- against -

XXX

PHYLLIS PERRUC,

Respondent.

The following papers have been read on this application:

| | Papers Numbered |
|--|-----------------|
| Order to Show Cause, Verified Petition, Affidavit and Exhibits and Affirmations and Exhibits | 1 |
| <i>Pro se</i> Affidavit in Opposition | 2 |
| Reply Affirmation | 3 |

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner moves, pursuant to CPLR § 7503, for an order permanently staying the demand for arbitration made by respondent based upon the expiration of the applicable statute of limitations, or, in the alternative, pursuant to CPLR §§ 7501 and 3102(c), for an order compelling discovery in aid of arbitration and temporarily staying the arbitration in this matter until completion of such discovery. Respondent, *pro se*, opposes petitioner's application.

Petitioner submits that on August 10, 2011, respondent forwarded a request for No-Fault

arbitration to the American Arbitration Association with regard to a claim for lost earning stemming from respondent's involvement in an automobile accident that occurred on August 16, 1991. Respondent is seeking \$350,077.00 in lost wage No-Fault compensation from petitioner pertaining to the period of time from August 16, 1991 through August 16, 1994. By correspondence dated September 15, 2011, the American Arbitration Association advised petitioner that it was required to submit its position in response to respondent's arbitration demand by October 15, 2011. Said deadline was extended to October 29, 2011.

Petitioner argues that respondent's demand for arbitration for her lost wages claim must be permanently stayed as respondent has failed to seek arbitration within the period of time required under the law.

Petitioner contends that, on August 16, 1991, respondent was allegedly involved in a car accident. Subsequent to her involvement in said accident, respondent submitted a claim to petitioner for lost wage earnings. Under the No-Fault Regulation then in effect, petitioner honored the lost wage request to the extent that same was deemed medically necessary.

Respondent's current demand for arbitration is for interest on a portion of the lost wage claim.

Petitioner submits that, pursuant to CPLR § 213, respondent was required to commence an action or initiate an arbitration proceeding within six years of petitioner's alleged failure to pay the claim for lost wages. Petitioner states that, at no point in time, did it ever waive the statute of limitations with regard to respondent's claim nor did it ever agree to extend the statute of limitations. Petitioner argues that it is undisputed that respondent failed to commence the arbitration within the relevant six year statute of limitations contained within CPLR § 213(2). Respondent first sought arbitration on or about August 10, 2011, almost twenty years after the

subject occurrence and almost seventeen years after respondent was entitled to receive No-Fault wage benefits. Petitioner states that “[b]ased upon the most generous possible end-date of Respondent’s lost wage claim, that being August 16, 1994, the Respondent was required to commence arbitration and/or litigation by August 16, 2000. The Respondent did not commence the arbitration proceeding within the required period of time - the Respondent has thus failed to satisfy a necessary requirement to maintain the subject demand for arbitration.”

Petitioner additionally argues that respondent is not entitled to a tolling of the statute of limitations. Petitioner states, “[i]n Respondent’s arbitration request it is alleged that the statute of limitations is not applicable as the Respondent ‘recently’ discovered fraud, which has the effect of extending the relevant statute of limitations period. A review of Respondent’s demand for arbitration states that she discovered that a ‘fraud’ was committed against her. The ‘Eureka’ moment allegedly occurred on June 1, 2010, and is based upon a ‘discovery’ of a newspaper article that was published in or around the year 2000. The Respondent alleges that the ‘fraud’ that was discovered was a newspaper article written in or about 2000 about a class action lawsuit commenced against STATE FARM as well as other insurance companies....The Respondent’s blatant attempt to circumvent the statute of limitations by invoking the tolling provision for fraud contained within CPLR § 213(8) is baseless and without merit. Respondent’s AR-1 lacks all necessary elements to establish a claim based in fraud....Respondent’s attempt to allege ‘fraud’ based upon the inclusion of a newspaper article that has nothing to do with the dispute at issue does not give rise to the level of fraud necessary to toll the statute of limitations as allowed by CPLR § 213(8).” Petitioner contends that respondent has failed to allege fraud sufficiently and with particularity to warrant a tolling of the statute of limitations.

In opposition to petitioner's applications, respondent, *pro se*, argues that "a review of the Petitioner and TAMMY MURPHY's affidavit wants the courts to believe my discovery was a newspaper article in 2000. That is False. TAMMY MURPHY knows Discovery was made when I received a re-review of my wages on 05-21-2010 with the wage and salary form showing my wages were \$217.50 was attached to that letter....Discovery from May 21, 2010 letter in Exhibit A was made because for years they have been sending the form of 13 weeks to justify my wages and up to May 2010 MARY BETRANG still told me they divided the 13 week (*sic*) into the gross and that's how they came up with \$186.92 for my accounting job. Both forms were received in Auto claims Dept Sarasota 12-04-1991....Discovery was May 21, 2010 my demand for arbitration has be filed in a timely Manner within the Statue (*sic*) of Limitation period in a case of fraud Laws of New York Section #213 of Civil Practice Law #8 an action based upon fraud the time within which the action must Be commenced shall be greater of six years from the date the cause of action accrued OR Two years from the time the Plaintiff claims discove (*sic*) the fraud or could with reasonable diligence have discovered it....I asked for years from my first checks how did they figure my wages they never answered me, finally on 04-13-1994 sent letter copy attached but never explaining the figure to pay me such differences for every month....Immediately I wrote to STATE FARM on 06-01-2010 with a copy to New York Insurance Department BARRY BISTRICK that I was not paid what I was making....STATE FARM committed fraud. How this came to be after 20 years. After STATE FARM stopped paying January 1998 New York Insurance Department told me to send my bills to Major Medical "Equitable" with STATE FARM denials which I did. And to this day I am still fighting Equitable with New York Insurance Department, 20 years of fighting insurance companies."

In reply to respondent's *pro se* Affidavit in Opposition, petitioner argues that, pursuant to

CPLR § 402, respondent has failed to timely interpose an Answer to the Petition and therefore is in default. As the Petition clearly states that there is an adverse party, namely the respondent, and respondent was required to answer the Petition pursuant to CPLR § 402. In response to the instant Petition, respondent failed to submit an Answer, but instead submitted an Affidavit in Opposition. Unlike a typical Answer, respondent's Affidavit in Opposition failed to address each allegation contained in the Verified Petition. Petitioner contends that respondent's failure to answer the Petition in a timely manner renders the respondent in default, all allegations raised in the Petition are deemed admitted and petitioner is entitled to the relief requested therein.

Petitioner further argues that respondent's out-of-state Affidavit is not properly before this Court as it was executed in the State of Florida and fails to contain the requisite Certificate of Conformity pursuant to CPLR § 2309(c). Petitioner contends that where the Affidavit sworn out-of-state fails to be accompanied by a certificate of conformity, the Affidavit should not be considered by the court.

Petitioner also contends that respondent has failed to allege fraud sufficiently and with particularity to warrant a tolling of the statute of limitations. Petitioner states, "[i]n the event that this Honorable Court overlooks the fact that Respondent has failed to submit an Answer as required by CPLR as well as fact that Respondent has failed to submit a Certificate of Conformity as required by the CPLR, Respondent's demand for arbitration must permanently be stayed as it was not timely commenced within the required period of time as mandated by CPLR § 213. Petitioner claims that "much, if not all, of Respondent's 'evidence' submitted contemporaneously with the Affidavit in Opposition is not in admissible form and is clearly hearsay upon hearsay. This is particularly the case with regard to: the Respondent's hand-written notes and/or letters; the article on 'Sjögren's Syndrome'; the hand-written notes on

correspondences allegedly issued by STATE FARM; the wage calculations submitted by the Respondent; and the pay stubs submitted by the Respondent. Moreover, much of the information contained within the hand-written letters submitted by the Respondent contain hearsay statements that are presumably submitted for the truth of the matter asserted and are therefore not properly before this Court. Further, even though the Respondent has alleged a variety of different matters in the hand-written notes and letters submitted with the Affidavit in Opposition it is noted that much of the information contained on the hand-written letters and notes is conspicuously absent from the Affidavit in Opposition.”

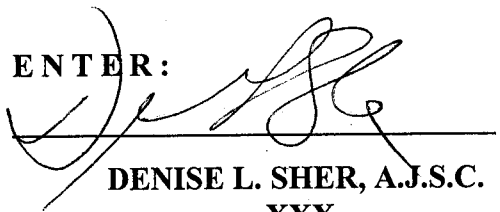
Petitioner adds that respondent fails to allege how there was fraud, what the fraud was or when she first discovered the fraud. Petitioner states, “[b]y Respondent’s own admission, the alleged ‘fraud’ was that STATE FARM did not properly calculate her loss wage rate for which she was reimbursed....Assuming *arguendo* that Respondent is correct that STATE FARM improperly calculated her wage rate, it goes without saying that same is not tantamount to fraud....By Respondent’s own admission there was a dispute as to the wage calculation on April 13, 1994....As such, if Respondent believed that there was ‘fraud’ it was uncovered in April of 1994. It is clear for (*sic*) the materials submitted by Respondent that she took issue with the handling of her No-Fault lost wage claim as far back as 1994. Respondent was legally required to commence an action or initiate arbitration by 2000 - the Respondent waited more than a decade beyond the applicable statute of limitations to initiate her request for arbitration.”

As has been noted above, respondent elected to proceed *pro se* in the instant matter. When an individual elects to proceed *pro se* one does so at one’s own peril, not being as well versed with the law as an admitted attorney. Consequently, as argued by petitioner, the *pro se* respondent failed to timely interpose an Answer to the Petition. The Affidavit in Opposition

submitted by respondent failed to address each allegation contained in the Verified Petition as is required in an Answer. Additionally, respondent's out-of-state Affidavit is not properly before this Court as it was executed in the State of Florida and fails to contain the requisite Certificate of Conformity pursuant to CPLR § 2309(c). Finally, respondent has failed to allege fraud sufficiently and with particularity to warrant a tolling of the statute of limitations. Accordingly, respondent's demand for arbitration was not timely commenced within the required period of time as mandated by CPLR § 213. Respondent fails to allege how there was fraud, what the fraud was or when she first discovered the fraud.

Based upon the above, petitioner's application, pursuant to CPLR § 7503, for an order permanently staying the demand for arbitration made by respondent based upon the expiration of the applicable statute of limitations is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER: 
DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
December 23, 2011

ENTERED
DEC 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE