

Matter of Government Empl. Ins. Co. v Schusheim
2012 NY Slip Op 31185(U)
April 17, 2012
Sup Ct, Nassau County
Docket Number: 1622/10
Judge: Roy S. Mahon
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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

**In the Matter of the Application of GOVERNMENT
EMPLOYEES INSURANCE COMPANY,**

Petitioner,

- against -

CHERYL SCHUSSHEIM,

Respondent.

TRIAL/IAS PART 5

INDEX NO. 1622/10

**MOTION SEQUENCE
NO. 3 & 4**

**MOTION SUBMISSION
DATE: February 6, 2012**

The following papers read on this motion:

- | | |
|----------------------------------|-----------|
| Notice of Motion | XX |
| Affirmation in Opposition | X |
| Opposition | X |
| Reply Affirmation | X |
| Reply Affidavit | X |
| Sur Reply Affirmation | X |
| Sur Reply Affidavit | X |

Upon the foregoing papers, the motion by the Petitioner for an Order pursuant to CPLR §7503(c) permanently staying the arbitration demanded by Cheryl Schussheim due to the failure of Cheryl Schussheim to comply with Court ordered discovery and an order awarding the Petitioner costs and sanctions from the Respondents due to her deliberate and intentional violation of Judge Palmieri's order/judgment and the motion by the Respondent for an Order to renew Geico's petition for failure to disclose and concealing from Cheryl Schussheim and the Court pertinent information it had in its possession, and for a motion to reargue pursuant to CPLR 2221(d) vacating the decision and order of June 20, 2011 vacating any Judgment if one shall be signed and restoring this matter to the calendar for an Order to be entered on what if any medical authorizations are relevant, and lifting all stays, both temporary and permanent to arbitration, are both determined as hereinafter provided:

The Court initially observes that this proceeding was assigned to this Court upon the retirement of Justice Ute Wolff Lally.

The Court additionally notes that by Order dated November 29, 2011 Justice Lally set forth:

"Upon the foregoing papers, it is ordered that this motion by respondent for an Order pursuant to CPLR 2221 granting leave to renew and/or reargue the application for a permanent stay of arbitration submitted on April 21, 2011 which resulted in the order of this Court dated June 20, 2011 granting a permanent stay of arbitration and a judgment based thereon dated the 1st day of August, 2011 is granted and upon renewal and reargument the Order dated June 20, 2011 and the Order and Judgment dated the 1st day of August, 2011 are vacated, in the interest of justice.

The Court reviewed the entire record of two proceedings brought by petitioner GEICO, the first under Index Number 57/2009 and the second under Index No. 1622/2010 which ultimately resulted in the prior order and judgment of this Court.

This is a matter that has been handled at one time or another by multiple Justices of this Court, who rendered partial determinations of various issues but in some cases recused and in other relinquished the handling of these matters due to a change in assignment in mid stream which appears to have caused a great deal of confusion and may have resulted in a determination which is inequitable based upon an incomplete record and the aforementioned confusion.

What this matter requires is an assignment to a new Justice of this Court, with a fresh set of eyes to determine fairly and completely all of the issues presented by the parties.

Under different circumstances (the undersigned Justice retiring at the end of this year) this Court would have no trouble trying to save the broth that too many chefs have touched. Based upon the circumstances extant the Court will vacate its order and judgment and direct that this matter be reassigned to a new Justice for all purposes to determine whether a stay of arbitration should issue, whether the Court should hold an In Camera inspection of all the respondent's medical records, whether all discovery has been provided and determine any and all other issues which may be raised therein."

In this regard, the June 20, 2011 Order of Justice Lally stated:

"Upon the foregoing papers, it is ordered that this application by the petitioner Government Employees Insurance Company, renewing the original application for a permanent stay of arbitration pursuant to CPLR 7503(c), due to the failure of respondent Cheryl Schussheim to comply with Court-ordered discovery, is granted.

Pursuant to the prior order of this Court (Palmeri, J.) dated October 27, 2010, a temporary stay of arbitration in favor of petitioner was granted directing the respondent to submit to an examination Under Oath and a physician examination, and to produce authorizations for all relevant medical providers and hospital records. The order also provided that the court retained jurisdiction over this matter for purposes of supervising discovery between the parties before proceeding to arbitration. Although the respondent has

complied with the Court's first two directives to submit to both an Examination Under Oath and a physical examination, the respondent has refused to produce authorizations for all relevant medical providers and hospital records. By a letter dated September 24, 2010, petitioner requested eighteen authorizations. At a conference on the record held before Justice Jeffrey S. Brown of this Court on January 19, 2011, said request was found to be "certainly relevant". Respondent, however, has refused to execute the authorizations.

Therefore, so much of this application which seeks renewal of the original application for a permanent stay of arbitration, is granted. Petitioner's request for an order awarding the petitioner costs of the petition and sanctions is denied."

The October 27, 2010 Order and Judgment of Justice Daniel Palmeri set forth:

"A Notice of Petition having been duly made by GOVERNMENT EMPLOYEES INSURANCE CO, ("GEICO"), for an Order granting a permanent stay of arbitration and said Petition having duly come to be heard on the 14th day of March, 2010.

Now, upon reading and filing the Notice of Petition, dated January 22, 2012 and the Petition to Stay Arbitration of Joseph Candela Esq. dated January 22, 2010 and exhibits in support of said Petition on behalf of GEICO, the Notice of Cross Motion and Affirmation in Opposition of CHERYL SCHUSSHEIM dated February 11, 2012 and exhibits annexed thereto, and the Reply Affirmation of Joseph Candela Esq. dated February 16, 2010 and upon the Respondent's Reply Affirmation of CHERYL SCHUSSHEIM dated March 2, 2010 and upon the Order of Justice Ute Wolff Lally dated May 10, 2010, setting this matter down for a hearing on the issues of whether GEICO properly disclaimed for late notice of the SUM claim and whether GEICO is entitled to pre-arbitration discovery before proceeding to arbitration and upon the framed issue hearing held before Justice Daniel R. Palmieri on the 25th day of August, 2010, and due deliberation having been had therein, and upon the decision of the Court following the hearing on August 25, 2010 and correspondence from respondent stating that no lost wage claim in made, it is

ORDERED AND ADJUDGED that a permanent stay of arbitration is denied, and it is further,

ORDERED that a temporary stay of arbitration is granted and that the Court shall retain jurisdiction for purpose of supervising discovery between the parties before proceeding to arbitration, namely, Examination Under Oath, physical examination and the production of authorizations for all relevant medical providers and hospital records, and that discovery will proceed in a reasonable manner, it is further

ORDERED that this matter will proceed to arbitration after all reasonable discovery has been completed, and it is further,

ORDERED that a copy of this Order/Judgment shall be served on all parties with Notice of Entry."

The Court observes that the November 29, 2011 Order of Justice Lally vacated that Court's June 20, 2011 Order. As such, to the extent that the Respondent's instant application seeks an Order vacating said June 20, 2011 Order, said application is **denied as moot**.

The Petitioner's application which was submitted to Justice Lally and resulted in the now vacated June 20, 2012 Order sought the Petitioner's requested relief (*supra*) based upon the alleged failure of the Respondent to provide certain authorizations for records for relevant medical providers and hospital records pursuant to the October 27, 2010 Order of Justice Palmieri (*supra*). In substance, the Petitioner maintains that the Respondent's claim for certain no-fault benefits arising out of an incident/accident that occurred on November 24, 2004 allegedly involving injuries to the Respondent's left knee; left foot; right foot; lower back and right shoulder involve injuries to the same body parts that were involved in three prior accidents of the Respondent respectively on April 11, 2001; September 8, 2003 and July 26, 2004 as determined by an ISO search. In this regard, the Petitioner by letter dated September 24, 2010 forwarded a request for 18 authorizations. The Petitioner maintains that the medical records for the prior three accidents are relevant pursuant to the October 27, 2010 Order of Justice Palmieri and that the failure of the Respondent to provide the requested authorizations warrant the requested relief of a permanent stay of the no-fault arbitration.

The Respondent in opposition maintains that to the extent that the Respondent was involved in the three prior accidents of April 11, 2001; September 8, 2003 and July 26, 2004 that said accidents involved injuries to different areas of the body and that any treatment received by the Respondent is not germane to the medical treatment for the accident of November 14, 2004 and is therefore not relevant treatment by a medical provider as set forth in the October 27, 2010 Order of Justice Palmieri. In support of this contention, the Respondent in opposition to the Petitioner's requested relief submits certain records/documents that are not bound for an in-camera review. Said submission is denominated by tab as Exhibits B1; B2; B3; B4; D1 and D2. The Court observes that from a review of the respective submissions and the various prior Orders that this in-camera review was undertaken by at least two prior Court's prior to submission to this Court. In this regard, although the Respondent references an Exhibit C, there was no tab C in the records/documents submitted to this Court for in-camera review. There were, however, 5 documents that appeared to this Court to relate by date to the Respondent's September 8, 2003 accident. To insure that said records/documents were the Respondent's Exhibit C, the Respondent met with the Court's Chief Clerk to review the documents and to review the in-camera submission on April 10, 2012 in the absence of the Court. The Respondent identified the 5 documents as Exhibit C and the Chief Clerk returned the in-camera records to this Court.

Upon in-camera review, the following determinations are made:

Exhibit B1 contains notes relative to the Respondent's April 11, 2001 accident but does not delineate by letterhead or name who made the entries in the notes.

Exhibit B2 contains a two page report of a radiology group an MRI of the Respondent.

Exhibit B2 (con't) contains certain filling claim forms of a physician and medical group involving treatment for the hip and thigh; lumbar disc displacement.

Exhibit B3 contains certain therapy records of a physical therapy group regarding treatment for lower back pain; lumbar sacral pain.

Exhibit B4 contains billing charges of a health care provider group.

Exhibit B4 (con't) contains certain physical therapy progress notes that are not captioned relative to pain and restriction of motion in the lumbar sacral area.

Exhibit B4 (con't) contains certain billing claim forms of a physician and a prescription from said physician

Exhibit B4 (con't) contains certain invoice claim forms of a message therapist, involving the Respondent's Lumbar radiculopathy/low back HNP.

Exhibit B4 (con't) contains certain billing claim forms of physician; a prescription from said physician.

Exhibit B4 (con't) contains certain billing claim forms and invoices of a physician.

Exhibit B4 (con't) contains certain No Fault Insurance Denial of Claim Forms relative to a message therapist; physician, physician medical group; health care provider/physical therapist.

Exhibit B4 (con't) contains an IME Request form of health care provider.

Exhibit B4 (con't) contains certain billing forms of a health care provider.

Exhibit B4 (con't) contains certain billing forms of a message therapist.

Exhibit B4 (con't) contains a health insurance claim form of a physician.

Exhibit B4 (con't) contains certain uncaptioned daily physical note records.

Exhibit B4 (con't) contains correspondence dated October 18, 2001 from an attorney.

Exhibit B4 (con't) contains a no-fault insurance claim form.

Exhibit B4 (con't) contains certain no-fault claim forms from a health care provider group.

Exhibit B4 (con't) contains a health insurance claim form of a physician.

Exhibit B4 (con't) contains a May 24, 2001 letter of a hospital.

Exhibit B4 (con't) contains a health insurance claim of a physician.

Exhibit B4 (con't) contains a Hospital Emergency Dept. record.

Exhibit B4 (cont') contains certain correspondence from an Insurance Company.

Exhibit B4 contains a prescription of a physician.

Exhibit C contains certain New York Worker's Compensation Board billing forms.

Exhibit C (con't) contains certain physical therapy notes of a physical therapist/health care provider to visits in September 2003 with complaints of lower back pain.

Exhibit C (con't) contains a prescription of a physician, MD.

Exhibit D1 contains a June 13, 2005 report of a physician, MD.

Exhibit D2 contains a September 3, 2004 report of a radiological group of an MRI of the Respondent's left shoulder.

Other than those exhibits in Exhibit B4 involving the buttocks, a review of all of the foregoing establishes that the Respondent's three prior accidents of April 11, 2001; September 8, 2003 and July 26, 2004 involve injuries/treatment to the same body parts as those involved in the Respondent's November 24, 2004 accident. As such, the authorizations requested by the Petitioner in the Petitioner's September 24, 2010 correspondence are material and necessary to the facts in litigation (see, **Allen v Crowell-Collier Publishing Co.**, 21 NYS2d 403, 288 NYS2d 449). In the absence of the Respondent providing the requested authorization, the Petitioner's application for an Order pursuant to CPLR §7503(c) permanently staying the arbitration demanded by Cheryl Schussheim due to the failure of Cheryl Schussheim to comply with Court ordered discovery and an order awarding the Petitioner costs and sanctions from the Respondents due to her deliberate and intentional violation of Judge Palmieri's order/judgment and the motion by the Respondent for an Order to renew Geico's petition for failure to disclose and concealing from Cheryl Schussheim and the Court pertinent information it had in its possession, is **granted** to the extent that the Respondent shall provide in hand the requested authorizations as set forth in the Petitioner's September 24, 2010 correspondence within 45 days of this Order. In the event that the Respondent fails to provide said authorizations as directed heretofore, the Petitioner's application for an Order pursuant to CPLR §6503(c) permanently staying the arbitration in issue, is **granted** without further Order of the Court.

SO ORDERED.

DATED: 4/17/2012


..... J.S.C.

ENTERED
APR 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE