

American Transit Ins. Co. v Johnson

2013 NY Slip Op 30811(U)

April 8, 2013

Sup Ct, Suffolk County

Docket Number: 22744-2012

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 22744-2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 12-04-2012
 Motion Submit Date: 01-22-2013
 Motion Sequence No.: 001 MOTD

_____ X

**AMERICAN TRANSIT INSURANCE
 COMPANY,**

Plaintiffs,

-against-

**SAYQUAN JOHNSON, EXCEL IMAGING PC,
 FIVE BORO PSYCHOLOGICAL & LM SW
 SVC, PLLC, GENERAL MEDICAL SERVICES
 PC, OS ORTHO SERVICES INC., REBUD
 PHYSICAL THERAPY PC, RUBEN
 CHIROPRACTIC PC, SALUS ACUPUNCTURE
 PC, AND WELBA MEDICAL SVC PC,**

Defendants.

_____ X

ORDERED, Plaintiff, American Transit Insurance Company (“insurer”) moves, by Notice of Motion (motion sequence # 001) for an Order staying the arbitration demanded by two of the defendants herein, OS ORTHO SERVICES, INC (OS) and GENERAL MEDICAL SERVICES, INC, on the grounds that the insurer is not obligated to afford mandatory personal injury protection (“PIP”) benefits to Defendant, Sayquawn Johnson (“Johnson”), due to Johnson’s failure to comply with policy conditions, specifically by not submitting to medical examination by specific physicians selected by the insurer. General Medical Services, PC did not oppose the motion and such is granted against that Defendant without opposition. However, counsel for OS (as assignee of Johnson) did

oppose the motion on various grounds, including the assertion that Plaintiff had failed to comply with the provisions of CPLR § 7503.

This action by Plaintiff for Declaratory Relief, commenced on July 27, 2012, arises out of a motor vehicle accident that occurred on July 22, 2011, where Johnson was a passenger in a vehicle owned by the insured driver. Johnson applied for mandatory personal injury protection benefits under the insured's policy pursuant to **11 NYCRR §, 65-1.1**. According to Plaintiff, although Johnson was noticed for various IME's and chiropractic examinations in October and December 2011, he failed to appear for the same. Plaintiff asserts that it thereafter timely denied benefits to Johnson retroactive to the date of the accident. When OS, as assignee of Johnson, sought reimbursement from Plaintiff for such services under no fault coverage, Plaintiff denied their claim. OS served a demand for arbitration with the American Arbitration Association contesting the denial of its claim on or before June 12, 2012. Plaintiff moved to stay the arbitration by this motion on November 27, 2012 (returnable December 4, 2012).

Plaintiff argues that the conclusion of this Declaratory Judgment action will result in a determination that Plaintiff has no obligation to pay any bills to Johnson and his assignees, including OS, because Johnson breached a condition precedent to coverage. Plaintiff's automobile insurance policy provides, in pertinent part that:

Conditions

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require.

It is Plaintiff's assertion that under applicable appellate case law, retroactive denial of claims by an insurer is appropriate when the basis of the denial is due to the assignor's failure to appear for medical examinations, even in a case where the insurer initially denied such claims on the ground of lack of medical necessity. **See Unitrin Advantage Ins Co v Bayshore Physical Therapy, PLLC**, 82 AD 3d 559, 918 NYS 2d 473 (1st Dep't 2011). In addition, it asserts that failure to appear for IME's requested by the insurer when reasonably requested constitutes a breach of a condition precedent to coverage under the No-Fault policy. **See, Central Gen Hosp v Chubb**

Group Ins Co, 90 NY 2d 195, 659 NYS 2d 246, 681 NE 2d 413 (1997).

OS opposes the motion on the grounds that Plaintiff submitted an Answer to the Demand for Arbitration, expressly affirming its intention to defend the same on or about July 12, 2012; and yet, it then improperly made the current motion to stay the same approximately four months later. According to OS, a stay of arbitration is limited to a party who has not participated in the same, when it makes its stay application. CPLR § 7503(b); **See, Avon Products Inc v Solos**, 150 AD 2d 236, 541 NYS 2d 406 (1st Dep't 1989). In addition, OS argues that Plaintiff has failed to move to stay arbitration within the twenty (20) day time period mandated pursuant to CPLR § 7503(c).

In reply, Plaintiff states that it has not brought its current application under Article 75; but, rather, for a stay in the court's discretion under CPLR § 2201.

CPLR § 7503(c) requires that a party, once served with a demand for arbitration, must move to stay such arbitration within twenty (20) days from the service of the demand or otherwise be precluded from raising its objections. **Steck v State Farm Insurance company**, 89 NY 2d 1082, 659 NYS 2d 839, 681 NE 2d 1285 (1996). There is nothing contained within CPLR § 2201 which relieves a party of such obligation. Rather, as set forth by the Court of Appeals, any challenge to arbitration that raises the issue as to whether the terms of right arbitration have been complied with, is governed by CPLR § 7503 and poses “[a]n instance of the so-called threshold question under CPLR § 7503(c)”. **See, Aetna Life & Casualty Company v Stekardis**, 34 NY 2d 182, 356 NYS 2d 587, 313 NE 2d 53 (1974). Thus, the failure to move for a stay of arbitration within the statutory period will preclude objection to the arbitration, in most cases, after the expiration of the twenty (20) day period has expired. **See Matter of Fiveco, Inc v Haber**, 11 NY 3d 140, 863 NYS 2d 391, 893 NE 2d 807 (2008); **State Farm Mutual Automobile Insurance Company v Urban**, 78 AD 3d 1064, 9123 NYS 2d 586 (2d Dep't 2010).

In this case, the Plaintiff's basis for the Defendant OS's inability to arbitrate its dispute rests on the ground that the conditions precedent thereto have not been complied with by the assignor of OS. This is precisely the kind of claim that the Court of Appeals in **Steck supra**, set forth as covered by CPLR Article 75. Any application to stay arbitration of such claim is, therefore, subject

to the twenty day statute of limitations set forth in CPLR § 7503(c).

Accordingly, for the reasons set forth herein, Plaintiff's motion to stay arbitration of the OS claim is hereby denied, and the temporary stay issued by this Court, in order to review the parties' papers is hereby vacated.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 8, 2013
Riverhead, New York



EMILY PINES
J. S. C.

FINAL
 NON FINAL

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