

Interboro Ins. Co. v Boris Kleyman Physician P.C.

2013 NY Slip Op 31672(U)

July 23, 2013

Sup Ct, NY County

Docket Number: 152395/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART _____

Index Number : 152395/2013
INTERBORO INSURANCE COMPANY
vs
BORIS KLEYMAN PHYSICIAN P.C.
Sequence Number : 002
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/23/13

CK _____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

CYNTHIA S. KERN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
INTERBORO INSURANCE COMPANY,

Petitioner,

Index No. 152395/2013

-against-

DECISION/ORDER

BORIS KLEYMAN PHYSICIAN P.C., HILLSIDE
SURGICARE, INTEGRAL ASSIST MEDICAL P.C.,
LONGEVITY MEDICAL SUPPLY, INC., LOVE
CHIROPRACTIC, P.C., MEDCO TECH INC.,
PROGRESSIVE ORTHOPEDICS, PLLC and
STAND-UP MRI OF BENSONHURST, P.C.,

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action against defendants seeking a declaratory judgment that defendants are not entitled to no-fault coverage or reimbursement for their claims submitted on behalf of plaintiff's insured Violette Charles. Plaintiff now moves for an order granting the following relief: (a) pursuant to CPLR § 2201 and § 7503(c) staying the pending arbitrations between plaintiff and defendants Love Chiropractic, P.C. ("Love") and Progressive Orthopedics, PLLC ("Progressive") pending the resolution of the instant action; (b) pursuant to CPLR § 326 and § 327 further staying the arbitrations for purpose of removing the Arbitrations to this court;

(c) pursuant to CPLR § 602 consolidating the arbitrations with the instant matter; and (d) staying interest on the arbitration matters pending a determination on the instant motion. Defendants have cross-moved for an order pursuant to CPLR § 3211(a)(1) and (5) dismissing plaintiff's summons and complaint on the ground that the instant action violates their right to arbitrate the matter and awarding them attorney's fees or, in the alternative, an order pursuant to CPLR § 2004 granting defendants additional time to answer plaintiff's complaint. For the reasons set forth below, plaintiff's motion is denied and defendants' cross-motion is granted in part.

The relevant facts are as follows. On December 23, 2011, defendants' assignor Violette Charles was allegedly involved in an automobile accident wherein she sustained bodily injuries (the "Accident"). Thereafter, plaintiff sought treatment from the various defendants. As payment for said services, Ms. Charles assigned her right to collect first party no-fault benefits to the various defendants. According to plaintiff's complaint, plaintiff denied defendants' claims based upon their alleged failure to appear for duly scheduled Examinations Under Oath ("EUOs").

Prior to the commencement of this action, defendants Love and Progressive submitted their disputes regarding reimbursement of first-party no-fault benefits to arbitration before the New York No-Fault Conciliation Center of the American Arbitration Association (the "AAA"). Additionally, according to the affidavits submitted by defendants Klyeman, Hillside, Integral and Medco, they also seek to have their claims adjudicated by the AAA but have not yet submitted a notice to arbitrate.

Plaintiff now moves to stay the arbitration proceedings already initiated by Love and Progressive and to have those proceedings consolidated with this Supreme Court declaratory

judgment action. Defendants cross-move to dismiss the instant action on the ground that Insurance Law Section 5106 requires the insurer to afford first-party claimants the option to elect the arbitration forum and plaintiff cannot now seek to deny defendants that right by initiating a declaratory judgment action in the Supreme Court.

Pursuant to Insurance Law Section 5106(b), “[e]very insurer shall provide a claimant with the option of submitting any dispute involving the insurer’s liability to pay first party benefits . . . to arbitration.” Additionally, the No Fault Mandatory Personal Injury Protection Endorsement provides:

Arbitration. In the event any person making a claim for first-party benefits and the Company do not agree regarding any matter relating to the claim, such person shall have the option of submitting such disagreement to arbitration pursuant to procedures promulgated or approved by the Superintendent of Insurance. 11 N.Y.C.R.R. 65-1.1

It is well settled that these arbitration provisions were enacted to “reduce significantly the burden of automobile personal injury litigation on the courts” and “to offer a mechanism where disputes over reimbursable expenses can be resolved more swiftly and economically than is generally possible in plenary suits.” *Roggio v. Nationwide Mut. Ins. Co.*, 66 N.Y.2d 260, 264 (1985). However, arbitration is merely optional and a claimant may also seek to adjudicate their claims in court. Additionally, an insurer may bring a declaratory judgment action in court for an order declaring it has no duty to provide first-party no-fault benefits. *See Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dept 2011).

If arbitration has been initiated, a party may bring an application to stay an arbitration pursuant to CPLR § 7503 (b) “on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision

(b) of section 7502.” Additionally, “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case upon such terms as may be just.” CPLR § 2201.

In the present case, as an initial matter, plaintiff’s motion seeking to stay the arbitrations already commenced by Love and Progressive and remove and consolidate those proceedings with the instant action is denied as it has failed to demonstrate the conditions necessary to stay a properly initiated arbitration and remove the controversies to this court to be decided. It is undisputed that Love and Progressive had the right to seek arbitration to challenge plaintiff’s denial of their no-fault claims and that arbitration is not barred by any other limitation under CPLR § 7502 (b). Thus, plaintiff has failed to establish a proper ground pursuant to CPLR § 7503 (b) warranting a stay. Additionally, the court declines to exercise its discretion to issue a stay under CPLR § 2201 as plaintiff has failed to show why this court should stay a properly initiated arbitration. Plaintiff’s contention that it would be in the interest of judicial economy to have all disputes arising from the Accident heard in this proceeding is unavailing. Indeed, in the present case, there is no common question of fact that is determinative of each defendants’ right to collect no-fault benefits from plaintiff as plaintiff’s denial of defendants’ claims are based on each of the individual defendants’ failure to appear for their own EUOs and not the assignor Ms. Charles.

Additionally, the portion of defendants’ motion seeking to dismiss this action as to Love and Progressive is granted but is denied as to the remaining defendants on the ground that only Love and Progressive initiated arbitration prior to commencement of the instant action. As Love and Progressive have exercised their statutory right under the applicable no-fault insurance laws

to have their claims arbitrated by the AAA as opposed to adjudication in the courts, plaintiff's instant action to adjudicate the same claims must be dismissed. However, the fact that the remaining defendants Kleyman, Hillside, Integral and Medco want to bring their claims to arbitration in the future is not sufficient to dismiss a properly initialed declaratory judgment action and these defendants provide no other grounds warranting dismissal. Thus, as Kleyman, Hillside, Integral and Medco do not currently have pending arbitrations against plaintiff, dismissal is not warranted and the dispute between them and plaintiff can be decided by this court.

The court now turns to the remainder of defendants' cross-motion seeking attorney's fees. "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004). However, in *U.S. Underwriters*, the Court of Appeals recognized a limited exception to the general rule and held that "an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured." *Id.* The reasoning behind the Court's decision was that the award of attorneys' fees was incidental to the insurer's contractual duty to defend. *Id.*

In the present case, the *U.S. Underwriters* limited exception is inapplicable as this is not a declaratory judgment action regarding an insurance company's duty to defend or indemnify. On the contrary, this is a declaratory judgment action regarding first-party no-fault benefits.

Finally, the portion of defendants' cross-motion seeking to extend their time to answer is

academic as filing of a pre-answer motion to dismiss tolls the time to file an answer as a matter of law. Pursuant to CPLR § 3211 (f), “[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.” Accordingly, defendants have ten days after service of notice of entry of this order to file an answer to plaintiff’s complaint.

Based on the foregoing, plaintiff’s motion is denied and defendants’ cross- motion is granted to the extent that this action is hereby dismissed as to Love and Progressive. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 7/23/13

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.