

**Government Empls. Ins. Co. v Avanguard Med.
Group PLLC**

2013 NY Slip Op 33849(U)

January 24, 2013

Supreme Court, Nassau County

Docket Number: 16313/11

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

GOVERNMENT EMPLOYEES INSURANCE CO.,
GEICO INDEMNITY CO., GEICO GENERAL
INSURANCE CO. and GEICO CASUALTY CO.,

TRIAL/IAS PART 33
NASSAU COUNTY

Plaintiffs,

Index No.: 16313/11
Motion Seq. No.: 02
Motion Date: 10/30/12

- against -

AVANGUARD MEDICAL GROUP PLLC,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
<u>Order to Show Cause, Affidavit and Exhibits and Memorandum of Law</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>

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

Plaintiffs move, pursuant to CPLR § 3212, for an order granting them summary judgment and declaring that defendant is not entitled to reimbursement under the No-Fault law for "facility fees" under auto policies issued by plaintiffs to third-parties because there is no statutory basis for reimbursement of such fees to defendant in the No-Fault statute and applicable regulations. Defendant opposes the motion.

On May 31, 2012, this Court rendered an Amended Decision and Order with respect to the instant action in which plaintiffs' prior motion (Seq. No. 01), made pursuant to CPLR § 2201, for an order staying all pending actions, arbitrations and proceedings commenced by the

defendant as against plaintiffs wherein defendant seeks to recover No-Fault benefits for facility fees and, made pursuant to CPLR § § 6301 and 6311, for a order enjoining defendant from commencing any new actions, arbitrations or proceedings against plaintiffs seeking reimbursement for facility fees pending resolution of this within action was denied. *See* Plaintiff's Affidavit in Support Exhibit E. In said Amended Decision and Order, the Court set forth a detailed analysis of the facts as they pertain to the instant matter and applicable law at issue in the case.

In their Verified Complaint, plaintiffs assert two causes of action. The First Cause of Action is for a declaratory judgment stating that plaintiffs are not obligated to compensate an Office Based Surgical Facility (as established and defined pursuant to Public Health Law § 230-d) for claims submitted in accordance with the New York State No-Fault rules and regulations. The Second Cause of Action is for an injunction preventing defendant from moving forward with outstanding plenary actions or arbitrations to recover submitted No-Fault claims and preventing defendant from submitting any additional claims for reimbursement of No-Fault benefits. *See* Plaintiff's Affidavit in Support Exhibit C.

Having already denied plaintiffs' prior motion for injunctive relief (Seq. No. 01), the Court now finds that plaintiffs have not established the even higher burden of summary judgment. It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept.

1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985). Plaintiffs have failed to meet this burden.

Additionally, as defendant argues, "there has been absolutely no material change in the law or facts in this matter since plaintiff filed its motion for injunctive relief...." *See* Defendant's Affirmation in Opposition ¶ 2.

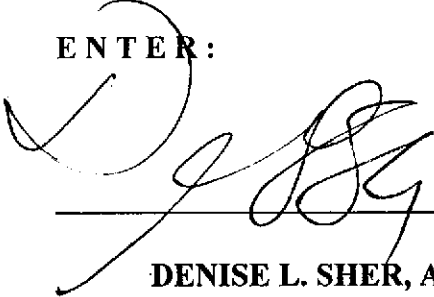
Furthermore, the Court notes that, in the instant motion, plaintiffs contend that "the Court erred when it concluded in the context of GEICO's motion for a stay that an Office Based Surgery ('OBS') Facility is entitled to reimbursement for facility fees because the No-Fault laws do not state that OBS Facilities are *not* entitled to such reimbursement when the statute and its implementing regulations do not specifically authorize such reimbursement." However, plaintiffs' current motion before the Court is not one for re-argument, but rather for summary judgment on the same issues that were decided by the Court in its May 31, 2012 Amended Decision and Order. *See* Plaintiff's Affidavit in Support Exhibit E.

Based upon this Court's prior ruling in its May 31, 2012 Amended Decision and Order, as well as the facts and legal arguments presented in the instant motion, the Court finds that plaintiffs failed to make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. Accordingly, plaintiffs' instant motion, pursuant to CPLR § 3212, for an order granting them summary

judgment and declaring that defendant is not entitled to reimbursement under the No-Fault law for "facility fees" under auto policies issued by plaintiffs to third-parties because there is no statutory basis for reimbursement of such fees to defendant in the No-Fault statute and applicable regulations is hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 33, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on February 19, 2013, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 24, 2013

ENTERED
JAN 29 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE