

Hernandez v Kalpakis
2013 NY Slip Op 34153(U)
December 23, 2013
Supreme Court, Nassau County
Docket Number: 601505/13
Judge: Robert A. Bruno
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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU****PRESENT: HON. ROBERT A. BRUNO, J.S.C.**
-----X**JOSE M. HERNANDEZ,**

Plaintiff,

TRIAL/IAS PART 20
INDEX No.: 601505/13
Motion Date: 10/30/13
Motion Sequence: 001

-against-

DECISION & ORDER**JAMES G. KALPAKIS and GOVERNMENT
EMPLOYEES INSURANCE COMPANY,**Defendants.
-----X**Papers Numbered***Sequence #001*

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Motion by defendants, James G. Kalpakis ("Kalpakis") and Government Employees Insurance Company ("GEICO"), for an Order, pursuant to CPLR §3211(a)(2), (3) and (7), dismissing the plaintiff's claims against defendant GEICO together with the plaintiff's claims for exemplary damages against both Kalpakis and GEICO, is granted in its entirety.

Insofar as a motion made pursuant to CPLR §3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows:

On October 13, 2012, the defendant James Kalpakis' motor vehicle came into contact with the plaintiff while he was riding his bicycle. The accident occurred on a sidewalk in front of 2419 Hempstead Turnpike, Hempstead, New York as the defendant was exiting a parking lot. As a result of said accident, the plaintiff was injured and received medical treatment and incurred

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medical expenses. The plaintiff also sustained loss of income and earnings due to his inability to work and/or work full time.

At the time of this accident, the defendant's vehicle was insured by the defendant GEICO under Policy Number 4234855163. A claim (Claim Number 042-326449-0101-020) was made by the plaintiff for no-fault benefits from the defendant GEICO under said policy.

According to the complaint, "the plaintiff...and/or his assignees" submitted claims pursuant to the New York State No-Fault Law, of the payment of his bills and benefits, as well as of his lost wages and benefits to the defendant GEICO (Complaint, ¶¶23-24). According to the plaintiff, "[s]aid losses are continuing and are covered up to the policy limit of \$50,000 less amounts previously paid" (Complaint, ¶25). Plaintiff alleges that the "[c]laims submitted or ongoing have been ignored and all claims remain unpaid to date and have been improperly denied" (Complaint, ¶26).

Ultimately, plaintiff seeks a judgment including "both compensatory and exemplary [damages] against the defendants" in each of his three causes of action for personal injuries, property damage, and lost wages/benefits.

In support of the instant motion, the defendants submit, *inter alia*, copies of some of the assignment of rights forms signed by the plaintiff each of which indicates that the plaintiff assigned to each provider "all rights, privileges and remedies to payment for healthcare services provided by the assignee" (*Motion*, Ex. D).

Pursuant to CPLR §3211(a)(3) and (7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...(3) the party asserting the cause of action has not legal capacity to sue... or (7) the pleading fails to state a cause of action..."

Initially, it is noted that standing and capacity to sue are related, but distinguishable legal concepts. Capacity requires an inquiry into the litigant's status, i.e., its "power to appear and bring its grievance before the court", while standing requires an inquiry into whether the litigant has "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue" (*Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 AD3d 239, 242 [2nd Dept. 2007] [internal citations omitted]). Both concepts can result in dismissal on a pre answer motion by the defendant and are waived if not raised in a timely manner (*Id.*).

No Fault Regulations contemplate payment directly to an Eligible Injured Person ("EIP") or his/her legal representative, unless said individual has executed an assignment, in which case payment shall be made directly to providers of health care services (Insurance Department Regulations [11 NYCRR] § 65-3.11[a]). In the absence of an assignment, a claim submitted by a

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health care provider must be deemed to have been submitted on behalf of the individual who has the right to be paid under the no-fault regulations. An insurer seeking dismissal pursuant to CPLR 3211(a)(7), on the ground that the claim has been assigned by the plaintiff EIP to a provider, bears the burden of demonstrating that there was an assignment from the EIP to a health care provider.

In this case, the defendant insurer has proffered documents that, it claims, demonstrate that plaintiff assigned his claims under the no-fault regulations to OrthoPro Services, Inc.; J. Rockman LAC, LMT; Vanguard Medical Imaging, P.C.; Professional Medical Healthcare Service; Branch Medical P.C.; Michael A. Bernstein, DC, PC; Goodman; and, Dr. Mehul R. Shah.

In opposition, counsel for the plaintiff failed to address the issue that the plaintiff lacks the capacity to sue GEICO on the basis of the assignments.

It is well settled that the assignee of a cause of action has the right to sue for its enforcement free from any control or interference of the assignor (*Gleason v. Northwestern Mut. Life Ins. Co.*, 203 NY 507 [1911]). Ordinarily, the assignee is the real party in interest who alone can bring suit (*Wagner v. Braunsberg*, 5 AD2d 564 [1st Dept. 1958]). That is, the assignor generally has no right to sue and it is only in cases where the assignor retains some protectable interest in the subject of the assignment and the assignee refuses or neglects to bring suit to recover the claim, that the assignor is permitted to bring an action (*Foster v. Central Nat. Bank*, 183 NY 379 [1906]). However, even under those circumstances, such an action would be a derivative and the recovery will be in favor of the assignee to the extent of the assignee's interest (*Id.*).

The record demonstrates that the plaintiff assigned his rights to receive reimbursement for no-fault medical benefits to each of the various providers (*Suraleb, Inc. v. International Trade Club, Inc.*, 13 AD3d 612, 612 [2nd Dept. 2004]), and, since there is no evidence herein that the plaintiff retained any interest in the subject of the assignment of his no-fault benefits, this Court finds that plaintiff's causes of action seeking reimbursement of said medical expenses are dismissed under CPLR §3211(a)(7). The defendants have demonstrated that the plaintiff, having assigned his rights, may no longer submit any claims on his behalf or seek reimbursement of medical expenses from GEICO. The plaintiff does not have the requisite standing to assert said claims (*Lopes v. Liberty Mut. Ins. Co.*, 24 Misc.3d 127(A) [App. Term 2nd, 11th and 13th Judicial Districts 2009]).

Accordingly, the plaintiff's complaint against GEICO is dismissed in its entirety.

Turning to defendants motion seeking dismissal of plaintiff's claim for exemplary damages against Kalpakis and GEICO, said application is also granted.

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Punitive damages are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives (*Felton v. Tourtoulis*, 87 AD3d 983, 984 [2nd Dept. 2011]; *Aronis v. TLC Vision Ctrs., Inc.*, 49 AD3d 576, 577 [2nd Dept. 2008]).

Here, it remains unclear from the allegations of the complaint as to the basis of plaintiff's application for punitive damages against defendant Kalpakis. However, in his affirmation in opposition, counsel for the plaintiff submits that "defendant... has failed to establish that his actions did not rise to a level where gross negligence existed and punitive damages may be awarded" (Aff. In Opp., p.1). It appears that the plaintiff seeks an award of punitive damages based upon his allegation that defendant may have been grossly negligent in the happening of the accident (*Id.*).

To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another (*Swersky v. Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept. 1996]). The complaint at bar fails to advance any allegations supporting an entitlement to the recovery of punitive damages from the defendant Kalpakis.

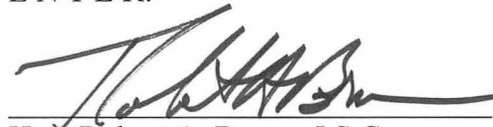
Accordingly, the defendants' application to dismiss the plaintiff's claim for punitive and exemplary damages is herewith granted.

All applications not specifically addressed are herewith denied.

This shall constitute the decision and order of this Court.

Dated: December 23, 2013
 Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

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**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**