

Unitrin Advantage Ins. Co. v Dowd

2014 NY Slip Op 32587(U)

October 2, 2014

Supreme Court, New York County

Docket Number: 160411/2013

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

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UNITRIN ADVANTAGE INSURANCE COMPANY,

Index No. 160411/2013

Plaintiff,

-against-

DECISION/ORDER

ANDREW J. DOWD, M.D.,

Defendant.

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HON. CYNTHIA 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>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action pursuant to Insurance Law § 5106(c) seeking a *de novo* review of the no-fault insurance dispute at issue between the parties. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment and declaring that it has no obligation to pay the no-fault claims submitted by defendant in connection with the injuries sustained by defendant’s assignor in connection with a motor vehicle accident that occurred on December 27, 2011. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. On or about December 27, 2011, defendant’s assignor Steven Sanders (“Sanders”) was allegedly involved in a motor vehicle accident wherein he sustained injuries. Subsequent to the accident, plaintiff allegedly sought treatment from

defendant for these injuries and defendant submitted claims to plaintiff Unitrin Advantage Insurance Company (“Unitrin”) for no-fault benefits. Specifically, on April 2, 2011, Unitrin received from defendant a bill for \$6,083.30 for medical services allegedly rendered to Sanders on March 15, 2012. Thereafter, in accordance with its rights under the no-fault regulations, Unitrin sought verification of defendant’s claims by requesting that he attend an EUO. Defendant failed to appear for an EUO on two occasions. Thus, on or about June 5, 2012, Unitrin denied defendant’s claim for no-fault benefits based on lack of medical necessity and failure to appear for two duly scheduled EUOs.

On or about August 22, 2012, Unitrin commenced a declaratory judgment action against a number of medical providers, including defendant herein, seeking a declaration that it had no duty to provide no-fault benefits arising from the December 27, 2011 accident on the ground that the providers failed to appear for two duly scheduled EUOs (the “DJ Action”). On or about February 18, 2014, the Honorable Shlomo S. Hagler, granted Unitrin’s motion for a default judgment against all defendants, including defendant herein, on the ground that defendants failed to answer or otherwise move and the time to do so had expired.

On or about November 6, 2012, while the DJ Action was pending, defendant commenced arbitration against plaintiff to recover the unpaid no-fault claims. In a decision dated June 14, 2013, the arbitrator found in favor of defendant and against plaintiff and awarded defendant \$6,083.30. In finding for the defendant, the arbitrator chose to follow Second Department case law, as opposed to First Department, and found that under *Weichester Med. Ctr. v. Lincoln General Ins. Co.*, 60 A.D.3d 1045 (2nd Dept 2009), Unitrin had failed to establish that it had timely noticed defendant for an EUO. On or about September 18, 2013, the Master Arbitrator

affirmed the June 14, 2013 arbitration decision.

On or about December 16, 2013, plaintiff commenced the instant action pursuant to Insurance Law § 5106(c) seeking *de novo* adjudication of the no-fault dispute. Plaintiff now moves for summary judgment upon the doctrine of res judicata and collateral estoppel.

The doctrine of res judicata “provides that as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.” *Singleton Mgt. v. Compere*, 243 A.D.2d 213, 215 (1st Dept 1998). This doctrine is applied “when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first.” *Id.* Collateral estoppel involves issue preclusion rather than claim preclusion and it is based on the principle that a party should not be able to relitigate an issue which was previously decided against it. *Id.* For collateral estoppel to be invoked, the identical issue must have been decided in the prior action and be decisive in the present action and the party to be precluded must have had a full and fair opportunity to contest the prior determination. *Id.* at 215-216. If these requirements are met, there is no need, as there is with res judicata, that the cause of action sought to be barred is substantially identical to the one decided in the prior action or that the party seeking to invoke the doctrine have had any connection to the prior action. *Id.* The proper doctrine to be applied is collateral estoppel rather than res judicata where the prior disposition was not made in the course of litigation between the same parties but in prior litigation between one of the parties and a third party. *See Malloy v. Trembley*, 50 N.Y.2d 46 (1980).

