

Permanent Gen. Assur. Co. v Thomas

2016 NY Slip Op 30631(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 155652/15

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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PERMANENT GENERAL ASSURANCE
COMPANY,

Plaintiff,

Index No. 155652/15

-against-

DECISION/ORDER

DARYL THOMAS, ABBOTT ANESTHESIOLOGISTS
ASSOCIATES, P.C. a/k/a ABBOTT ANESTHESIA
ASSOCIATES, P.C., AMHERST MEDICAL SUPPLY
LLC, BRAIN & SPINE MEDICAL SERVICES, PLLC,
BUFFALO DIAGNOSTIC IMAGINE, PLLC,
BUFFALO NEUROSURGERY, P.C. a/k/a BUFFALO
NEUROSURGERY GROUP, EASTERN GREAT
LAKES PATHOLOGY, P.C., ELITE MEDICAL
SUPPLY OF NEW YORK, LLC a/k/a ELITE MEDICAL
SUPPLY, GEORGE B. MOORE, M.D., LIFELINE
MONITORING SERVICES, LLC, LOUBERT S.
SUDDABY, M.D., P.C., MERCY HOSPITAL OF
BUFFALO, NEW YORK SPINE & WELLNESS
CENTER a/k/a NEW YORK SPINE & WELLNESS,
NORTHTOWN IMAGING, P.C., NORTHTOWN
ORTHOPEDICS, P.C., PINNACLE ORTHOPEDIC &
SPINE SPECIALISTS, LLC, SCOTT A. CROCE, D.C.,
P.C., SRA MEDICAL IMAGING LLC, WESTERN
NEW YORK MRI LLP, WESTERN NEW YORK
PETCT LLC f/k/a WNY PETCT LLC, JERRY J.
TRACY III, PHYSICIAN PLLC,

Defendants,

-----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:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Reply Affidavits.....	3
Exhibits.....	4

Plaintiff Permanent General Assurance Company commenced the instant action seeking a

declaratory judgment as to its obligation to pay any claims submitted by defendant medical providers based on defendant Darryl Thomas' ("Thomas") failure to appear for two duly scheduled Independent Medical Examinations ("IMEs"). Plaintiff now moves for an Order pursuant to CPLR § 2221(d) granting it leave to reargue this court's decision dismissing the action against certain defendants (the "moving defendants") and compelling arbitration and upon reargument, allowing the instant action to move forward as against the moving defendants. For the reasons set forth below, reargument is granted and upon reargument, this court reverses its prior determination and finds that the instant action should not be dismissed as against the moving defendants.

The relevant facts are as follows. On or about October 18, 2011, defendant Thomas was involved in a motor vehicle accident and as a result of said accident, Thomas became an eligible injured person ("EIP") under the PIP endorsement of an insurance policy issued by plaintiff (the "Policy"). The Policy contains the following arbitration provision as required by New York Insurance Law § 5106(b) and the New York Insurance Regulations, 11 NYCRR 65-1.1:

Arbitration. In the event any person making a claim for first-party benefits and [plaintiff] 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.

Thomas allegedly suffered injuries as a consequence of the accident and received medical treatment for said injuries from defendant medical providers. Thereafter, Thomas assigned his benefits under the Policy to the medical providers who then submitted claims for no-fault benefits to plaintiff for the services provided to Thomas.

Plaintiff did not pay the claims submitted by the medical providers and instead commenced the instant action seeking a declaratory judgment that it has no obligation to pay defendants' claims

on the ground that there was a breach of a condition precedent to coverage in the Policy based on Thomas' failure to appear at two duly scheduled IMEs. Thereafter, defendants Scott A. Croce, D.C., P.C. and Jerry J. Tracy III, Physician PLLC, Mercy Hospital of Buffalo, Brain & Spine Medical Services and Loubert S. Suddaby, M.D., P.C. moved for an Order compelling arbitration and dismissing the instant action. In a decision dated January 13, 2016, this court granted defendants' motions to dismiss the action as against them and compelled arbitration based on the arbitration provision in the Policy. Plaintiff now moves for an Order granting it leave to reargue this court's decision and upon reargument, allowing the instant action to go forward as against the moving defendants.

As an initial matter, any assertion by the moving defendants that the motion to reargue should be denied on the grounds that it is untimely or that plaintiff has not sufficiently specified in its moving papers that it is moving for reargument is denied as the court finds the instant motion to be timely and to be one for leave to reargue pursuant to CPLR § 2221(d).

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. *See* CPLR 2221(d)(2). In the instant action, plaintiff's motion for leave to reargue is granted as plaintiff has sufficiently alleged that this court overlooked matters of fact and law. Specifically, plaintiff asserts that this court erred when it dismissed the action as against the moving defendants because plaintiff may maintain this declaratory judgment action despite the fact that the moving defendants seek to arbitrate their disputes with plaintiff.

Further, upon reargument, this court reverses its prior determination, and finds that the instant action should not be dismissed as against the moving defendants. Pursuant to New York Insurance Law § 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." However, despite a medical provider's statutory right to submit its dispute to arbitration, an insurer has the right to bring a declaratory judgment action in court for an order declaring that 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). Indeed, "although the claimant has the option of submitting a no fault dispute to arbitration, declaratory judgment may be an appropriate vehicle for settling disputes concerning no fault benefits." *AIU Ins. Co. v. Deajess Medical Imaging, P.C.*, 882 24 Misc.3d 161, 165 (Sup. Ct. Nassau County 2009). "While a court may dismiss a declaratory judgment action in a proper exercise of discretion, the mere existence of other adequate remedies does not mandate dismissal." *St. Paul Travelers Ins. Co. v. Nandi*, 15 Misc.3d 1145 *5 (Sup. Ct. Queens County 2007).

Here, the court finds that it erred in dismissing this properly initiated declaratory judgment action as against the moving defendants. Initially, this court can provide greater relief than is available to plaintiff in the underlying arbitrations. While the moving defendants were within their rights to submit their disputes to arbitration, and it has been made clear to the court that some of them have already done so, those arbitration proceedings only concern the specific claims submitted to arbitration by the individual provider defendants and any holding would be constrained to those claims. A judgment in this action, on the other hand, would determine the validity of any and all current and future claims for no-fault benefits between plaintiff and defendants relating to the alleged accident involving Thomas. Further, the moving defendants always had the opportunity to commence an arbitration proceeding to resolve a controversy involving a claim for first-party no-fault benefits but such opportunity does not preclude an insurer from commencing a declaratory

