American Tr. Ins. v Saunders
2016 NY Slip Op 30984(U)
May 27, 2016
Supreme Court, New York County
Docket Number: 151636/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. PART 35

Index Number : 151636/2016
AMERICAN TRANSIT INSURANCE
vs
SAUNDERS, DOMINIQUE
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 5/18/16
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

In this declaratory judgment action concerning no-fault benefits, defendant Dominique Saunders ("Saunders") moves to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and CPLR 3211(a)(1) on the ground that a defense is based on documentary evidence.

It is alleged that plaintiff's insured, Kam Chi, was struck Saunders, a pedestrian, who then filed a no-fault benefits claim under the policy plaintiff issued to Chi. Sanders then assigned her rights to collect such benefits to various health care providers, including additionally named defendants herein.

On July 23, 2015, plaintiff requested that Saunders attend an Independent Medical Examination ("IME") on August 5, 2015 at 3:45 p.m. Upon Saunders's failure to attend the IME, plaintiff sent another notice on August 6, 2015 for an IME on August 26, 2015, 2:00 p.m. Upon Saunders's failure to attend the IME, plaintiff sent to defendants its NF-10 form denying all coverage for failure to comply with a condition precedent to policy coverage. Therefore, plaintiff seeks a declaration that it has no obligation to provide coverage as to all defendants that seek no-fault reimbursement from plaintiff.

In support of dismissal, Saunders argues that prior to the scheduling of the IMEs, and as shown on plaintiff's own NF-10, plaintiff had already denied the no-fault claims on the ground

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

Dated: _____ _____ **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**

that Saunders was "in the course of her employment at the time of the accident." Once plaintiff denied the claim, Saunders was no longer under an obligation to attend the IMEs. Having already repudiated the claim on the ground of Workers' Compensation, plaintiff could not insist that Saunders comply with the terms of the policy. Once an insurer repudiates liability, the insured is excused from its obligations under the policy. Since the health provider defendants stand and fall upon the same defenses as assignor Saunders, the complaint should be dismissed in its entirety.

In opposition, plaintiff argues that Saunders misinterprets the NF-10 in that the denial therein was not of the entire claim. Workers' Compensation benefits serve as an offset against first-party benefits. The insurer remains liable for any amounts in excess of Workers' Compensation coverage, if such coverage applied in any event. Further, the complaint states a justiciable controversy.

In reply, Saunders argues, *inter alia*, that the caselaw cited by plaintiff is distinguishable because the disclaimer at issue herein did not involve issues of excess loss wages. Further, the NR-10 denied all claims for medical expenses without reservation.

Discussion

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

"The failure to appear for IMEs requested by the insurer "when, and as often as, [it] may reasonably require" (Insurance Department Regulations [11 NYCRR] § 65–1.1) is a breach of a condition precedent to coverage under the No–Fault policy" (*Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], lv denied 17 NY3d 705 [2011]; *Hertz Corp. v. Active Care Med. Supply Corp.*, 124 A.D.3d 411, 1 N.Y.S.3d 43 [1st Dept 2015] ("No–Fault Regulation contains explicit language in 11 NYCRR 65–1.1 that there shall be

no liability on the part of the no-fault insurer if there has not been full compliance with the conditions precedent to coverage")). CPLR 3001 states that the "supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." Therefore, to the degree defendants seek coverage under the subject policy, and accepting the allegations of the complaint as true, as this court must, it cannot be said that plaintiff fails to state a justiciable controversy to support a declaratory judgment cause of action (*see American Transit Ins. Co. v. Connor*, 2015 WL 7625827 (N.Y.Sup.), 2015 N.Y. Slip Op. 32253(U) [Supreme Court, New York County] ("allegation that the provider defendants submitted bills for services allegedly provided to Ms. Connor which it was not obligated to reimburse due to Ms. Connor's failure to appear for duly scheduled IMEs" found sufficient to support a declaratory judgment action)). Thus, dismissal of the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is unwarranted.

As to dismissal based on documentary evidence, the NF-10 on which Saunders' relies, states that a "portion" of the claim was denied, as to all amounts for health service benefits. The reason provided was that Saunders was "eligible for workers' compensation as he/she was in the courts of employment at the time of accident, as a result, all medicals should be submitted to the workers' compensation carrier. ATIC [plaintiff] is requesting that we be placed on notice regarding any workers' compensation hearing." It is noted that the box adjacent to "Your entire claim is denied" is *not* selected. Therefore, only a portion of the claim was denied.

Where it is clear from a denial letter that it is intended to apprise plaintiff that workers' compensation coverage is potentially primary for plaintiff's claim, and that any no-fault benefits would be excess to workers' compensation benefits, such denial is not such an unequivocal denial of plaintiff's claim "as would cut off defendant's rights to further verification of his claim for no-fault benefits" (*Nordstrom v. Nationwide Mut. Fire Ins. Co.*, 2014 WL 6634554 (N.Y.Sup.), 2014 N.Y. Slip Op. 32914(U) (Trial Order) [Supreme Court, New York County] (where document advised plaintiff that Insurer "would afford basic PIP benefits to the extent that it is excess over the workers' compensation benefits," such document was "not such a complete and unequivocal denial of plaintiff's claim as would cut off [insurer] defendant's rights to further verification of his claim for no-fault benefits")).

Given that the denial herein was of a "portion" of the claim, and stated that plaintiff should submit the claims to workers compensation and wanted to be advised of the workers' compensation hearing, it cannot be said that the NF-10 herein constitutes an unequivocal denial of the entire claim so as to preclude plaintiff from seeking further verification of the claim.

Moreover, to the extent the NF-10 is ambiguous, it cannot support dismissal pursuant to CPLR 3211(a)(1). While CPLR 3211(a)(1) does not define "documentary evidence," the document must resolve all factual issues as a matter of law and that they "conclusively and definitively" dispose of plaintiff's claim (*see Dellith v. Oneonta City School Dist.*, 280 A.D.2d 864, 720 N.Y.S.2d 637 [3d Dept 2001]), and thus, a defendant may not prevail on a motion to dismiss on documentary evidence where the relied upon document is ambiguous. Saunders's remaining arguments are insufficient to support dismissal under CPLR 3211(a)(1).

Accordingly, dismissal pursuant to CPLR 3211(a)(1) is also unwarranted.

Conclusion

Based on the above, it is hereby

ORDERED that the motion by defendant Dominique Saunders to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and CPLR 3211(a)(1) on the ground that a defense is based on documentary evidence, is denied; and it is further

ORDERED that the parties shall appear for a conference on July 5, 2016, 2:15 p.m.; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 5-27-2016 **ENTER:** _____, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE