

<b>Tirana v AXA Equit. Life Ins. Co.</b>
2017 NY Slip Op 31611(U)
August 1, 2017
Supreme Court, New York County
Docket Number: 153109/2012
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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Bardyl R. Tirana,

Index No. 153109/2012

Plaintiff,

against

DECISION & ORDER

AXA Equitable Life Insurance Company,

Motion Seq: 003, 004, 005

Defendant.

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**Anthony Cannataro, J.:**

In this action to enforce an insurance policy for medical expenses, plaintiff Bardyl R. Tirana moves pursuant to CPLR 4311 and 4312 for an order of reference (Motion Seq 003). Plaintiff also seeks a judgment based on a November 10, 2016 order from the Appellate Division, First Department that granted him partial summary judgment and awarded him costs (Motion Seq 004). Lastly, Tirana moves for an order “requiring AXA to comply with” the abovementioned appellate order (Motion Seq 005).

Plaintiff’s action seeks for reimbursement of medical expenses incurred pursuant to a Lifetime Major Medical Expense Policy (the policy) entered into with AXA’s predecessor. The amended complaint alleges that, every year beginning January 1, 2009, AXA failed to reimburse plaintiff for purported overpayments that he or Medicare made to his basic annual deductible. The complaint also alleges that AXA incorrectly calculated the policy’s “usual and customary rates” for purposes of reimbursing plaintiff for certain medical services.

Both parties previously moved for summary judgment. By order, dated July 9, 2014, Supreme Court (Coin, J.) granted AXA's motion solely with respect to his deductible claim, but otherwise denied both motions. Plaintiff appealed only that portion of the order granting summary judgment to AXA. On February 2, 2016, the First Department reversed and granted plaintiff summary judgment on his claim concerning deductibles, but only as to liability (*see Tirana v AXA Equitable Life Insurance Company*, 136 AD3d 408 [1st Dept 2016]). Specifically, the court stated that, "to the extent that plaintiff paid any or all of the basic deductible in a year in which Medicare paid in excess of \$3,000 for covered expenses, plaintiff would be entitled to reimbursement of that amount." The Appellate Division further limited plaintiff's damages to the extent AXA had already reimbursed him through its "Variable Deductible Payback Benefits" program.

Taking plaintiff's motion for an order directing "AXA to comply with" the appellate order (Motion Seq 004) first, plaintiff states in his affidavit that that his motion is a request that AXA "pay back to my wife and me all amounts which AXA withheld as deductibles from the benefits due to my wife and to me in each of the years from 2009 to 2016 in which Medicare's payments for my wife or me exceeded [the basic annual deductible]." Evidently, plaintiff's motion seeks a money judgment on his deductible claim. However, it is well-settled that "the plaintiff ha[s] the burden of proving damages at trial with a reasonable certainty" (*see City of New York v State*, 27 AD3d 1, 4 [1st Dept 2005]).

Here, while liability on his deductible claim has been determined by the appellate court, plaintiff nonetheless offers no proof of damages with reasonable certainty on his deductible claim. Indeed, plaintiff's affidavit does not allege what amounts, if any, constitute an overpayment during the relevant period. In his motion, plaintiff also fails to address the "Variable Deductible Payback Benefits" program

referenced in the appellate order. As such, plaintiff has failed to show his entitlement to a money judgment on the deductible claim.

With respect to the motion for an order of reference (Motion Seq 003), plaintiff asserts without explanation that “eight years of accounting and claims” renders his causes of action a “long account” pursuant to CPLR § 4317 (b) (1). However, “in order for a matter to be considered a ‘long account’ subject to a compulsory reference, the issues must be so numerous and tedious that it would be impossible for a jury to resolve them within the reasonable time limits of a trial and primarily present an issue of appropriate computation (*see Schanback v Schanback*, 130 AD2d 332, 340 [2d Dept 1987]). Here, Tirana fails to demonstrate that the “eight years of accounting and claims” contains items so numerous and tedious that it would be impossible for the Court-as-fact-finder to resolve them within a reasonable timeframe (*see e.g. Moritz v J. Eisner & Sons Co.*, 212 AD 434, 436 [1st Dept 1925]). As such, the motion for an order of reference is denied.

Insofar as plaintiff moves for an award of costs pursuant to the appellate order (Motion Seq 005), the motion is denied for two reasons. First, Tirana has not shown compliance with the statutory procedure for obtaining an award of costs. As AXA’s attorney correctly notes, Tirana must apply for costs with the clerk (*see* CPLR § 8401 [“costs, disbursements and additional allowances shall be taxed by the clerk upon the application of the party entitled thereto”]). Second, it is unclear why costs, if any, should not be added to the final judgment rather than issued in the form of a separate judgment (*see* CPLR § 8401 [the clerk “shall insert in the judgment the total of the amount taxed as costs”]). Accordingly, it is

**ORDERED** that plaintiff Bardyl R. Tirana’s motion for an order enforcing the Appellate Division’s February 2, 2016 order (Motion Seq 005) is denied; and it is further

**ORDERED** that plaintiff Bardyl R. Tirana’s motion for an order of reference (Motion Seq 003) is denied; and it is further

ORDERED that plaintiff Bardyl R. Tirana's motion for an award of costs (Motion Seq 004) is denied; and it is further

ORDERED that the parties are directed to appear for a settlement conference on 8/24/17 at 9:30 A.M. before this Court in Room 419 at 111 Centre Street.

This constitutes the decision and order of this Court.

Dated: 8/11/17

ENTER:



Anthony Cannataro, JSC