

Kemeny v Liberty Mut. Ins. Co.
2018 NY Slip Op 30626(U)
April 4, 2018
Supreme Court, New York County
Docket Number: 656267/2016
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

INDEX NO.

656267/2016

MALCOLM KEMENY

Plaintiff,

MOTION DATE

10/13/2017

- v -

MOTION SEQ. NO.

002

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 11, 13, 14, 15, 16

were read on this application to/for

REARGUMENT/RECONSIDERATION

ORDER

Upon the foregoing documents, it is

ORDERED that the branch of plaintiff's application seeking leave to reargue is granted, and upon reargument, the motion is granted and this action is hereby RESTORED to the court's pre-note of issue calendar; and it is further

ORDERED that the branch of plaintiff's application seeking leave to amend the complaint is granted, in part, to the extent that leave is granted to add the sixth cause of action for

declaratory relief, and to such extent the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed fourth, fifth and seventh causes, and those cause of action are stricken; and it is further

ORDERED that the defendant shall answer the amended complaint within two days of the date of such service; and it is further

ORDERED that counsel are directed to appear in IAS Part 59, 60 Centre Street, Room 331, 60 Centre Street, New York, New York on May 8, 2018, 9:30 A.M.

DECISION

Plaintiff Malcolm Kemeny moves, pursuant to CPLR 2221, for leave to reargue this court's decision and order dated June 1, 2017 (Prior Order), and upon reargument, for an order modifying such Prior Order to reflect that is a non-final disposition. He also moves, pursuant to CPLR 3025 (b), for leave to amend his complaint.

Background

Plaintiff suffered injuries in an automobile accident on January 12, 2013. At that time, he had a motor vehicle insurance

policy with defendant Liberty Mutual Insurance Company, which included Supplemental Underinsurance Motorist coverage (SUM) in the amount of \$100,000, and no-fault benefits.

Plaintiff filed for SUM arbitration with the American Automobile Association (AAA). On November 7, 2016, an arbitration award was issued finding, inter alia, that plaintiff's injuries to his left ankle met the 'serious injury' threshold of Insurance Law § 5102 (d), and awarding him \$75,000, plus the cost of the AAA filing fee.

After defendant refused to pay the arbitration award, plaintiff filed the instant action, asserting three causes of action: confirmation of the arbitration award of \$75,000, together with costs, interest and counsel fees (first); recovery of his out-of-pocket medical expenses of \$4,258.93, plus interest, costs and counsel fees, based on defendant's wrongful denial of no-fault benefits (second); and compensatory and punitive damages for bad faith insurance practices (third). Defendant interposed an answer with nine affirmative defenses on December 22, 2016.

Plaintiff thereafter filed the underlying motion, pursuant to CPLR 3212, for summary judgment on the first and second causes of action, and, pursuant to CPLR 7501, for an order confirming the arbitration award. Prior to the submission of the underlying motion, plaintiff advised this court that defendant had paid the

arbitration award, and that he was withdrawing only that branch of his application regarding the first cause of action (correspondence dated 3/2/17 from plaintiff's counsel to this court and defendant's counsel). Liberty did not oppose the motion.

In the Prior Order, this court granted plaintiff's application on default for summary judgment on his second cause of action, and directed the entry of a judgment in favor of plaintiff and against defendant in the amount of \$4,158.93 with interest, \$831.79 in counsel fees, and costs and disbursements.

Plaintiff now moves for reargument of the Prior Order to the extent that it was marked a "final disposition."

Analysis

"A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law (Kent v 534 E. 11th St., 80 AD3d 106, 116 [1st Dept. 2010]).

Here, plaintiff does not challenge this court's determination granting summary judgment in his favor. He instead moves for reargument only to the extent of amending that branch of the Prior Order, which marked it a "final disposition." He argues that the Prior Order did not dispose of his first and third causes of action, and, thus, that the instant action should

be allowed to proceed on such claims, including that branch of his first cause of action, which seeks interest and counsel fees.

A review of the Prior Order reveals that this court inadvertently marked this action as disposed. As argued by plaintiff, the Prior Order resolved only one of the three causes of action asserted in the underlying complaint. Contrary to Liberty's argument, plaintiff's withdrawal of that branch of his motion regarding the first cause of action, after his receipt of the arbitration award, did not constitute a final resolution of the complaint. The record is devoid of any indication that plaintiff intended to waive the remainder of the relief sought therein. Furthermore, the underlying motion did not seek any relief with respect to the third cause of action.

Therefore, that branch of plaintiff's application seeking leave to reargue the Prior Order is granted, and upon reargument, the motion is granted to the extent of modifying the Prior Order to reflect that it is a non-final disposition.

Plaintiff also moves, pursuant to CPLR 3025 (b), for leave to amend his complaint to assert four additional claims.

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit (Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept. 2017]).

Here, the proposed fourth cause of action seeks interest, costs and counsel fees, pursuant to 22 NYCRR § 130-1 (a), based on Liberty's purported frivolous conduct in asserting its purportedly baseless seventh affirmative defense in this action. 22 NYCRR 130-1.1 (a) provides that "the court in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct" However, since "New York does not recognize an independent cause of action for the imposition of sanctions relating to frivolous actions" (Zuniga v BAC Home Loans Servicing, L.P., 147 AD3d 882, 884 [2d Dept. 2017]), plaintiff's proposed fourth cause of action is not viable, and leave to amend the complaint to add this claim is denied.

The proposed fifth cause of action purports to allege a fraud claim. Plaintiff alleges that Liberty's attorney represented to his counsel that the no-fault benefits, sought in the second cause of action would be paid if plaintiff's counsel agreed to withdraw his motion for summary judgment; that this representation was false and meant to induce him to withdraw his motion; that the defendant to date has failed to pay the no-fault benefits; and that, as a result, plaintiff has been damaged in the amount sought in the second cause of action, plus interest, costs, attorney's fees and punitive damages.

"The elements of a fraud cause of action consist of a misrepresentation or a material omission of fact which was false and known to be false by [the] defendants, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Pasternack v Laboratory Corp. of Am. Holdings, 27 NY3d 817, 827 [2016] [internal quotation marks and citation omitted]). Here, the claim fails to adequately allege a claim in fraud, inasmuch plaintiff did not withdraw his motion for summary judgment with respect to the second cause of action, and, thus, no reliance on the alleged representation can be demonstrated. Further, in the Prior Order, he was awarded summary judgment on this claim, and received a judgment in the amount of his claimed medical expenses with interest and costs, together with attorney's fees, which has not been challenged by defendant. Thus, plaintiff cannot allege that he suffered any damages based upon the misrepresentation.

In the proposed sixth cause of action, plaintiff claims that, based on the arbitration award and the Prior Order, he is entitled to a judgment declaring that the no-fault provisions of his motor vehicle policy with defendant remain in full force and effect, and that he may continue to submit no-fault claims for related medical expenses necessitated by the underlying motor vehicle accident. Defendant acknowledges that the Prior Order

awarded plaintiff payment for his claimed medical expenses arising from his injuries in the underlying action, but argues that there is no indication that there are, or have been, other no-fault benefits to which the plaintiff has a claim. Further, it contends that the arbitration award does not entitle plaintiff to additional medical expenses.

"The general purpose of a 'declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations'" (Touro Coll. v Novus Univ. Corp., 146 AD3d 679, 679 [1st Dept. 2017] [citation omitted]). Here, the allegations of this claim sufficiently identify a justiciable controversy between Liberty and plaintiff that would be resolved by issuance of the requested declaration (*id.* at 680), that is, the parties' dispute concerning the defendant's continued obligation to pay no-fault benefits for the injury, which was found by the arbitrator to be sufficient to meet the "serious injury" threshold. Therefore, that branch of the plaintiff's application for leave to amend his complaint to add the sixth cause of action for declaratory relief is granted.

The proposed seventh cause of actions purports to state a claim for unjust enrichment. In this claim, plaintiff alleges that, due to defendant's improper denial of no-fault benefits, he was compelled to submit his medical bills to his employee

benefit insurance carrier, which directly paid those expenses to his health care providers; and that defendant was unjustly enriched to the extent that those expenses should have been paid by Liberty through no-fault, and not by plaintiff's employee benefit insurance carrier.

To state a cause of action for unjust enrichment, "a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). Here, the purported unjust enrichment claim is insufficient in that it fails to allege that defendant was enriched at the expense of the plaintiff (Leidel v Annicelli, 114 AD3d 536, 537 [1st Dept. 2014]). Based on the facts pleaded, the payments for plaintiff's medical expenses, by which Liberty was purportedly enriched, were not made by the plaintiff, but rather by his unidentified employee insurance

carrier. Thus, that branch of plaintiff's motion for leave to amend the complaint to assert the seventh cause of action for unjust enrichment is denied.

4/4/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- ☐ CASE DISPOSED
- ☐ GRANTED
- ☐ SETTLE ORDER
- ☐ DO NOT POST

☐ DENIED

- ☒ NON-FINAL DISPOSITION
- ☒ GRANTED IN PART
- ☐ SUBMIT ORDER
- ☐ FIDUCIARY APPOINTMENT
- ☐ OTHER
- ☐ REFERENCE