

Kemeny v Liberty Mut. Ins. Co.
2019 NY Slip Op 33083(U)
October 16, 2019
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

IAS MOTION 59EFM

Justice

-----X

MALCOLM KEMENY,

INDEX NO. 656267/2016

MOTION DATE 04/19/2019

Plaintiff,

MOTION SEQ. NO. 004 005 006

- v -

LIBERTY MUTUAL INSURANCE COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 73, 74, 75, 79, 113, 114

were read on this motion to/for

REARGUMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 76, 107

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 109, 110, 111, 112

were read on this motion to/for

SANCTIONS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant for costs and sanctions is denied (motion sequence 006); and it is further

ORDERED that plaintiff's motion for summary judgment (motion sequence 004) is hereby withdrawn without prejudice; and it is further

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 004) seeking dismissal of

plaintiff's first cause of action, pursuant to CPLR 7501, for an order confirming the arbitration award and awarding arbitration costs is granted, and plaintiff's cause of action pursuant to CPLR 7501 is dismissed; and it is further

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 004) seeking dismissal of plaintiff's first cause of action seeking interest on the arbitration award is denied; and it is further

ORDERED that plaintiff is entitled to a money judgment in the sum of \$1,975.31 which represents interest owed by defendant on the arbitration award, from the date of the award (November 7, 2016) to the date of attempted payment (February 22, 2017); and it is further;

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 004) seeking dismissal of plaintiff's first amended complaint seeking additional costs and attorney's fees is granted and plaintiff's first cause of action for attorney's fees and costs is dismissed; and it is further

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 004) seeking dismissal of plaintiff's second cause of action is granted and is dismissed; and it is further

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 004) seeking dismissal of plaintiff's third cause of action is granted and such third cause of action is dismissed; and it is further

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 004) seeking dismissal of plaintiff's sixth cause of action is granted and plaintiff's sixth cause of action is dismissed; and it is further

ORDERED that plaintiff's motion for an order granting leave to serve a second amended verified complaint (motion sequence 005) is denied; and it is further

ORDERED that defendant's motion to dismiss the first cause of action is denied and plaintiff is entitled to recover from defendant \$1,975.31, and the clerk is directed to enter a judgment in favor of the plaintiff, accordingly; and it is further

ORDERED that the portion of defendant's cross motion for summary judgment (motion sequence 005) seeking dismissal of plaintiff's third cause of action in the first amended complaint is rendered academic as set forth above.

DECISION

In motion sequence 004, plaintiff, Malcolm Kemeny, moves pursuant to CPLR 3212 for an order granting him summary judgment on his first cause of action contained in his first amended

verified complaint. Defendant, Liberty Mutual Insurance Company, opposes the motion and cross-moves for summary judgment dismissing the complaint in its entirety.

In motion sequence 006, defendant seeks an order awarding sanctions against plaintiff, asserting that plaintiff has engaged in frivolous conduct in this action pursuant to 22 NYCRR § 130-1.1.

In motion sequence 005, plaintiff moves pursuant to CPLR 3025 (b) for an order granting him leave to serve a second amended verified complaint. Specifically, plaintiff seeks an order permitting a class action pursuant to CPLR 901. Defendant opposes the motion and cross-moves for summary judgment dismissing the third cause of action in the first amended verified complaint.

Background

This action stems from the non-payment of an arbitration award in the sum of \$75,000.00, plus \$250.00 for arbitration costs, issued in favor of plaintiff on November 7, 2016. The arbitrator concluded that plaintiff's injuries to his left ankle met the serious injury threshold of Insurance Law § 5102 (d).

Plaintiff maintains that defendant refused to pay the arbitration award because he and his wife would not agree to provide defendant with a release. Plaintiff claims that defendant's conduct of demanding a release prior to paying an

arbitration award, constitutes an illegal insurance practice and is against public policy which favors alternative dispute resolution over litigation.

As a result of defendant's non-payment of the arbitration award, plaintiff commenced this action by filing a verified complaint on December 1, 2016, seeking, inter alia, to confirm the arbitration award, pursuant to CPLR 7501. Defendant's answer contained nine affirmative defenses. Plaintiff moved for summary judgment on his first and second causes of action on December 23, 2016. On February 22, 2017, prior to the actual submission of plaintiff's motion, defendant paid plaintiff \$75,250.00, which constituted the full amount of the arbitration award, plus arbitration costs. By court order, plaintiff was permitted to amend his verified complaint to add a sixth cause of action for a declaratory judgment.

ANALYSIS

Plaintiff's Summary Judgment Motion (under Motion Sequence 004) on its First Cause of Action in the First Amended Complaint

Plaintiff moves for summary judgment on his first cause of action which seeks a judgment in the sum of \$75,000.00, plus \$250.00 in arbitration costs, plus interest, legal fees and additional costs. As per plaintiff's correspondence dated November 5, 2018, plaintiff's summary judgment motion under motion sequence 004 is deemed withdrawn.

Defendant's Cross Motion for Summary Judgment Dismissing
Plaintiff's First Amended Verified Complaint

Defendant moves for summary judgment dismissing plaintiff's first amended verified complaint on the grounds that 1) defendant paid the arbitration award and all no-fault benefits to which plaintiff is entitled; and 2) the remainder of plaintiff's claims including attorney's fees incurred in prosecuting this action, interest on interest, and punitive and consequential damages are without merit.

It is well settled that "a movant for summary judgment bears the initial burden of presenting affirmative evidence of its entitlement to summary judgment" (Hairston v Liberty Behavioral Mtg. Corp., 157 AD3d 404, 405 [1st Dept 2018]; see Cole v Homes for the Homeless Inst., Inc., 93 AD3d 593 [1st Dept 2012]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 [1985]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to

the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

In support of its cross motion, defendant submits the affidavits of Jason Merritt, a Claims Resolution Specialist, and Marshall T. Potasher, Esq.

First Cause of Action: Confirmation of Arbitration Award, Plus Arbitration Costs, Interest on the Arbitration Award, Reasonable Attorney's Fees and Additional Costs

Plaintiff's first cause of action demands judgment against defendant for the full amount of the arbitration award (\$75,000.00), plus \$250.00 in arbitration costs, plus interest on the arbitration award, reasonable attorney's fees and additional costs.

It is undisputed that on February 22, 2017, defendant paid plaintiff the sum of \$75,250.00 which constituted full payment of the arbitration award and \$250.00 for arbitration costs. Likewise, on August 20, 2018, defendant issued plaintiff a check in the sum of \$1,975.31, representing interest due on plaintiff's arbitration award from the date of the award (November 7, 2016) to the date of payment (February 22, 2017). Plaintiff rejected the August 20, 2018, interest payment because

defendant failed to include his attorney's fee in connection with the recovery of such interest.

Defendant has demonstrated that plaintiff's first cause of action pertaining to the confirmation of the arbitration award and arbitration costs has been rendered moot by payment. Therefore, defendant has established its entitlement to summary judgment on the issue of the confirmation of arbitration award and arbitration costs. The dispute over damages pursuant to the underinsured motorist provisions of plaintiff's insurance policy has been resolved. Accordingly, that portion of plaintiff's first cause of action seeking confirmation of the arbitration award, plus arbitration costs is dismissed as moot.

Next, defendant's request for summary judgment dismissing that portion of plaintiff's first cause of action seeking interest on the arbitration award is denied. Interest is required to be calculated from the date of the award (Matter of County of Westchester v Doyle, 43 AD3d 1055 [2d Dept 2007]).

Here, plaintiff is entitled to a judgment to recover interest on the arbitration award from the date of the award until the date defendant issued payment. The fact that plaintiff rejected the interest payment does not allow plaintiff to recover additional post-award interest past the date such payment was issued. Thus, that portion of defendant's

motion seeking summary judgment dismissing plaintiff's first cause of action pertaining to interest on the arbitration award is denied; and the clerk is directed to enter a judgment in favor of the plaintiff in the sum of \$1,975.31.

Finally, that portion of defendant's motion to dismiss plaintiff's request for additional costs and attorney's fees incurred as a result of filing the instant lawsuit to confirm the arbitration award is denied for the reasons set forth below.

Plaintiff seeks attorney's fees pursuant to NYCRR § 130-1.1 (a), on the grounds that defendant engaged in frivolous behavior and litigation. 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". "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]). Defendant likewise seeks costs and sanctions against plaintiff for his alleged frivolous conduct in this action.

In determining whether the conduct undertaken was frivolous, the court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent

or should have been apparent (Matter of Kover, 134 AD3d 64 [1st Dept 2015]; 22 NYCRR 130-1.1 [c]).

22 NYCRR 130-1.1 [c] sets forth three categories of "frivolous conduct":

"(1) [conduct which] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law";

"(2) [conduct which] is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another"; or "(3) [conduct which] asserts material factual statements that are false" (DeRosa v Chase Manhattan Mtge. Corp., 15 AD3d 249, 250 [1st Dept 2005]).

Here, defendant has established its right to contest the arbitration award (Reichel v Government Empls. Ins. Co., 66 NY2d 1000 [1985]). On the other hand, plaintiff has established its right to interest on the arbitration award. Therefore, it cannot be said that defendant's conduct in requesting a release was frivolous. Moreover, defendant made payment in full, within three months. Defendant also attempted to pay interest on the arbitration award. In opposition, plaintiff has not met his burden by setting forth material issues of fact regarding the necessity for a trial. Therefore, that portion of defendant's motion seeking summary judgment dismissing plaintiff's first cause of action for attorney's fees and additional costs shall be granted.

Likewise, as plaintiff made a colorable claim for relief in terms of payment of interest, defendant has not its burden to show that plaintiff's conduct was frivolous.

Second Cause of Action: Money Judgment For Out Of Pocket Medical Expenses, Plus Interest, Costs and Attorney's Fees

Plaintiff's second cause of action demands judgment in the sum of \$4,258.93, plus interest, costs and attorney's fees. Defendant moves for summary judgment dismissing this cause of action as moot.

On or about June 3, 2014, defendant issued a no-fault denial of claim for surgical benefits to plaintiff. Subsequently, plaintiff had the surgery which defendant refused to cover, despite the fact that the arbitration award concluded that plaintiff's ankle injury was caused by the accident, necessitating surgical intervention. As a result of defendant's denial, plaintiff incurred \$4,158.93 in out of pocket expenses.

Defendant's motion for an order dismissing plaintiff's second cause of action for a money judgment seeking \$4,158.93 for out of pocket medical expenses is granted as moot. Defendant paid plaintiff \$4,158.93 on June 5, 2018.

Next, plaintiff's demand for interest on the \$4,158.93 out of pocket expense incurred by plaintiff from November 7, 2016 to June 5, 2018, based on the theory that defendant was

unjustly enriched at plaintiff's expense, is denied.

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 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. That portion of plaintiff's request for costs and attorneys' fees is denied as without merit.

Third Cause of Action: Compensatory and Punitive Damages, Attorney's Fees and Costs based on Bad Faith Insurance Practices

Plaintiff's third cause of action seeks compensatory and punitive damages, attorney's fees and costs. Plaintiff alleges that defendant 1) engaged in bad faith insurance practices by requiring a release prior to paying the arbitration award, 2) misled plaintiff, through television and other media advertisements by claiming defendant would stand by plaintiff;

and 3) failed to act in good faith by concealing medical reports which were favorable to plaintiff.

Defendant moves to dismiss plaintiff's third cause of action on the grounds that plaintiff has not set forth a viable cause of action for the relief requested. In this case, there is no separate tort for requesting the parties execute a release or for bad faith refusal to pay the arbitration award (see New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]). Since there is no basis for determining that the defendant's conduct constituted a tort independent of its obligations under the insurance contract, the plaintiff's demand for punitive damages is dismissed (Paterra v Nationwide Mut. Fire Ins. Co., 38 AD3d 511 [2d Dept 2007]). Contrary to the plaintiff's contentions, he does not have a claim for consequential damages beyond the limits of the policy (Acquista v New York Life Ins. Co., 285 AD2d 73, 82 [1st Dept 2001]).

Sixth Cause of Action: Declaratory Judgment

In his sixth cause of action, plaintiff seeks a declaratory judgment that the no-fault provisions of his motor vehicle insurance policy with defendant remain in full force and effect, and that plaintiff may continue to submit no-fault claims for related medical expenses pertaining to the underlying accident.

Defendant moves for summary judgment dismissing plaintiff's sixth cause of action on the grounds that no justiciable controversy exists in this case, and therefore, the court is without jurisdiction to render a declaratory judgment. Defendant concedes that plaintiff's motor vehicle insurance policy remains in full force and effect and that plaintiff may continue to submit no-fault claims to defendant for related medical expenses necessitated by the subject motor vehicle accident. Thus, that portion of defendant's cross motion seeking summary judgment dismissing plaintiff's sixth cause of action is granted.

Finally, that portion of defendant's cross motion seeking costs and disbursements from plaintiff is denied.

Plaintiff's Motion to Amend

In motion sequence 005, plaintiff moves pursuant to CPLR 3025 for leave to file a second amended complaint. The proposed second amended complaint seeks to add an eighth cause of action for class action certification pursuant to CPLR 901.

Pursuant to CPLR 3025 (b), leave to amend a pleading is freely given, absent prejudice or surprise resulting directly from the delay (Eighth Ave. Garage Corp. v H.K.L. Realty Corp., 60 AD3d 404 [1st Dept 2009]). The determination of whether to allow such an amendment is reserved for the court's discretion, and exercise of that discretion will not be overturned without a

showing that the facts offered for the amendment do not support the new claims (Eighth Ave. Garage Corp., 60 AD3d 404 [1st Dept 2009], citing Murray v City of New York, 43 NY2d 400 [1977]). In order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted (Megariss Furs v Gimble Bros., 172 AD2d 209 [1st Dept 1991]).

Plaintiff's proposed eighth cause of action ultimately seeks class certification to the extent of certifying a subclass to be represented on his cause of action for bad faith claims handling. Plaintiff's request to amend his complaint to include an eighth cause of action for class certification must be denied. As stated above, there is no compelling authority indicating that a separate, non-contractual claim exists for "bad faith claims handling" by defendant (Orient Overseas Assoc. v Xl Ins. Am., Inc., 132 AD3d 574, 575 [1st Dept App Div 2015]).

Plaintiff's motion pursuant to CPLR 3025 to amend his first amended verified complaint shall be denied.

Defendant's Cross Motion for Summary Judgment (Motion Sequence #005) Dismissing the Third Cause of Action in Plaintiff's First Amended Verified Complaint

Next, in light of the court's decision on motion sequence 005, defendant's cross motion for summary judgment dismissing plaintiff's third cause of action in the first amended complaint

which seeks compensatory and punitive damages, attorney's fees and costs is denied as moot.

<u>10/16/2019</u>		<u><i>Debra A. James</i></u>	
DATE		DEBRA A. JAMES, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE