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| American Tr. Ins. Co. v Kaisman |
| 2021 NY Slip Op 31070(U) |
| April 5, 2021 |
| Supreme Court, Kings County |
| Docket Number: 508784/2020 |
| Judge: Debra Silber |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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AMERICAN TRANSIT INS. CO.,

Plaintiff,

-against-

ARDEN M. KAISMAN, M.D., et al.,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of intervenor Iqbal Sakandar’s motion to dismiss and plaintiff’s motion to renew and reargue the court’s prior decision which denied plaintiff’s prior motion to disqualify Iqbal Sakandar’s counsel

DECISION/ORDER

Index No.: 508784/2020

Motion Seq. No.: 5 & 6

| Papers | NYSCEF Doc. |
|---|-----------------------|
| Notices of Motion, Affirmation and Exhibits Annexed | <u>98-99, 100-104</u> |
| Answering Affirmations and Exhibits..... | <u>108, 105-107</u> |
| Replies..... | <u>109, 110</u> |

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

This declaratory judgment action arises from a motor vehicle accident that occurred on August 30, 2016. One of the drivers was Iqbal Sakandar (hereafter “Sakandar”), who is also referred to in many of the documents as Sakandar Iqbal. In this action, plaintiff American Transit Ins. Co. (“ATIC”), Sakandar’s insurer, seeks a declaratory judgment that “American Transit owes no duty to pay no-fault claims to the provider defendants with respect to the August 30, 2016 collision referenced in the complaint, and which permanently stays any and all pending no-fault suits or arbitrations relating to this matter 1) due to the fact that the alleged injuries of the non-party (Sakandar) claimant and any subsequent no-fault medical treatment submitted by the provider defendants was not causally related to the August 30, 2016 alleged

accident; 2) due to the fact that the non-party claimant (Sakandar) materially misrepresented the facts and circumstances relating to the August 30, 2016 collision, violating the no-fault regulations; and 3) due to the fact the August 30, 2016 collision was the result of deliberate, staged, and intentional acts committed by the non-party claimant, and thus, was not a covered event under the no-fault regulations.”

On November 30, 2020, the court granted Sakandar’s motion to intervene (MS #3), so he is no longer a “non-party” and denied plaintiff’s motion (MS #4) to disqualify Sakandar’s attorney, Jason Tenenbaum, from representing him in this action in the event the motion to intervene was granted.

In Mot. Seq. #5, Sakandar now moves to dismiss the complaint as against himself and all of the defendants, pursuant to CPLR §3211 (a) (5) [collateral estoppel] and §3211 (a) (7) [failure to state a claim]. In Mot. Seq. #6, plaintiff moves to renew and reargue the court’s decision and order which denied its motion to disqualify Sakandar’s attorney.

Background

There are three related actions arising from the same motor vehicle accident: *Sakandar v American Transit Ins. Co.*, Index No. 508784/2020, in Queens County (“Queens Action”); *American Transit Ins. Co. v Mt. Sinai Hosp. a/a/o Sakandar Iqbal*, Index No. 655442/2019, commenced in New York County (NY Action), and this declaratory judgment action.

On the date of the accident, Sakandar had an insurance policy issued by ATIC that included statutory no-fault benefits of at least \$50,000 for qualifying claims. After the accident, Sakandar sought treatment from the health care defendants in this action,

and Sakandar assigned his no-fault benefits to them in exchange for those services. Sakandar's medical claims, when submitted by the medical providers, were denied by ATIC. In this action, ATIC alleges in the complaint that Sakandar's injuries were not causally related to the accident. ATIC also alleges that Sakandar was evasive and vague during an examination under oath, and that the independent medical examination of Sakandar demonstrated that his alleged injuries are unrelated to the accident. ATIC also determined that the treatments Sakandar received (including spinal fusion surgery) were either medically unnecessary or were not causally related to the accident, or both.

The NY Action, which was recently settled and discontinued, concerned a no-fault arbitration concerning a \$63,931.19 claim made by Mt. Sinai Hospital for medical services performed (spinal surgery, etc.) from 12/4/17 – 12/6/17. The arbitrator found for Mt. Sinai and awarded it \$63,931.19. That award was confirmed in a subsequent proceeding and ATIC then commenced the NY Action for a trial de novo pursuant to Insurance Law § 5106 (c) and for a declaratory judgment declaring ATIC not liable for Mt. Sinai's claim as Sakandar's assignee. In January 2021, ATIC and Mt. Sinai settled the NY Action for "Balance of NF Policy; \$34,317.70; "Interest: 12,000.00"; "Attorney Fee: 1,750.00 (1360.00 & 390.00)"; and "Filing Fee: 40.00" (NY Action [655442/2019] Doc 14). As a result of the settlement, ATIC discontinued this action as against Mt. Sinai.

In the Queens Action, which remains pending, Sakandar seeks a declaratory judgment against ATIC declaring that he is entitled to no-fault coverage and, specifically, a declaratory judgment against ATIC that he is entitled to collect benefits for his lost wages resulting from the accident (see E-File Doc 10 [Queens Action

pleadings]). Sakandar also seeks damages from his insurer for its alleged breach of contract, that is, for its failure to pay his lost wages, and he also asserts a claim for “bad faith” under General Business Law § 349 in the Queens Action.

Discussion

Intervenor’s Motion to Dismiss (MS #5)

The court must address this motion first, as if it is granted, the other motion will become moot. Intervenor moves under CPLR 3211 (a) (5) and (a) (7). Sakandar first argues that this action must be dismissed because of the collateral estoppel effect which he alleges must be given to ATIC’s arbitration of the Mt. Sinai claim and its subsequent settlement of the NY Action. He argues that the no-fault arbitration determination between the insurer [ATIC] and the claimant’s assignee [Mt. Sinai] is binding on all of the defendants in this action, and that ATIC had a “full and fair opportunity” to litigate the issues raised in this action in the arbitration proceeding.

Sakandar also argues that dismissal is appropriate under CPLR 3211 (a) (7) “[a]s it relates to a [no] medical necessity defense” concerning claims that “relate[] to any back injuries.” Because the complaint “does not assert that any denials for rendered services were timely or otherwise proper,” “any [no] medical necessity defense is precluded and, otherwise, not properly pleaded” (see Doc 99 [Intervenor’s Attorney’s Aff.]). He further argues that the complaint contains no facts supporting a “medical necessity defense” and “any ‘exaggeration’ of wages would at most be a defense as to Sakandar only,” “[y]et the complaint . . . states that Sakandar is a non-party” against whom ATIC cannot seek such relief (see *id.*).

ATIC opposes the motion to dismiss on several grounds. First, it points out that there is no lost wages claim at issue in the instant action, which solely involves medical claims. Second, it argues that the arbitration determination between Mt. Sinai Hospital and ATIC has no preclusive effect since it involved only Mt. Sinai's bill and Mt. Sinai is no longer a party to this action, and not the other defendants' bills, and, in any event, the arbitration award is not an exhibit to the Intervenor's motion.¹ ATIC also argues that the issues determined at the arbitration with Mt. Sinai does not collaterally estop it from bringing this action, as only Mt. Sinai's claims, not any claims made by the remaining health care defendants, were at issue.

Discussion

With regard to the branch of the motion based on §3211(a)(7), the court finds that the motion to dismiss must be denied. "In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR §3211(a)(7) 'the sole criterion is 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' " (*Quinones v Schaap*, 91 AD3d 739, 740 [2012], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 [1977]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter*, 79 AD3d 814, 815 [2010]). "[H]owever, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by

¹ This is not a valid objection, as it is in the NYSCEF file for this action. The CPLR was amended to permit an attorney to reference a document in the court file without e-filing it again.

documentary evidence are not entitled to any such consideration” (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks omitted]).

Affording the complaint its most liberal construction, ATIC asserts a cause of action for a declaratory judgment against the remaining health care defendants. Under CPLR §3001, “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.” Intervenor does not dispute that the issues raised in the complaint are justiciable.

The branch of the motion to dismiss the complaint pursuant to CPLR 3211 (a)(5) must also be denied. “It is settled law that the doctrine of collateral estoppel is applicable to issues resolved by an earlier arbitration. Where, however, a claim not passed upon by the arbitrators is the subject of a later action, obviously the award is not a bar to that action. The scope of the arbitrator’s award and, therefore, its *res judicata* or collateral estoppel effect, is an issue properly determined by the court and not by the arbitrator. (see *Rembrandt Indus., Inc. v Hodges Intern., Inc.*, 38 NY2d 502, 504 [1976] [internal citations omitted]). “Either a judgment or an award in arbitration may be explored through parol evidence to discover its scope and therefore its *res judicata* effect. . . . [W]hen the record leaves the matter in doubt, parol evidence not inconsistent with the award may be introduced to show what was litigated before the arbitrator and what was determined by his decision” (*id.* [internal citations and quotation marks omitted]).

Here, plaintiff has not made a prima facie case that the scope of the Mt. Sinai arbitration proceedings or the arbitrator’s determination was a determination of the

same claim or issue as the claims made by the other medical provider defendants herein. As the Court of Appeals explains in *D'Arata v NY Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]:

Collateral estoppel, an equitable doctrine, is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it (*see, Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485; *see also, Kaufman v Lilly & Co.*, 65 NY2d 449, 455). As this doctrine has evolved, only two requirements must be satisfied. First, the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action (*see, Kaufman v Lilly & Co.*, *supra*, at 455). Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination. The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (*see, id.*, at 455-456). Collateral estoppel, we have held, is grounded on concepts of fairness, and should not be rigidly or mechanically applied (*see, Matter of Halyalkar v Board of Regents*, 72 NY2d 261, 268-269)[emphasis added].

In conclusion, the arbitration compelled by Mt. Sinai Hospital, which resulted in a determination in its favor, is not binding on the plaintiff ATIC herein, as it did not involve any of the claims of the defendants herein. Therefore, ATIC would not have had any opportunity to have its claims against the defendants herein “fully and fairly” litigated and determined in the arbitration.

Plaintiff’s Motion to Renew and Reargue (MS #6)

In Mot Seq. 4, ATIC sought to disqualify Sakandar’s counsel because he was previously counsel to plaintiff ATIC (between 2010 and 2015) and argued that an attorney cannot now represent a party with an adverse interest to that of ATIC. The court denied the motion, and plaintiff moves to “renew and reargue.”

In the Queens Action, plaintiff here [ATIC] made a motion to disqualify Sakandar's attorney, which was granted by order dated December 7, 2020. Now, ATIC has returned to Kings County to argue that the judge in Queens was correct in disqualifying Mr. Tenenbaum, and thus the undersigned should recall the order denying Mot. Seq. #4 and change it to disqualify Jason Tenenbaum.

There is no basis here to grant renewal of the prior motion because the only "new information" that ATIC submits is a copy of the order disqualifying Tenenbaum in the Queens Action. That order is not binding on this court and, thus, plaintiff has not "demonstrate[d] that there has been a change in the law that would change the prior determination" (CPLR 2221 [e]). ATIC specifically contends, in support of the instant motion, that the Justice who decided the disqualification motion in the Queens Action relied on precisely the same law that was applied in this court's decision and order denying Mot. Seq. #4. Further, movant has not identified any facts or law that the court overlooked or misapprehended in its prior decision. Thus, reargument is not warranted.

In any event, even if ATIC had established that reargument or renewal were appropriate here, it is not entitled to the relief it seeks. Tenenbaum, counsel for Sakandar, was hired by ATIC as an attorney for many matters during the years 2010 to 2015, and they apparently had a falling out. Plaintiff is an insurance company which insures many, if not all, of the yellow cabs in New York City. Plaintiff's counsel seems to claim that once an attorney is hired by plaintiff, that attorney would have a conflict of interest for the rest of his career if he or she is subsequently hired by any party who is involved in a lawsuit arising from a motor vehicle accident with a yellow cab. That is not a logical analysis of the principles which govern the disqualification of an attorney.

“[T]he disqualification of an attorney is a matter which rests within the sound discretion of the court” (*Legacy Builders/Developers Corp. v Hollis Care Group, Inc.*, 162 AD3d 649, 649-650 [2d Dept 2018] [quotation marks omitted], quoting *Olmoz v Town of Fishkill*, 258 AD2d 447, 447 [2d Dept 1999]). “A party’s entitlement to be represented in ongoing litigation by counsel of his [or her] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion” (*Olmoz*, 258 AD2d at 447 [internal citations omitted]).

In the prior decision, this court quoted “A party seeking to disqualify an attorney or a law firm for an opposing party on the ground of conflict of interest has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse” (*Mediaceja v Davidov*, 119 AD3d 911, 911-912 [2d Dept 2014]). “[V]ague and conclusory assertions [are] insufficient to make a clear showing or raise a substantial issue of fact as to whether an attorney-client relationship had been previously formed” (*Legacy Builders/Developers Corp.*, 162 AD3d at 649-650).

Here, ATIC argues that the motion to disqualify should have been granted because the matters involved in both representations are substantially related. To this court, that seems to mean that they are related as they are both cases which arise from motor vehicle accidents involving at least one yellow cab. That is not what is meant by “substantially related.”

Additionally, ATIC argued without basis in the prior motion that Tenenbaum's representation of Sakandar creates "an appearance of impropriety that outweighs any countervailing interest Sakandar has in choosing his own counsel." ATIC also speculated that Tenenbaum will violate his continuing obligations to ATIC, his former client, because he may have and/or could potentially utilize "confidences" he learned as counsel for ATIC. Specifically, ATIC asserts that Tenenbaum's representation of the proposed intervenor will violate at least Rules 1.6 (Confidentiality of Information) and 1.8 (Conflict of Interest with Former Clients) of the Code of Professional Responsibility.

In opposition, Tenenbaum averred (in the prior motion) that he had not performed any legal work for ATIC for six years prior to the motion (E-File Doc 67 [Tenenbaum Aff]). He argued that ATIC has not satisfied its obligation to demonstrate that disqualification was warranted, because its proof in support of the motion was insufficient. Tenenbaum denied having obtained any confidential information related to this action (relating to an accident which took place after he stopped representing ATIC) or to ATIC's current business practices and argued that there is no proof that his prior representation of ATIC involved the same transaction or legal dispute underlying either this or the Queens action.

The court concluded that ATIC's assertions regarding the "confidences" Tenenbaum was purportedly privy to were vague and conclusory, and ATIC only speculated that Tenenbaum's representation may violate the Rules of Professional Conduct (see e.g. *Legacy Builders/Developers Corp.*, 162 AD3d at 649-650; *Sessa v Parrotta*, 116 AD3d 1029, 1030 [2d Dept 2014] [(C)onclusory allegations that, in the prior representation, C & V gained access to confidential material substantially related

to the present litigation were insufficient to determine the nature of the confidential information allegedly obtained or that there is a reasonable probability that such information would be disclosed during the present litigation.”]).

The decision of a judge of co-equal jurisdiction, that is, another Supreme Court Justice, is not binding on this court. Plaintiff has failed to set forth any proper grounds for either reargument or renewal, and as such, leave to renew and/or reargue is denied.

Accordingly, it is **ORDERED** that the Intervenor’s motion to dismiss the complaint (MS #5) is denied; and

it further **ORDERED** that the plaintiff’s motion for leave to renew and/or reargue (MS #6) is denied.

This shall constitute the decision and order of the court.

Dated: April 5, 2021

ENTER :



Hon. Debra Silber, J.S.C.