American Tr. Ins. Co. v Health Plus Surgery Ctr. LLC
2021 NY Slip Op 31654(U)
May 17, 2021
Supreme Court, New York County
Docket Number: Index No. 152320/2020
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

- v -

HEALTH PLUS SURGERY CENTER LLC,CITIMED SERVICES, PA A/A/O SANDRA VALERA

Defendant.

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INDEX NO. 152320/2020

MOTION DATE 02/09/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents and for the reasons stated hereinbelow, (1) the instant motion, pursuant to CPLR 1003 and 3025(b) and (c), by plaintiff, American Transit Insurance Company, to amend the instant complaint is denied; and (2) the instant cross-motion, pursuant to CPLR 3211(a)(7) and/or (5), by defendants, Health Plus Surgery Center, LLC and Citimed Services, PA a/a/o Sandra Valera, to dismiss is granted in part.

Background

On March 9, 2016, non-party Sandra Valera ("the assignor") was allegedly injured in a motor vehicle accident. She assigned her right to collect No-Fault benefits to defendants, Health Plus Surgery Center, LLC ("Health Plus") and Citimed Services, PA a/a/o Sandra Valera ("Citimed") under an insurance policy that plaintiff, American Transit Insurance Company, had issued. On July 14, 2017, Health Plus performed arthroscopic surgery on the assignor's left ankle, and Citimed provided anesthesia. Non-party MII Supply, LLC ("MII Supply") provided the assignor with a deep vein thrombosis cuff. Health Plus, Citimed, and MII Supply each submitted bills to plaintiff for reimbursement for the aforementioned medical services that they provided to the assignor. Plaintiff denied those bills, essentially (1) citing the October 16, 2017 peer review report of Dr. Douglas Petroski; (2) asserting that the aforementioned services were not medically necessary and constituted "an improper referral violating the self-referral statutes" of New York and New Jersey; and (3) claiming that the amounts that defendants sought in their subject arbitration were incorrect and violated the Worker's Compensation Fee Schedule. (NYSCEF Documents 1 and 29.)

On November 29, 2017, Health Plus and Citimed filed separate requests with the American Arbitration Association ("the AAA") for arbitration of the subject issue of No-Fault reimbursements from plaintiff (AAA Case No. 17-17-1080-3425 and AAA Case No. 17-17-1080-3426, respectively); Health Plus sought an arbitration award in the amount of $17,146.84, and Citimed sought an arbitration award in the amount of $1,800.00. (NYSCEF Documents 15 and 29.) Field Law Group, P.C., who apparently represented defendants at the subject arbitrations, submitted a December 4, 2018 rebuttal "to refute plaintiff's defense of lack of medical necessity" from surgeon Steve A. Bernstein, DPM FACFAS to Dr. Petroski's report. On May 10, 2019, MII Supply filed a request for arbitration with the AAA (AAA Case No. 17-19-1128-6349) in the amount of $967.97. (NYSCEF Documents 15 and 29.) On August 24, 2019, No-Fault Arbitrator Vincent Gerardi entered two separate awards, one in favor of Health Plus in the amount of $8,450.96 ("the Health Plus Award"), and one in favor of Citimed in the amount of $691.76 ("the Citimed Award") (NYSCEF Doc. 31). On December 10, 2019, Master Arbitrator Victor J. D'Ammora affirmed the Health Plus Award and the Citimed Award (NYSCEF Doc. 32).

On or about March 2, 2020, plaintiff commenced the instant action, seeking a judgment (1) declaring that this Court should decide the subject No-Fault dispute de novo; (2) declaring that plaintiff is not liable to defendants for No-Fault benefits; and (3) awarding costs and disbursements to plaintiff (NYSCEF Doc. 1, at 5).

On June 6, 2020, No-Fault Arbitrator Tali Philipson heard MII Supply's claim, during which hearing MII Supply submitted a rebuttal by Dr. Leonid Shapiro to plaintiff's defense that the service(s) that MII Supply provided to the assignor were not medically necessary. (NYSCEF Doc. 29.) On June 16, 2020, Arbitrator Philipson entered an award in the amount of $967.97 in favor of MII Supply ("the MII Supply Award," NYSCEF Doc. 25). On September 4, 2020, Master Arbitrator D'Ammora affirmed the MII Supply Award (NYSCEF Doc. 26).

The Instant Motion and the Instant Cross-Motion

Plaintiff now moves, pursuant to CPLR 1003 and 3025(b) and (c), to amend the instant complaint to add MII Supply as a defendant to the instant case (NYSCEF Documents 6-7).

Plaintiff essentially asserts that, as with Health Plus and Citimed, MII Supply (1) provided medical services to the assignor arising from the same subject alleged accident; and (2) sought arbitration for No-Fault benefit payments from plaintiff arising from the same set of facts (aside from a different peer review rebuttal from MII Supply) as those out of which defendants' subject arbitrations arose (NYSCEF Documents 7-8).

Defendants oppose plaintiff's instant motion, essentially asserting that the $967.97 MII Supply Award does not exceed the $5,000.00 minimum that 11 NYCRR § 65-4.10(h)(i)-(ii) and New York Insurance Law ("NY Ins Law") § 5106(c) require for de novo review. Defendants cite to Imperium Ins. Co. v Innovative Chiropractic Servs., P.C., 43 Misc 3d 137(a) (1st Dept. 2014), which states, in pertinent part, the following:

> De novo review of a master arbitrator's award is limited to the grounds set forth in CPLR article 75 unless the award is in the amount of $5,000 or more, in which

> case the dispute is subject to a 'plenary judicial adjudication' pursuant to Insurance Law § 5106(b). Since none of the master arbitrator's awards giving rise to these actions met or exceeded the statutory threshold sum of $5,000, de novo review was unavailable, and the individual complaints served by plaintiff seeking such relief did not state a viable cause of action.

(Internal citations omitted.) (NYSCEF Doc. 29.)

Defendants now jointly cross-move (1), pursuant to CPLR 3211(a)(7), to dismiss the instant complaint as against Citimed, or, in the alternative, (2), pursuant to CPLR 3211(a)(5), to dismiss the instant complaint in its entirety, essentially on the ground(s) of collateral estoppel and/or res judicata (NYSCEF Documents 28-29).

Defendants assert, inter alia, the following: (1) the Citimed Award is in the amount of $691.76 and thus is below the $5,000.00 minimum required for plaintiff to seek de novo review; (2) plaintiff's allegations that the subject treatments lacked medical necessity and that the amounts sought in the subject arbitrations failed to comply with the New York State Worker's Compensation Fee Schedule are identical to those issues that the subject arbitrations addressed; and (3) plaintiff bears the burden to demonstrate that it previously did not receive a full and fair opportunity to litigate the subject issues (NYSCEF Doc. 29).

In reply to defendants' allegation that the $5,000.00 minimum bars plaintiff's claim, plaintiff asserts that "the 'dispute' in this case involves a single surgery with over $10,000 in bills," *collectively*. Plaintiff further claims that Imperium and the instant case are distinguishable, as, in the instant case, one of the subject awards, namely, the Health Plus Award, did exceed $5,000.00. Additionally, plaintiff cites to Greenberg v Ryder Truck Rental, Inc., 70 NY2d 573 (1987), in which the New York State Court of Appeals stated, in pertinent part, that the $5,000.00 minimum "may not be read to constrict the judicial role to the benefits issue only because the statute itself in this respect speaks of de novo judicial adjudication, not arbitral review." Id. at 577.

As for defendants' collateral estoppel/res judicata claim, plaintiff correctly asserts that "once a de novo action is filed pursuant to Insurance Law § 5106 the underlying arbitration no longer exists and cannot have a collateral estoppel effect" (NYSCEF Doc. 38). In support thereof, plaintiff cites to, and e-files the Hon. Denise L. Sher's August 21, 2018 Decision and Order in American Transit Insurance Company v McCulloch Orthopaedic Surgical Services, LLC /a/ao Ana Rodriguez, Index No. 613471/2017 (Motion Sequence Numbers 1 and 2) (NYSCEF Doc 39).

Discussion

Pursuant to NY Ins Law § 5106(c), in pertinent part (emphasis added):

> The award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that **where the amount of such master arbitrator's award is five thousand dollars or greater**, exclusive of interest and attorney's fees, the

> insurer or the claimant may institute a court action to adjudicate the dispute de novo.

Pursuant to 11 NYCRR § 65-4.10(h)(i)-(ii), "Appeal from master arbitrators award" (emphasis added):

> (1) A decision of a master arbitrator is final and binding, except for:
> (i) court review pursuant to an article 75 proceeding; or
>
> (ii) **if the award of the master arbitrator is $5,000 or greater**, exclusive of interest and attorney's fees, either party may, in lieu of an article 75 proceeding, institute a court action to adjudicate the dispute de novo.

CPLR 3211(a)(7) states the following: "A party may move for judgment dismissing one or more causes of action asserted against [him or her] on the ground that … the pleading fails to state a cause of action."

CPLR 3211(a)(5) states the following:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that … the cause of action may not be maintained because of arbitration and award, collateral estoppel … res judicata …

This Court finds that, as defendants assert (NYSCEF Doc. 20, at 6), plaintiff may not aggregate the subject three arbitration awards so that they collectively exceed the $5,000.00 minimum that NY Ins Law § 5106(c) and 11 NYCRR § 65-4.10(h)(i)-(ii) require for de novo review. The instant case and Greenberg are distinguishable, as Greenberg addressed a single arbitration award.

The MII Supply Award is in the amount of $967.97 (NYSCEF Doc. 25). As said amount is below the $5,000.00 minimum that NY Ins Law § 5106(c) and 11 NYCRR § 65-4.10(h)(i)-(ii) require, plaintiff is not entitled to de novo review of plaintiff's No-Fault payment dispute with MII Supply. Additionally, plaintiff has failed to make out a prima facie case that it was denied the opportunity to litigate sufficiently its instant dispute with MII Supply. Therefore, this Court will deny plaintiff's motion to amend the instant complaint to add MII Supply as a defendant to the instant case, as doing so would be futile.

The Citimed Award is in the amount of $691.76 (NYSCEF Doc. 31), and, thus, also is below the $5,000.00 minimum that NY Ins Law § 5106(c) and 11 NYCRR § 65-4.10(h)(i)-(ii) require for de novo review. Thus, plaintiff has failed to state a viable cause of action as against Citimed, and, pursuant to CPLR 3211(a)(7), this Court will dismiss the instant action as against Citimed, only.

The Health Plus Award is in the amount of $8,450.96 (NYSCEF Doc. 31), exceeding the $5,000.00 minimum that NY Ins Law § 5106(c) and 11 NYCRR § 65-4.10(h)(i)-(ii) require for de novo review. As the New York Court of Appeals stated, in pertinent part, in Greenberg: "The

natural and plain words of the statute … require that if the monetary predicate is satisfied, the entire subject matter in controversy, including both the liability and benefits components, is subject to plenary judicial determination." Greenberg at 577 (internal citations omitted). Here, the monetary predicate is satisfied as to Health Plus. The instant issues are not subject to collateral estoppel and/or res judicata. Thus, Health Plus has failed to make out a prima facie case, pursuant to CPLR 3211(a)(5), to dismiss the instant complaint in its entirety, and this case shall proceed as against Health Plus, only.

This Court has considered plaintiff's and defendants' other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will (1) grant defendants' instant joint cross-motion solely to the extent of dismissing the instant complaint as against Citimed and (2) deny plaintiff's instant motion to amend the instant complaint.

Conclusion

Thus, for the reasons stated hereinabove, (1) the instant motion, pursuant to CPLR 1003 and 3025(b) and (c), by plaintiff, American Transit Insurance Company, to amend the instant complaint to add MII Supply, LLC as a defendant to the instant case, is hereby denied; and (2) the instant joint cross-motion by defendants, Health Plus Surgery Center, LLC and Citimed Services, PA a/a/o Sandra Valera, is hereby granted in part, pursuant to CPLR 3211(a)(7), solely to the extent of dismissing the instant complaint as against defendant Citimed Services, PA a/a/o Sandra Valera. The instant case shall proceed as against defendant Health Plus Surgery Center, LLC, only. The Clerk is hereby directed to enter judgment accordingly, to dismiss the instant complaint as against defendant Citimed Services, PA a/a/o Sandra Valera, and to amend the file and caption accordingly.

This Court hereby requests that plaintiff and defendant Health Plus Surgery Center, LLC contact our Part Clerk, Margie Ramos-Ciancio, via email at mciancio@nycourts.gov, to schedule a Preliminary Conference, remembering to copy all parties.

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5/17/2021
DATE

ARTHUR F. ENGORON, 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