

American Tr. Ins. Co. v Kaisman

2022 NY Slip Op 30147(U)

January 19, 2022

Supreme Court, Kings County

Docket Number: 508784/2020

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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., P.C.,
BETH ISRAEL MEDICAL CENTER,
FLATLANDS CHIROPRACTIC WELLNESS, P.C.,
TAIRA RX CORP. d/b/a FOREST DRUGS,
MASPETH RX INC.,
METRO PAIN SPECIALISTS P.C.,
THE MOUNT SINAI HOSPITAL,
THE MOUNT SINAI HOSPITAL
d/b/a ANESTHESIA DEPT OF MOUNT SINAI,
THE MOUNT SINAI HOSPITAL
d/b/a MOUNT SINAI SCHOOL OF MEDICINE,
THE MOUNT SINAI HOSPITAL
d/b/a ORTHOPEDICS DEPT OF MOUNT SINAI,
RX FOR YOU CORP.,
STAND-UP MRI OF BENSONHURST, P.C.,
STARRETT CITY MEDICAL, P.C.,
SUTTER PHARMACY INC., and
IQBAL SAKANDAR a/k/a SAKANDAR IQBAL,

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 for summary judgment dismissing the complaint

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed	<u>136-141</u>
Answering Affirmation and Exhibits.....	_____
Reply.....	_____

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

This declaratory judgment action arises from a motor vehicle accident that occurred on August 30, 2016. One of the drivers was intervenor 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.”

In Mot. Seq. #9, Sakandar now moves for summary judgment dismissing the complaint as against himself and all of the defendants, based upon the order dated November 4, 2021, which granted Sakandar’s motion for discovery sanctions in Motion Seq. #8, and precluded plaintiff from “offering any evidence, testifying at trial, or submitting an affidavit in response to any dispositive motion with regard to Sakandar.” In addition, Sakandar seeks an order granting him attorneys’ fees and scheduling a hearing for same.

The court notes that all of the answering defendants have settled with plaintiff, and this action has been discontinued as against them, leaving only three defendants in addition to Intervenor Sakandar: Taira RX Corp. d/b/a Forest Drugs, Maspeth RX Inc., and Stand-Up MRI of Bensonhurst, P.C. As these three defendants have not answered the complaint,

plaintiff never moved for a default against these three defendants, and more than a year has passed since their default, including the Covid-19 suspension until November 3, 2020, plaintiff has abandoned this action as against them. The complaint is hereby dismissed as against these three defendants pursuant to CPLR 3215 (c). As a result, the only defendant who remains in this declaratory judgment action is movant, intervenor Sakandar.

This motion for summary judgment dismissing the complaint is unopposed by plaintiff, and as such, is granted.

Turning to the branch of Sakandar's motion which seeks attorneys' fees, the court finds that this request must be denied. Counsel also argues that the other defendants should also be granted their reasonable attorneys' fees. But there are no other defendants.

While counsel fees are only recoverable if they are provided for by court rule, statute or contract, the Court of Appeals has interpreted the Insurance Law and the mandatory terms therein for automobile insurance, to provide that "an insured who is cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations, and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 at 21 [1979])." They explain "the reasoning behind *Mighty Midgets* is that an insurer's duty to defend an insured extends to the defense of any action arising out of the occurrence, including a defense against an insurer's declaratory judgment action." (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597-598 [2004]). The court concluded that "recovery of attorneys' fees is incidental to the insurer's contractual duty to defend" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 598 [2004]). In *U.S. Underwriters Ins. Co.*, *supra*, the Court of Appeals found that an insured who prevailed in an action brought by an insurer seeking a declaratory judgment that it had no duty to defend or indemnify the insured can

recover attorneys' fees expended in defending against the declaratory judgment action, regardless of whether the insurer provided a defense to the insured. (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 595 [2004]).

Here, while Sakandar was not named a party defendant in this action, he should have been, as a person "who might be inequitably affected by a judgment in the action" (CPLR 1001), and as such, he hired counsel and moved to intervene. If his insurance would not pay his medical bills arising from the motor vehicle accident, he would be obligated to pay them. The court notes that he had back fusion surgery, which he claimed was necessitated by this accident, plaintiff disputed this, but the claims relating to this surgery were settled before this action was commenced.

Reviewing the Court of Appeals decision in *Underwriters, supra*, the court must determine how it applies to this motion. As the action was settled or abandoned with regard to all of the defendant medical providers, leaving only the insured, movant intervenor, as a defendant in this declaratory judgment action, is he a "prevailing party" entitling him to attorneys' fees? Movant intervened and filed an answer, but the case is over. The court finds that he is not "a prevailing party on the merits."

Accordingly, it is **ORDERED** that the branch of the motion for summary judgment dismissing the action is granted and this action is dismissed.

It is further **ORDERED** that the branch of the motion for attorneys' fees is denied.

This shall constitute the decision and order of the court.

Dated: January 19, 2022

ENTER:



Hon. Debra Silber, J.S.C.