

Postiglione v National Gen. Ins. Co.

2022 NY Slip Op 30811(U)

March 9, 2022

Supreme Court, New York County

Docket Number: Index No. 656988/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

JOHN POSTIGLIONE

Plaintiff,

- v -

NATIONAL GENERAL INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 656988/2020

MOTION DATE 09/17/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 67, 79, 80, 81, 82, 83

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the branch of Defendant National General Insurance Company's application by Order to Show Cause for an order vacating, modifying, reversing, or awarding a protective order, the Court's July 28, 2021 Order pursuant to CPLR 3103, 3122, 6301, and 6313 (Motion Seq. 001) is granted; and it is further

ORDERED that the branch of the Court's July 28, 2021 Order directing Defendant to comply with Plaintiff John Postiglione's demand for "No-Fault Reports, Defense Medical Records, and Peer Reviews authored by Lisa Nason, M.D. and Alain De La Chapelle, M.D., along with payment records for both doctors, for the one-year period prior to the filing of the summons and complaint" is vacated; and it is further

ORDERED that the branch of Defendant's application by Order to Show Cause for an Order pursuant to CPLR 3211(a)(7), and 3024(b), dismissing Plaintiff's purported cause of action for fraud is granted; and it is further

ORDERED that Plaintiff's purported cause of action for fraud is severed and dismissed from this action, and all other claims shall continue against Defendant; and it is further

ORDERED that counsel shall jointly, within ten (10) days, provide an email update (mwcavarr@nycourts.gov; comflynn@nycourts.gov) to the Court advising of the status of outstanding discovery in this action; and it is further

ORDERED that counsel for Defendant shall serve a copy of this Order, along with Notice of Entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this breach of contract action, Defendant National General Insurance Company moves by Order to Show Cause (Motion Seq. 001) for an order:

- (i) Pursuant to CPLR 3103, 3122, 6301, and 6313, prohibiting the disclosure of the contested discovery in this Court's July 28, 2021 Order until the instant application is decided ("Relief #1")¹;
- (ii) Pursuant to CPLR 2221(a), 3103, 3122, and 3101 vacating, modifying, reversing, or awarding a protective order, this Court's July 28, 2021 Order ("Relief #2");
- (iii) Pursuant to CPLR 3211(a)(7), and 3024(b), dismissing Plaintiff's purported separate cause of action for fraud ("Relief #3).

Plaintiff John Postiglione opposes Defendant's motion in its entirety.

BACKGROUND

This is a breach of contract action wherein Plaintiff, the holder of a Supplementary Uninsured/Underinsured Motorist (SUM) policy with Defendant, claims that Defendant breached

¹ The Court granted Relief #1 by interim order dated September 17, 2021.

its obligation to pay Plaintiff's claim for SUM benefits in full after Plaintiff was injured in a 2019 accident with an underinsured vehicle.

The contested discovery directed in this Court's July 28, 2021 Order that is the subject of the instant motion is Plaintiff's demand for "No-Fault Reports, Defense Medical Records, and Peer Reviews authored by Lisa Nason, M.D. and Alain De La Chapelle, M.D., for the one-year period prior to filing of the summons and complaint" as well as "Payment records for Lisa Nason and Allain De La Chappelle, M.D., for the one year period prior to the filing of the summons and complaint." (hereinafter, the "Contested Discovery").

On January 15, 2021, Plaintiff first served the demand for the Contested Discovery in his notice for Discovery and Inspection (NYSCEF doc No. 5.)

Defendant responded to Plaintiff's demand on May 3, 2021; however, the response was limited to only IME reports and peer reviews of Dr. Nason and Dr. De La Chappelle related to Plaintiff's claim. (NYSCEF doc No. 45.)

During a June 30, 2021 Microsoft Teams status conference, the parties informed the Court of the discovery dispute regarding Drs. Nason and De La Chapelle's previous work history. The Court directed the parties to submit letter briefs detailing their positions on the matter. (NYSCEF doc Nos. 17 and 21.)

Following review of the parties' letter briefs, the Court issued its July 28, 2021 decision wherein it found that while Defendant argued the Contested Discovery was not material and necessary for Plaintiff to prove his entitlement to SUM benefits, Defendant did not address the Contested Discovery's relevance to a separate claim in Plaintiff's complaint that could reasonably be construed as a cause of action for fraud. The Court detailed its rationale for ordering production of the Contested Discovery as follows:

“...Plaintiff has asserted a cause of action in his complaint alleging that Defendant knowingly referred Plaintiff to physicians ‘it has paid hundreds of thousands of dollars (if not more) over the years directing or knowing that they would conclude that treatment under defendant’s no-fault insurance obligations are not necessary or related to the subject accident in order to prevent Plaintiff from obtaining treatment and to avoid paying Plaintiff’s treaters their duly earned fees’... The medical records and financial information sought in this demand are thus relevant to Plaintiff’s claim that Defendant essentially engaged in fraud by referring Plaintiff to physicians that would lessen the value of his SUM claim and may lead to admissible evidence that will help Plaintiff establish his fraud claim.”

(NYSCEF doc No. 29).

On September 3, 2021, Defendant filed the instant application, moving to (1) prohibit the disclosure of the contested discovery (“Relief #1”); (2) vacate, modify, and reverse the Court’s July 28, 2021 Order (“Relief #2”); and (3) dismiss and strike Plaintiff’s purported cause of action for fraud (“Relief #3”) (Mot. Seq. 001). In support, Defendant relied on a newly filed affidavit from one of its Regional Claims Managers, Victoria Sadkowski, that was not before the Court when it issued its July 2021 Order. In the affidavit, Ms. Sadkowski affirmed that Defendant does not select its own physicians to perform medical examinations and peer reviews; instead, Defendant relies on four separate third party vendors to facilitate necessary examinations and reviews. (*Id.* at ¶¶7-8.)

By Interim Order dated September 17, 2021, the Court construed Relief #2 as a motion for leave to renew pursuant to CPLR 2221(e) based on the new evidence of Ms. Sadkowski’s affidavit (as opposed to a motion to reargue under CPLR 2221[d], which would have been time barred). (NYSCEF doc No. 51 at 6-7.) The Court found that Defendant had proffered new facts from Ms. Sadkowski that could potentially change its prior determination and had provided a reasonable justification for failing to present the facts when it first challenged the Contested

Discovery.² (*Id.*) Accordingly, the Court stayed disclosure of the Contested Discovery (Relief #1) for the limited purpose of allowing time for further document production and for Plaintiff to depose Ms. Sadkowski. The Court held in abeyance Defendant's application for Relief #2 and Relief #3 pending the parties' disclosures under the new Court-mandated discovery schedule. (*Id.* at 8.)

By email dated January 7, 2022, the parties advised the Court that discovery had been completed, and the Court directed further letter submissions with respect to Relief #2 and Relief #3.

Pursuant to the Court's January 7, 2022 directive, Defendant submitted a letter to the Court in further support of its application (*See* NYSCEF doc No. 79.) In the letter, Defendant argues that Ms. Sadkowski's testimony confirms (1) Defendant does not have direct contact with the physicians conducting the evaluation; (2) Defendant is billed through invoices sent by the third-party vendors, instead of paying the physicians directly (NYSCEF doc No. 41 at ¶¶11-12); (3) Defendant does not request specific physicians with positive or negative findings, but rather requests the third-party vendors provide physicians with certain specialties related to the claim at issue, such as orthopedists or neurologists (*id.* at ¶9); and lastly (4) Defendant does not have any sort of "approved physicians list." (NYSCEF doc No. 80 at 13). Additionally, Defendant asserts that the Contested Discovery includes demands that, as written, are impossible to comply with. Defendant notes that Plaintiff seeks IME reports and Peer Reviews conducted for other insurers and payment information that Defendant does not possess.³ (*Id.* at ¶15.)

² In holding that Defendant proffered a reasonable justification, the Court noted that when it issued its July 2021 Order, Defendant had not been on notice of Plaintiff's separate, viable fraud cause of action.

³ According to Ms. Sadkowski, Defendant does not know, and in fact has no way of knowing, how much Defendant paid Drs. Nason and De La Chappelle for physical examination as its vendors' billing reports are broken down by claim number, not by physician. (NYSCEF doc No. 80 at 17-18.)

Based on the forgoing testimony, Defendant argues that Plaintiff has failed to establish a *prima facie* cause of action for fraud and the claim should be dismissed. (See NYSCEF doc No. 38 at 14; NYSCEF doc No. 79 at 4). Further, as the Court's July 2021 Order solely relied on Plaintiff's fraud cause of action to find the Contested Discovery relevant and, therefore, discoverable, Defendant argues that the Contested Discovery is not material and relevant to Plaintiff's only remaining claim for reimbursements under the SUM insurance policy.

In response, Plaintiff does not argue that his complaint sets forth a cognizable cause of action for fraud and does not oppose Defendant's motion to dismiss the cause of action for fraud under Relief #3. (See NYSCEF doc No. 82.) Nonetheless, Plaintiff maintains that the Contested Discovery is discoverable, and the Court should deny Defendant's motion to modify its July 2021 Order under Relief #2. Plaintiff argues that the scope of disclosure under CPLR 3101 encompasses all matters material and necessary to the prosecution or defense of an action and that 'relevancy and materiality' include evidence of witness bias that may shade their testimony. (See *Porcha v Binette*, 155 AD3d 1676, 1676 [4th Dept 2017]; NYSCEF doc No. 82 at ¶14, Plaintiff's Letter in Opposition.)

DISCUSSION

As the Court set forth in its Interim Order, CPLR 2221 (e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion." (See CPLR 2221 (e); *Ezzard v One East River Place Reality Co.*, 137 AD3d 648 [1st Dept 2010].) A motion to renew "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were

unknown to the party seeking renewal and therefore not brought to the court's attention. (*Beiny v Wynyard*, 132 AD2d 190 [1st Dept 1987].)

By providing Ms. Sadkowski's affidavit and deposition testimony, Defendant has presented the Court with both new facts and a reasonable justification for not providing them on the earlier motion. (*See* NYSCEF doc No. 51 at 6, [Court's Interim Order].) As such, the Court now turns to whether, upon renewal, Defendant is entitled to the dismissal of Plaintiff's fraud claim (Relief #3) and vacatur of the branch of the Court's July 2021 Order that compelled production of the Contested Discovery (Relief #2).

Relief #3

In moving to dismiss Plaintiff's cause of action for fraud under CPLR 3211 (a)(7), Defendant asserts that Paragraph 31 of Plaintiff's complaint, as interpreted by the Court in its July 2021 Order, fails to state a cognizable cause of action for fraud. The Court of Appeals has held that a cause of action for fraud must establish (1) defendant made a representation of material fact; (2) the representation was false; (3) defendant intended to deceive plaintiff; (4) plaintiff believed and justifiably relied on the representation by engaging in a course of conduct; and (5) defendant sustained damages as a result (*Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]). Defendant maintains that Paragraph 31 alleges none of these elements. (NYSCEF doc No. 38 at 13.)

In response, Plaintiff does not argue that he can maintain a cause of action for fraud. In his letter to the Court, Plaintiff's counsel intimates that Plaintiff had not conceived of Paragraph 31 creating a separate cause of action and that the Court's July 2021 Order *sua sponte* fashioned it. (NYSCEF doc No. 81.) Instead, Plaintiff seeks to refocus the issue of the Contested

Discovery's relevancy away from his allegations in Paragraph 31 and onto any possible bias the doctors may have that may shade their testimony at trial.

As discussed *supra*, Plaintiff's assessment that the Court *sua sponte* fashioned a cause of action for fraud based on the allegation in Paragraph 31 is correct.

Given that, in light of the new evidence presented by Defendant, there is no longer any factual support for the allegation that Defendant paid doctors "directing or knowing that they would conclude that treatment under defendant's no-fault insurance obligations are not necessary or related to the subject accident," the unopposed branch of Defendant's motion to dismiss Plaintiff's cause of action for fraud (Relief #3) is granted.

Relief #2

Under Relief #2, Defendant seeks an order "vacating, modifying, reversing, or awarding a protective order" the Contested Discovery.

CPLR 3122 provides that "within twenty days of service of a notice or subpoena duces tecum under rule 3120 or 3121, the party or person to whom the notice or subpoena is directed, if that party or person objects to the disclosure, inspection, or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection." Such an objection provides the party seeking disclosure to move for a protective order under CPLR 3124 or 2308. However, Courts have carved out an exception to CPLR 3122's general rule that objections to discovery requests must be made within twenty days. The First Department noted in *Haller v North Riverside Partners* (189 AD2d 615, 616 [1st Dept 1993]) that Courts may still modify or quash the discovery requests made outside the twenty-day time frame when such requests are "palpably improper." The Court continued that overly broad or unnecessarily burdensome demands may be considered palpably improper. (*Id.*; citing *Aetna Ins. Co. v Mirisola*, 167 AD2d

270 [1st Dept 1990]; *see also Medina v 31 Avni Reality Corp.*, 244 AD2d 287 [1st Dept 1997] [“outstanding discovery requests did not require a response because the information sought was palpably improper.”].)

Defendant argues that, while it did not object to the Contested Discovery or seek a protective order under CPLR 3103 within CPLR 3122’s statutory twenty-day timeframe, the Contested Discovery is nonetheless undiscoverable because Plaintiff’s demands are palpably improper, irrelevant, overly broad, and unnecessarily burdensome. (NYSCEF doc No. 38 at 7-8; NYSCEF doc No. 23 at 3-4.)

In reply, Plaintiff argues that the scope of disclosure under CPLR 3101 is exceedingly broad and includes any matter bearing on the controversy which will assist preparation for trial. (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968].) Plaintiff maintains that the Contested Discovery will assist him in litigating this case as Drs. Nason’s and De La Chappelle’s IME Reports, Peer Reviews, and payment records may show possible bias or motive to favor Defendant if they received substantial compensation (NYSCEF doc No. 17; NYSCEF doc No. 82.)

While recognizing CPLR 3101 permits broad disclosure of material relevant to a party’s cause of action, the Court finds that Plaintiff has made no showing that “the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” (*Abrams v Pecile*, 83 AD3d 527 [1st Dept 2011], citing *Vyas v Campbell*, 4 AD3d 417, 418 [2d Dept 2004].)

As discussed *supra*, the Contested Discovery seeks *all* IME Reports, Peer Reviews, and payment information from Drs. Nason and De La Chappelle—regardless of which insurance company requested their services—for the year prior to Plaintiff’s commencement of the instant

action.⁴ Yet Plaintiff has not—nor could he have—demonstrated that Defendant possesses any of the material ordered by other insurers. Consequently, the Court finds the Contested Discovery overbroad as to any IME Reports, Peer Reviews, and payment information Drs. Nason and De La Chappelle produced for other insurers.

Furthermore, as Ms. Sadkowski's testimony demonstrated, Defendant does not maintain a relationship with the doctors who conduct the IME Reports and Peer Reviews that Defendant orders for its claimants. It does not refer claimants to specific doctors, it does not directly pay doctors, and it does not keep records as to whether individual doctors provide it with favorable or unfavorable IME Reports and Peer Reviews. The third-party vendors bill Defendant based on case-number as opposed to specific doctors, meaning Defendant does not possess the part of the Contested Discovery related to Defendant's payments to Drs Nason and De La Chappelle. (NYSCEF doc No. 80 at 11-18). Accordingly, the Contested Discovery, even as modified to include reports and payments ordered by Defendant, is unduly broad and burdensome against Defendant.

In addition to being unduly broad and burdensome against Defendant, Plaintiff has not shown that the Contested Discovery is materially relevant to Plaintiff's remaining SUM Benefits claim. As discussed *supra*, when the Court directed Defendant to comply with the Contested Discovery in its July 2021 Order, it reasoned that the Contested Discovery was relevant to Plaintiff's now-dismissed fraud claim:

“The medical records and financial information sought in this demand thus are relevant to Plaintiff's claim that Defendant essentially engaged in fraud by referring Plaintiff to physicians that would lessen the value of his SUM claim and may lead to admissible evidence that will help Plaintiff establish his fraud claim.”

⁴ In its July 2021 Order granting the Contested Discovery, the Court modified the Contested Discovery to only include medical reports and payment records ordered by Defendant. However, Plaintiff's letter application refers to the Contested Discovery as originally written.

(NYSCEF doc No. 29).

In his opposition to the instant application, Plaintiff argues that the Contested Discovery is relevant to Drs. Nason and De La Chappelle’s potential bias and may assist Plaintiff’s efforts to cross-examine the doctors at trial. However, Plaintiff does not articulate how the Contested Discovery contains information material and necessary to Plaintiff’s SUM benefits breach of contract claim as asserted against Defendant. The Court notes that its determination herein does not preclude Plaintiff from separately issuing non-party subpoenas to Drs. Nason and De La Chappelle for their past medical reports and payment records. Regardless, as Plaintiff’s fraud claim has been severed, the Court can no longer adhere to its prior determination finding that Defendant is obligated to produce the Contested Discovery.

Accordingly, the branch of the Court’s July 28, 2021 Order directing Defendant to produce the Contested Discovery is vacated.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of Defendant National General Insurance Company’s application by Order to Show Cause for an order vacating, modifying, reversing, or awarding a protective order, the Court’s July 28, 2021 Order pursuant to CPLR 3103, 3122, 6301, and 6313 (Motion Seq. 001) is granted; and it is further

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3/9/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE