Kemper Independence Ins. Co. v Aron Rovner MD, PLLC
2017 NY Slip Op 31945(U)
September 13, 2017
Supreme Court, New York County
Docket Number: 158417/2016
Judge: Carmen V. St. George

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

Index No. 158417/2016
Motion Sequence 001

-against-

Decision and Order

ARON ROVNER MD, PLLC, ARTHUR AVENUE MEDICAL SERVICES, P.C., BEACON ACUPUNCTURE P.C., COLUMBUS IMAGING CENTER LLC, GENTLE HANDS PT, P.C., HAYEK CHIROPRACTIC P.C., SIGMA MED CARE INC. and SHEILA WILLIAMS,

Defendants.

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ST. GEORGE, J.S.C.:

In this action, plaintiff Kemper Independence Insurance Company seeks a declaratory judgment stating it has no obligation to pay any claims submitted by defendants. The relevant facts are as follows: Defendant Sheila Williams was involved in a motor vehicle accident on January 22, 2016. Williams was therefore an eligible injured person under the PIP endorsement of plaintiff's policy. The policy contains an arbitration provision, which is required by both New York Insurance Law 5106(b) and 11 NYCRR 65-1.1. The latter provision states:

> Arbitration. In the event any person making a claim for first-party benefits and [plaintiff Kemper] do not agree regarding any matter relating to the claim, such person shall have the option of submitting such disagreement to arbitration pursuant to procedures promulgated or approved by the Superintendent of Insurance.

Ms. Williams allegedly sustained injuries from the January 22, 2016 accident, and received medical treatment from a number of medical providers. She assigned her right to reimbursement

under plaintiff's policy to these providers, who subsequently submitted over $18,500 in no-fault claims to plaintiff for their asserted services.

Plaintiff refused to pay these claims, and instead commenced this declaratory judgment action. It argues that several medical providers failed to appear for their EUOs (examinations under oath) on two separate occasions and this obviates its obligation to pay the claims. Accordingly, it seeks a declaratory judgment that defendants have no right to recover no-fault benefits. Plaintiff also seeks a permanent stay of all arbitrations, lawsuits, and/or claims by the defendants in relation to the no-fault claims at issue due to the failure of several defendants to submit to examinations under oath (EUO). As is relevant to the instant motion, plaintiff served Hayek Chiropractic PC (Hayek), one of the alleged providers, on October 18, 2016 through the secretary of state. Thereafter, Hayek moved to compel arbitration and dismiss the action, alleging that it has the right to arbitrate the claims for reimbursement that it has submitted, along with any future claims it may submit. It cites Federal and New York statutes, along with caselaw, which note the judiciary's strong preference for allowing the appropriate legal disputes to be sent to arbitration. It claims it has not waived its right to arbitrate because plaintiff only recently commenced its lawsuit, and because instead of answering the complaint it immediately moved to compel arbitration.

In opposition, plaintiff contends that Hayek's motion is untimely and procedurally defective, and that it must be denied for both reasons. As to timeliness, it cites BCL § 306, which allows a defendant thirty days from service of the complaint to either answer or bring a pre-answer motion. It states that it served Hayek through the secretary of state on October 18, 2016, and that Hayek's motion, filed on December 20, 2016, was over thirty days late. Alternatively, plaintiff states that the motion should be denied on the merits. It states that Hayek has not sought arbitration, so its right to arbitrate has not been denied. Instead of making this motion, it contends Hayek

should file an arbitration and attempt to move forward. According to plainttiff, the arbitration can proceed simultaneously with the lawsuit because it relates to the bills themselves and the action relates to Hayek's general right to arbitrate. It cites *Unitron Advantage Ins. Co. v Bayshore Phys. Therapy, PLLC* (82 AD3d 559 [1st Dept 2011]) (Unitron), and *AIU Ins. Co. v Deajess Medical Imaging, P.C.* (24 Misc3d 151 [Sup Ct Nassau County 2009]) (AIU), among other cases, in support of this contention. It relies on *Permanent Gen. Assur. Co. v Thomas* ([2016 NY Slip Op 30631 (U)] [Sup Ct NY County 2016] [avail at 2016 WL 1449425] [Permanent]), which involves a situation similar to the one at hand, for the proposition that a claimant's arbitration does not bar an insurer's right to commence a declaratory judgment action. It states that Hayek's reliance on federal law in misplaced because New York no-fault law alone governs.

Hayek's reply reiterates that New York jurisprudence strongly favors arbitration. Accordingly, it states, a contract providing for arbitration is binding as long as the agreement is valid and the dispute is covered by the contract. It challenges plaintiff's reliance on *Permanent* because the trial court decision is currently being appealed to the First Department and because a trial court order does not bind another trial court.

After careful consideration, this Court denies the motion.[1] Although Hayek is correct that *Permanent* is not controlling authority, this Court agrees with Justice Kern's analysis as well as the analysis in *USSA General Indem. Co. v Hayek Chiropractic, P.C.* ([2017 NY Slip Op

[1] Contrary to plaintiff's contention, Hayek properly sought arbitration by means of its motion to compel. Hayek's brief delay in filing this pre-answer motion does not waive Hayek's right to arbitrate, as defendant has not "manifest[ed] an intent to accept the judicial forum" (*See Spatz v Ridge Lea Assoc., LLC*, 309 AD2d 1248, 1248-49 [4th Dept 2003]). Moreover, defendant does not dispute that the application is timely (*645 First Ave. Manhattan Co. v Silhouette Drywall Sys., Inc.*, 212 AD2d 394, 396 [1st Dept 1995]). *Unitron* and *AIU*, which plaintiff cites, stand for the general principle that plaintiff has the right to bring an action for declaratory judgment but do not speak to the precise situation at hand.

30711(U)] [Sup Ct NY County 2017] [avail at 2017 WL 1345596] [USAA], which relies on *Permanent*. As those decisions note, New York Insurance Law § 5106 (b), a claimant has the right to arbitrate the insurer's liability to pay (*See* 11 NYCRR 65-1.1). However, "Hayek's right and wish to arbitrate its dispute with plaintiff is separate from plaintiff's declaratory judgment action" (*USSA*, at *4). Indeed, an action for declaratory judgment is "an appropri ate vehicle for settling disputes concerning no fault benefits" (*AIU Ins. Co. v Deajess Medical Imaging, P.C.*, 24 Misc. 3d 161, 165 [Sup Ct Nassau County 2009]). Moreover, as Justice Kern noted in *Permanent*, the Court can provide greater relief than is available to plaintiff in an arbitration because the arbitrator's determination would only relate to Hayek's claims, and would leave open the claims of the other medical providers. "A judgment in this action, on the other hand, would determine the validity of any and all current and future claims for no-fault benefits between plaintiff and defendants relating to the alleged accident involving [plaintiff]" (*Permanent*, at * 4). The fact that Hayek has the right to commence an arbitration proceeding regarding its dispute with plaintiff, therefore, does not preclude plaintiff from "commencing a declaratory judgment action seeking a declaration that it has no duty to provide first-party no-fault benefits" (*Id.*, at *4).

Accordingly, it is

ORDERED that the motion is denied; and it is

ORDERED that defendant is directed to serve and file an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: 9/13, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.