

Liberty Mut. Ins. Co. v Henderson

2012 NY Slip Op 33499(U)

June 29, 2012

Sup Ct, New York County

Docket Number: 650092/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: COIN
ELLEN M. COIN Justice

PART 63

LIBERTY MUTUAL INSURANCE COMPANY,
ET AL. INDEX NO.

650092/12

- v -

TODD HENDERSON,
ET AL.

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.

This constitutes the decision and order of the Court.

Dated: 6/29/12

EM
HON. ELLEN M. COIN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

-----X
LIBERTY MUTUAL INSURANCE COMPANY and
LIBERTY MUTUAL FIRE INSURANCE COMPLANAY,

Plaintiffs,

-against-

TODD HENDERSON, TODD HENDERSON, JR.,
TASHMERE HENDERSON, TYQUAN HENDERSON
and TIQUASIA SMITH

(“Individual Defendants”)

And

ACTIVE CARE MEDICAL SUPPLY CORPORATION,
ACTUAL CHIROPRACTIC, P.C., ADVANCED
CHIROPRACTIC SERVICES, P.C., ALLEVIATION
MEDICAL SERVICES, P.C., ATLANTIC
CHIROPRACTIC, P.C., DOVPHIL ANESTHESIOLOGY
GROUP PLLC, EASY CARE ACUPUNCTURE P.C.,
FIVE BORO PSYCHOLOGICAL AND LICENSED MASTER
SOCIAL WORK SERVICES PLLC, GREAT MEDICAL
SERVICES P.C., K.O. MEDICAL P.C., METROPOLITAN
DIAGNOSTIC MEDICAL CARE P.C., MODERN
CHIROPRACTIC P.C., NEW YORK VEIN CENTER, LLC,
PRIME MOVERS PHYSICAL THERAPY PLLC, SML
ACUPUNCTURE P.C., STAR MEDICAL & DIAGNOSTIC
PLL, SUNLIGHT MEDICAL CARE P.C., TITAN
PHARMACY, ULTIMATE CARE CHIROPRACTIC, P.C.,
VICTORY MEDICAL DIAGNOSTICS P.C.,

(“Medical Provider Defendants”),

Collectively, the Defendants

-----X

Index Number 650092/2012
Subm. Date: June 13, 2012
Mot. Seq. No 001
DECISION & ORDER

For Plaintiffs :

Law Offices of Burke, Gordon & Conway
Employees of Liberty Mutual Group, Inc.
By Stephane D. Martin, Esq.
10 Bank Street–Suite 790
White Plains, New York 10606
914-997-8100

For Defendants Active, Alleviation and Ultimate

The Rybak Firm PLLC
By Oleg Rybak, Esq.
1506 Kings Highway, 2nd Floor
Brooklyn, New York 11229
718-975-2035

For Defendant Five Boro:

Gary Tsirelman PC
By Selina Chin, Esq.
65 Jay Street, Third Floor
Brooklyn, New York 11201
718-438-1200

Papers considered in review of this motion for a preliminary injunction:

Papers	Numbered
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Rybak Affirm. in Opposition.....	<u>2</u>
Tsirelman Affirm. in Opp.....	<u>3</u>

ELLEN M. COIN, J.

Plaintiffs Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company (“Liberty”) move for an order: (1) staying each and every part of any arbitration or court hearing for No-Fault benefits stemming from individual defendant Todd Henderson’s (“Henderson”) automobile accident on March 7, 2011 (the “accident”) until a resolution is made on Liberty’s claims in this action; (2) granting a preliminary injunction barring any arbitration or court hearing for No-Fault benefits stemming from the accident until a final determination is made on its requested relief; (3) declaring that Liberty’s denial of all claims for No-Fault benefits stemming from the accident be deemed valid or ordering a framed issue hearing on the validity of such denial.

BACKGROUND

This is an action by Henderson’s automobile insurer, Liberty, to nullify any No-Fault benefits allegedly due to any of the medical provider assignees for services they rendered to any of the individual defendants as a result of the accident.

Liberty states that its investigation of Henderson's automobile accident suggested that it involved a "minor sideswipe." However, the subsequent medical treatment received by Henderson and the other passengers appeared to Liberty to be "excessive" for a minor accident and suggested misrepresentation of their injuries. In addition, Henderson had "an extensive prior history of claims with multiple losses where Tiquasia Smith was a passenger." Accordingly, Liberty attempted to conduct further investigation by scheduling Examinations Under Oath ("EUOs") for all of the Individual Defendants. Liberty contends that although it scheduled and re-scheduled EUOs, none of the Individual Defendants appeared. As a result, Liberty denied the claims of all of the Medical Provider Defendants.

CONTENTIONS

Liberty argues that since none of the Individual Defendants submitted to an EUO, it was entitled to deny the claims of the Medical Provider Defendants.

Medical Provider Defendants Active Care Medical Supply Corporation, Alleviation Medical Services, P.C., Five Boro Psychological and Licensed Master Social Work Services PLLC, and Ultimate Care Chiropractic, P.C. oppose the instant motion. They contend that motions to stay an action must be made in the action to be stayed, and that a preliminary injunction is not warranted because Liberty has not demonstrated a likelihood of success on the merits or that it will suffer an irreparable injury.¹

¹ The Individual Defendants and the remaining Medical Provider Defendants did not respond to the instant motion.

DISCUSSION

A. Stay

The court denies so much of the instant motion as seeks a stay of arbitration or court hearings for no-fault benefits stemming from the accident. Liberty has brought a plenary action for a declaratory judgment and thus cannot avail itself, either explicitly or implicitly, of the mechanism for staying arbitration under Article 75 of the CPLR. The only other CPLR provision for stays of court proceedings, CPLR 2201, is also unavailable. That section provides; “Except where otherwise prescribed by law, *the court in which an action is pending* may grant a stay of proceeding in a proper case, upon such terms as may be just” (emphasis added). The general rule is that a court’s power to grant a stay is limited to proceedings in an action pending in that court. (4 Weinstein-Korn-Miller, New York Civil Practice, para. 2201.04, at 22-14). In *Matter of Modernismo Publications, Ltd. v Tenney* (104 AD2d 721, 721 [4th Dept 1984]), the court stated, “The practice of applying in one action to stay the proceedings in another action, pending in a different jurisdiction, is unauthorized.” (See also *Matter of Church Mut. Ins. Co. v People*, 251 AD2d 1014 [4th Dept 1998]). “[T]he proper procedure for seeking a stay or dismissal of another action would be to apply to the judge presiding over that matter.” (*Fourth Fed. Sav. & Loan Assn. of N.Y. v Garber*, 172 AD2d 399, 399 [1st Dept 1991]).

B. Injunction

This motion is properly viewed as one for a preliminary injunction. On a motion for a preliminary injunction, the movant has the burden of showing (1) a likelihood of success on the merits, (2) irreparable injury absent the grant of the preliminary injunction, and (3) a balance of the equities in the movant’s favor. (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Plaintiff must establish

that the irreparable injury it will sustain in the absence of an injunction outweighs the harm that defendants will suffer as a result of the imposition of the injunction. (*Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 721-22 [2d Dept 2012]).

Liberty contends that it is likely to succeed on the merits of its causes of action for a declaratory judgment that its denials of the claims of the Individual Defendants were proper, based upon their failure to appear for EUOs. It argues that in accordance with State Regulation 68A, NYCRR §65-1.1 and the policy Liberty issued thereunder, Liberty was entitled to require an “eligible injured person” to submit to an EUO, and, in absence of the EUO, to deny his/her claim. (*Five Boro Psychological Servs., P.C. v Progressive Northeastern Ins. Co.*, 27 Misc3d 141(A) [App Term 2d Dept 2010]; *All-Boro Med. Supplies, Inc. v Progressive Northeastern Ins. Co.*, 20 Misc3d 554, 556 [Civ Ct, Kings County 2008]).

Significantly, Liberty fails to attach to its moving papers a copy of the insurance policy that it claims required the Individual Defendants’ appearance at the EUOs. Thus, the Court cannot determine that EUOs were required by the policy.

Moreover, as the Medical Provider Defendants note, Liberty has failed to prove that the notices of the EUOs were timely and properly mailed. Liberty does not submit an affidavit from anyone in the office of Burke, Lipton & Gordon, which purportedly mailed the notices, with personal knowledge of the mailings. (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 721 [2d Dept 2006]; *Five Boro Psychological Servs., P.C. v Progressive Northeastern Ins. Co.*, 27 Misc3d 141(A) [App Term 2d Dept 2010]). Nor does it offer an affidavit of an employee with knowledge of the law firm’s standard office practice or procedure designed to ensure that items were properly addressed and mailed (*St. Vincent’s Hosp. of Richmond v Government Empls. Ins. Co.*,

50 AD3d 1123, 1123-24 [2d Dept 2008]; *Back to Back Chiropractor, P.C. v State Farm Mutual Auto. Ins. Co.*, 35 Misc3d 1241(A) [Suffolk Dist Ct 2012]). Liberty has also failed to attach to its submission copies of return receipts and receipts for certified mailing. In the absence of such proof, Liberty has failed to establish its likelihood of success on this motion.

The Medical Provider Defendants also contend that Liberty's purported denial of their claims is untimely, citing *Fair Price Med. Supply Corp. v Travelers Indem. Co.* (10 NY3d 556 [2008]) and *Presbyterian Hosp. v Md. Cas. Co.* (90 NY2d 274 [1997]). Liberty claims that the issue here is one of coverage, governed by the Court of Appeals decision in *Central Gen. Hosp. v Chubb Group of Ins. Cos.* (90 NY2d 195 [1997]). The complaint alleges "that this was a possible staged accident" (Complaint, para.48; Exh. B to the Affirmation of Stephane D. Martin dated April 9, 2012). However, it also alleges a misrepresentation of the injuries suffered by the Individual Defendants (Complaint, para.47), which is not a coverage issue. At any rate, in view of Liberty's other failures of proof of their likelihood of success, these conflicting allegations are not determinative.

The Court notes that Liberty has met its burden to show that it would be irreparably injured absent injunctive relief. The element of irreparable harm is established by the numerous assignments of no-fault benefits that the Individual Defendants made to medical providers. The multiplicity of lawsuits and arbitration proceedings, necessitating constant revisiting of the identical issue of fraud, may lead to an ever-increasing amount in attorneys' fees and may subject the insurance company to conflicting legal directives (*21st Century Advantage Ins.*, 2012 NY Slip Op 31490U, *10 [Sup Ct, Queens County 2009]). However, the failure of adequate proof of Liberty's likelihood of success on the merits defeats its request for preliminary injunctive relief. In view of the Court's determination on this issue, there is no reason for a framed issue hearing.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion for a stay of any arbitration or court hearing for No-Fault benefits stemming from the March 7, 2011 occurrence is denied; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction barring any arbitration or court hearing for such No-Fault benefits is denied; and it is further

ORDERED that plaintiffs' motion for a declaration that plaintiffs' denials of all claims for such No-Fault benefits be deemed valid or for a framed issue hearing to make such determination is denied.

This constitutes the decision and order of the Court.

Dated: 6/29/12

ENTER:


Ellen M. Coin, A.J.S.C.