

**Allstate Ins. Co. v Hospital for Special Surgery**

2013 NY Slip Op 32430(U)

October 4, 2013

Sup Ct, New York County

Docket Number: 157397/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: \_\_\_\_\_ Justice

PART \_\_\_\_\_

Index Number : 157397/2012
ALLSTATE INSURANCE COMPANY
vs
HOSPITAL FOR SPECIAL SURGERY
Sequence Number : 001
DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 10/4/13

PK \_\_\_\_\_, J.S.C.

- 1. CHECK ONE: ... CASE DISPOSED
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

CYNTHIA S. KERN
J.S.C.
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
ALLSTATE INSURANCE COMPANY,

Plaintiff,

-against-

HOSPITAL FOR SPECIAL SURGERY  
a/a/o LAWRENCE AMORUSO,

Defendant.  
-----X

Index No. 157397/2012

**DECISION/ORDER**

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

| Papers                                       | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits and Cross Motion.....   | <u>2</u> |
| Replying Affidavits.....                     | <u>3</u> |
| Exhibits.....                                | <u>4</u> |

Plaintiff commenced the instant action pursuant to Insurance Law § 5106(c) seeking *de novo* review of the no-fault insurance dispute at issue between the parties. Plaintiff now moves pursuant to CPLR § 3211(b) for an order dismissing defendant’s second affirmative defense. Defendant cross-moves pursuant to CPLR § 3212 for summary judgment directing plaintiff to pay the amount awarded in arbitration. For the reasons set forth below, plaintiff’s motion is granted and defendant’s cross-motion is denied.

The relevant facts are as follows. On or about January 18, 2009, defendant’s assignor Lawrence Amoruso was allegedly involved in a motor vehicle accident wherein he sustained

injuries to his shoulder. Subsequent to the accident, plaintiff sought treatment from defendant for these injuries and defendant submitted claims to Allstate for no-fault benefits. Allstate subsequently denied defendant's claims based on Mr. Amoruso's failure to timely submit a no-fault application. It is undisputed that Mr. Amoruso's application was untimely.

On or about August 12, 2011, defendant commenced arbitration against plaintiff to recover the unpaid no-fault claims. In a decision dated April 23, 2012, the arbitrator found in favor of defendant and against plaintiff and awarded defendant \$15,378.33 with interest. In finding for the defendant, the arbitrator relied on the arbitration decision rendered in the prior related arbitration between plaintiff and Mr. Amoruso dated February 25, 2010. In that decision, the arbitrator found that Mr. Amoruso had a reasonable justification for submitting late notice of his no-fault claim. Adopting this finding, the arbitrator found that as defendant's assignor had provided a reasonable justification for its failure to submit notice of his no-fault claim within thirty days, plaintiff's denial of defendant's claim on that basis was without merit. On or about August 28, 2012, the Master Arbitrator, affirmed the April 23, 2012 arbitration decision.

On or about October 19, 2012, plaintiff commenced the instant action pursuant to Insurance Law § 5106(c) seeking *de novo* adjudication of the no-fault dispute. In its answer, defendant states as its second affirmative defense that plaintiff's complaint must be dismissed as plaintiff has failed to state a cause of action upon which relief can be sought. Plaintiff now moves to dismiss defendant's second affirmative defense and defendant cross-moves for summary judgment on the ground that the arbitrator has already determined that Mr. Amoruso had a reasonable justification for filing an untimely application and as such no triable issue of fact remains.

The court first turns to defendant's cross-motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Pursuant to 11 NYCRR 65-1.1(d) of the no-fault regulations, "[i]n the event of an accident, written notice setting forth details sufficient to identify the eligible injured person, along with reasonably obtainable information regarding the time place and circumstances of the accident, shall be given by, or on behalf of, each eligible injured person, to the Company, or any of the Company's authorized agents, as soon as reasonably practicable, but in no event more than 30 days after the date of the accident." If an eligible injured person fails to give notice of his or her claim within 30 days, an insurer may deny his or her claim based upon the claimants's failure to provide timely written notice of claim. *See* 11 NYCRR 65-3.3(e). However, "late notice will be excused where the applicant can provide reasonable justification for the failure to give timely notice." *Id.*; *see also* 11 NYCRR 65-1.1(d).

In the present case, defendant has failed to establish its *prima facie* right to judgment as a matter of law as it has failed to demonstrate that Mr. Amoroso submitted to plaintiff written proof providing clear and reasonable justification for his failure to give timely notice. Here, defendant relies solely on the prior arbitration decisions to demonstrate that its assignor Mr.

Amoruso had a “reasonable justification” for his failure to timely file notice of his no-fault claim and as such plaintiff’s denial of its claims is improper. However, the arbitrators’ decisions are insufficient for this court to determine that proper written notice was provided to plaintiff as no evidence upon which the arbitrator reached this decision was presented. This is an action *de novo* and the court must make its own determination based on the evidence provided and not simply adopt the findings of the arbitrator. Additionally, to the extent that defendant argues that the arbitration decisions are admissible and sufficient as they are the testimony of Mr. Amoruso, such contention is without merit as the arbitration award contains only the arbitrator’s view of Mr. Amoruso’s testimony and not his actual testimony. Accordingly, defendant has failed to establish its *prima facie* right to judgment as a matter of law and its motion for summary judgment must be denied.

However, plaintiff’s motion to dismiss defendant’s second affirmative defense is granted as plaintiff properly commenced this action pursuant to Insurance Law § 5106(c). Insurance Law § 5106(c) expressly provides that either party to a matter submitted to arbitration has the right to a *de novo* determination of the dispute in the event that the master arbitrator’s award is \$5,000 or greater, exclusive of interest and attorney’s fees. See *Matter of Greenberg (Ryder Truck Rental)*, 70 N.Y.2d 573 (1987). In the present case, it is undisputed that defendant was awarded the amount of \$15,378.33. As this amount far exceeds \$5,000, plaintiff was entitled to file the instant action for a trial *de novo* of the underlying no-fault dispute and defendant’s second affirmative defense in its answer that plaintiff failed to state a cause of action is without merit.

Accordingly, plaintiff’s motion is granted and defendant’s cross-motion is denied. This constitutes the decision and order of the court.

