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

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PERMANENT GENERAL ASSURANCE COMPANY,

Plaintiff,

Index No. 155652/15

-against-

DECISION/ORDER

DARYL THOMAS, ABBOTT ANESTHESIOLOGISTS ASSOCIATES, P.C. a/k/a ABBOTT ANESTHESIA ASSOCIATES, P.C., AMHERST MEDICAL SUPPLY LLC, BRAIN & SPINE MEDICAL SERVICES, PLLC, BUFFALO DIAGNOSTIC IMAGINE, PLLC, BUFFALO NEUROSURGERY, P.C. a/k/a BUFFALO NEUROSURGERY GROUP, EASTERN GREAT LAKES PATHOLOGY, P.C., ELITE MEDICAL SUPPLY OF NEW YORK, LLC a/k/a ELITE MEDICAL SUPPLY, GEORGE B. MOORE, M.D., LIFELINE MONITORING SERVICES, LLC, LOUBERT S. SUDDABY, M.D., P.C., MERCY HOSPITAL OF BUFFALO, NEW YORK SPINE & WELLNESS CENTER a/k/a NEW YORK SPINE & WELLNESS, NORTHTOWN IMAGING, P.C., NORTHTOWN ORTHOPEDICS, P.C., PINNACLE ORTHOPEDIC & SPINE SPECIALISTS, LLC, SCOTT A. CROCE, D.C., P.C., SRA MEDICAL IMAGING LLC, WESTERN NEW YORK MRI LLP, WESTERN NEW YORK PETCT LLC f/k/a WNY PETCT LLC, JERRY J. TRACY III, PHYSICIAN PLLC,

Defendants,

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HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2
Notice of Cross-Motion and Affidavits Annexed.....	3
Affirmations in Opposition.....	4
Reply Affidavits.....	
Exhibits.....	5

Plaintiff Permanent General Assurance Company commenced the instant action seeking a

declaratory judgment as to its obligation to pay any claims submitted by defendant medical providers based on defendant Darryl Thomas' ("Thomas") failure to appear for two duly scheduled Independent Medical Examinations ("IMEs"). Defendants Scott A. Croce, D.C., P.C. ("Dr. Croce") and Jerry J. Tracy III, Physician PLLC ("Physician") now move for an Order compelling arbitration and dismissing the instant action. Defendant Mercy Hospital of Buffalo ("Mercy") cross-moves for an Order compelling arbitration and dismissing the instant action, or, in the alternative, changing the venue of this action to Erie County. Defendants Brain & Spine Medical Services ("Brain") and Loubert S. Suddaby, M.D., P.C. ("Dr. Suddaby") separately move for an Order compelling arbitration and dismissing the instant action, or, in the alternative, changing the venue of this action to Erie County. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. On or about October 18, 2011, defendant Thomas was involved in a motor vehicle accident and as a result of said accident, Thomas became an eligible injured person ("EIP") under the PIP endorsement of an insurance policy issued by plaintiff (the "Policy"). The Policy contains the following arbitration provision as required by New York Insurance Law § 5106(b) and the New York Insurance Regulations, 11 NYCRR 65-1.1:

> Arbitration. In the event any person making a claim for first-party benefits and [plaintiff] 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.

Thomas allegedly suffered injuries as a consequence of the accident and received medical treatment for said injuries from defendant medical providers. Thereafter, Thomas assigned his benefits under the Policy to the medical providers who then submitted claims for no-fault benefits to

plaintiff for the services provided to Thomas.

Plaintiff did not pay the claims submitted by the medical providers and instead commenced the instant action seeking a declaratory judgment that it has no obligation to pay defendants' claims on the ground that there was a breach of a condition precedent to coverage in the Policy based on Thomas' failure to appear at two duly scheduled IMES. Defendants Dr. Croce, Physician, Mercy, Brain and Dr. Suddaby now move for an Order compelling arbitration and dismissing the instant action based on the provision in the Policy, or, in the alternative, changing the venue of this action to Erie County.

On a motion to compel arbitration, "[i]f the court concludes that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and that there has been compliance with any agreed on conditions precedent to arbitration, judicial inquiry is at an end (absent any issue as to bar by limitation of time) and the parties should be directed to proceed to arbitration." *Matter of County of Rockland*, 51 N.Y.2d 1, 8 (1980). The same standard applies in deciding a motion to compel arbitration under the FAA. In deciding whether to compel arbitration under the FAA, the Court must decide (1) whether a valid agreement to arbitrate exists and, if so, (2) whether the dispute falls within the scope of the arbitration clause. *See Verizon N.Y. Inc. v. Broadview Networks*, 5 Misc. 3d 346 (Sup. Ct. N.Y. County 2004).

In the present case, the court grants defendants Dr. Croce, Physician, Mercy, Brain and Dr. Suddaby's (hereinafter referred to as the "moving defendants") motions to compel arbitration and dismiss the instant action. The contract clearly contains a valid agreement to arbitrate as it provides that if any person making a claim for first-party benefits and plaintiff do not agree as to any matter relating to the claim, "such person shall have the option of submitting such disagreement

to arbitration...." The dispute also clearly falls within the scope of the arbitration clause as it involves the issue of whether plaintiff is obligated to pay the first-party claims submitted by the defendants. Indeed, courts have consistently found this arbitration provision valid and enforceable and encompassing the dispute at issue. *See Alstate Ins. Co. v. Elzanaty*, 929 F.Supp.2d 199, 212 (E.D.N.Y. 2013)("The unambiguous arbitration clause at issue...clearly provides that in the event any person making a claim for first-party benefits and the insurer do not agree regarding any matter relating to the claim, such person shall have the option of submitting such disagreement to arbitration. Under the FAA, this type of written provision is valid, irrevocable, and enforceable.")

Plaintiff's assertion that the moving defendants' motions should be denied on the ground that despite the arbitration provision in the Policy, it is entitled to seek a declaratory judgment of no coverage based on Thomas' failure to appear at two duly scheduled IMEs, a condition precedent to coverage under the Policy, is without merit. Indeed, plaintiff does not contest defendants' ability to arbitrate such a dispute but rather, it asserts that pursuant to CPLR § 3001, an insurance company is free to bring a declaratory judgment action at any time where a justiciable controversy exists despite defendants' ability to arbitrate. However, while plaintiff is certainly entitled to bring the instant action against the defendants, defendants must first be provided an opportunity to arbitrate the issue if they desire to do so pursuant to the arbitration provision in the Policy.

Further, plaintiff's assertion that the moving defendants' motions should be denied on the ground that the granting of said motions would be prejudicial to plaintiff because it would "be forced to have the same issue decided on a claim by claim (or bill by bill) basis" in different forums which would be a strain on judicial resources is also without merit. It is well-settled that "the FAA compels arbitration of arbitrable claims where, as here, a party files a motion to compel, 'even

where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" *Id.* at 213 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

Accordingly, the moving defendants' motions to compel arbitration and dismiss the instant action is granted and the action is hereby dismissed as against the moving defendants only. This constitutes the decision and order of the court.

Dated: 1/13/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C