Hertz Vehs., LLC v Woodhaven Comprehensive Med., P.C.
2016 NY Slip Op 32355(U)
November 29, 2016
Supreme Court, New York County
Docket Number: 152950/2015
Judge: David B. Cohen

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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HERTZ VEHICLES, LLC,

Plaintiff,

DECISION/ORDER
Index No. 152950/2015

-against-

WOODHAVEN COMPREHENSIVE MEDICAL, P.C., VERASO MEDICAL SUPPLY CORP., REHABILITATION PSYCHOLOGICAL SERVICES, P.C., RANDALL V. EHRLICH, M.D., P.C., NJ PAIN TREATMENT, P.C., JEREMY M. WHITFIELD, D.C., P.C., IRENE MEDICAL, P.C., DUNAMIS REHAB, P.T., P.C., BMJ CHIROPRACTIC, P.C., BL HEALTHY LIFE ACUPUNCTURE, P.C., AGYAL P.T., PLLC, METROPOLITAN MEDICAL AND SURGICAL, P.C., ISURPLY LLC, PAIN PHYSICIANS, NY PLLC, SOVERA MEDICAL SUPPLY CORP., MARKEL DACOSTA, MAXIE DACOSTA, NARCHAL DACOSTA, TIFFANY IMES

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion:

Papers	Number
Notice of Motion Seq 4 and Affirmation and Exhibits	1
Notice of Cross Motion and Opposition and Exhibits	2
Notice of Motion Seq 5 to Vacate a Default and Reply to Mot Seq 4	3
Opposition to Motion to Vacate and Exhibits	4
Reply	5

HON. DAVID COHEN, J.:

Hertz vehicles ("plaintiff") brought this action seeking a declaratory judgment that it does not owe no-fault benefits in connection with an accident that occurred on May 3, 2014 at the intersection of 78th Street and 2nd Avenue in New York, New York (the "Accident"). On that day, defendants Markel Dacosta, Maxie Dacosta, Narchal Dacosta and Tiffany Imes were allegedly the occupants of a vehicle, owned and insured by plaintiff that was involved in a collision, and suffered injuries. The complaint states that various medical providers submitted bills in connection with the treatment for injuries allegedly sustained in the Accident and that plaintiff sought examinations under oath ("EUOs") of these various medical providers as

permitted by the no-fault regulations. The complaint further alleges that these medical providers did not appear for their scheduled EUOs on two occasions. Thereafter, plaintiff commenced this action seeking a declaratory judgment that based upon the failure to appear for the EUOs, no benefits were owed by plaintiff. Upon the default of certain defendants, plaintiff moved for a default judgment against the non-answering defendants. On June 8, 2016, this Court signed a settled order granting dismissal for certain defaulting defendants.

On May 20, 2016, defendants BMJ Chiropractic P.C. ("BMJ") and NJ Pain Treatment P.C. ("NJ Pain") moved to dismiss this matter and compel arbitration. At that time, BMJ had not answered the complaint and was one of the defendant's plaintiff had sought a default judgment against and NJ Pain had not been served. On July 12, 2016, plaintiff cross-moved seeking (a) that the June 8, 2016 Order be amended to include BMJ as BMJ had been left off the settled order due to a "technical error;" and (b) that the time to serve NJ Pain be extended. On August 8, 2016, BMJ moved to vacate its default and plaintiff opposed the vacatur on September 7, 2016. By stipulation so-ordered on October 13, 2016, the parties agreed that NJ Pain has accepted service; that the June 8, 2016 order be amended to include BMJ; that the Court should decide Mot Seq 5 first; that should the Court grant Mot Seq 5, Mot Seq 4 be deemed a pre-answer motion to dismiss by both BMJ and NJ Pain; and that should the Court deny Mot Seq 5, the Court should decide Mot Seq 4 as a pre-answer motion to dismiss by NJ Pain only.

BMJ's motion to vacate is granted. CPLR § 5015(a)(1) allows the court to relieve a moving party from a judgment or order based on excusable default. In addition, New York has long had a strong policy favoring resolution of cases on the merits (*Prowley v Dejay Litho, Inc.*, 42 Misc 3d 131(A) [App Term 2013]). BMJ has an excusable default as it established that it did not receive the summons and complaint through from the secretary of state and that it only became aware of the default in March 2016 and shortly thereafter filed its motion to vacate. In addition, as New York favors resolution on the merits and plaintiff will suffer no prejudice as this matter shall proceed against at least one other answering defendant, the Court finds that vacatur is just in this matter. Based upon the October 13, 2016 stipulation, the Court shall decide Mot Seq 4 as a pre-answer motion by both BMJ and NJ Pain.

BMJ and NJ Pain argue that this matter must be dismissed as they have the right to proceed in arbitration. Specifically, they point the Court to New York Insurance Law 5106(b) which provides:

> Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

In addition, New York Insurance Regulations, 11 NYCRR 65-1.1 provides:

> 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.

Based upon the above language, BMJ and NJ Pain argue that the Court must dismiss this matter as they are electing to have this dispute resolved in arbitration. However, BMJ and NJ Pain's desire and right to arbitrate the individual denials of benefits is separate from plaintiff's action seeking a declaration of insurance coverage as a whole. The Appellate Division, First Department, has permitted an insurer to bring a declaratory judgment action in Court for an order declaring that it has no duty to provide first-party no-fault benefits despite a medical provider's statutory right to submit its dispute to arbitration (*see Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559 (1st Dept 2011). Indeed, "although the claimant has the option of submitting a no fault dispute to arbitration, declaratory judgment may be an appropriate vehicle for settling disputes concerning no fault benefits" (*Permanent General Assur. Co. v. Thomas*, 2016 WL 1449425 (2016 NY Sup, Kern, J.). In *Permanent*, the Court stated:

> While the moving defendants were within their rights to submit their disputes to arbitration, and it has been made clear to the court that some of them have already done so, those arbitration proceedings only concern the specific claims submitted to arbitration by the individual provider defendants and any holding would be constrained to those claims. 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 Thomas. Further, the moving defendants always had the opportunity to commence an arbitration proceeding to resolve a controversy involving a claim for first-party no-fault benefits but such opportunity does not preclude an insurer from commencing a declaratory **5 judgment action seeking a declaration that it has no duty to provide first-party no-fault benefits.

Here, the Court agrees with Judge Kern's analysis. Upon receipt of the denials, the moving defendants were/are permitted to seek arbitration consistent with the statute and regulation. The instant lawsuit did not remove the ability of the arbitrator to resolve a controversy involving a claim for first-party no-fault benefits as to any specific individual bill. However, plaintiff is permitted the opportunity to seek a declaration as to its overall duty for coverage.

For the above reasons it is therefore

ORDERED, that defendant BMJ's motion to vacate its default is granted; it is further

ORDERED, that plaintiff's motion to extend time to serve NJ Pain is denied as academic; it is further

ORDERED, that plaintiff's motion to amend the June 8, 2016 Order is granted per the parties October 13, 2016 stipulation, however the default judgment against BMJ is vacated; it is further

ORDERED, that defendant BMJ and NJ Pain's motion to dismiss is denied; and it is further

ORDERED, that defendants BMJ and NJ Pain shall file their Answer in this action within 20 days of the date of this Order.

This constitutes the decision and order of the Court.

DATE : 11/29/2016

COHEN, DAVID B., JSC