Country-Wide Ins. Co. v Lalane
2017 NY Slip Op 30048(U)
January 9, 2017
Supreme Court, New York County
Docket Number: 162554/2014
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

-against-

ERNESTO LALANE
("Eligible Injured Party Defendant"),

And

CHIROPRACTIC ASSOCIATES OF RICHMOND HILL, PC,
MIDDLE VILLAGE DIAGNOSTIC IMAGINE, PC, and
KANTER PHYSICAL MEDICINE & REHAB, PC.
("Medical Provider Defendants")
Defendants.

INDEX NO. 162554/2014
MOTION DATE 11/16/2016
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion for summary judgment, and cross-motion to amend the Answer.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 7
Replying Affidavits	8 - 9; 10

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for summary judgment against the Defendants, is denied. The Cross-Motion by Defendants Chiropractic Associates of Richmond Hill, PC (herein "Defendant Chiropractic Associates"), and Kanter Physical Medicine and Rehab, PC (herein "Defendant Kanter") (collectively herein "Cross-Movants") seeking leave to amend their Answer to include a counterclaim, is denied.

This action arises from a vehicle collision on May 18, 2014, involving Defendant Ernesto Lalane (herein "Lalane"). Plaintiff received bills for treatment allegedly rendered to Lalane by the Defendants in July and August of 2014. (Mot. Exh. H). In seeking to verify these claims, Plaintiff contends that it timely mailed an appointment letter to Lalane and his attorney on August 1, 2014, scheduling Lalane for an Independent Medical Examination (herein "IME"). (Mot. Exh. D). Plaintiff asserts that

Lalane failed to appear on the scheduled date, and that Plaintiff rescheduled the IME by mailing a second appointment letter to Lalane and his attorney on August 19, 2014. (Mot. Exh. E). That Lalane again failed to appear on the rescheduled date, after which Plaintiff timely issued a general denial of the claims on September 5, 2014, based on Lalane's violation of the policy conditions in failing to appear for the IME's. (Mot. Exh. J).

Plaintiff commenced the instant action by Summons and Complaint on December 19, 2014, seeking a declaration that Plaintiff does not owe a duty to pay no-fault claims to the Defendants, and that the Defendants have no rights to collect no-fault benefits from Plaintiff, in connection with the May 18, 2014 accident. (Mot. Exh. A). Issue was joined by the Defendants in March of 2015. (Mot. Exh. C).

Plaintiff now moves for summary judgment against the Defendants on the grounds that Lalane violated the terms of the insurance policy by failing to appear for the scheduled IME's.

Defendants Chiropractic Associates and Kanter oppose the motion and cross-move to amend their Answer to include a counterclaim.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

11 NYCRR 65-2.4(a) states that "[n]o action shall lie against the self-insurer unless, as a condition precedent thereto, there shall have been full compliance with the terms of this section." 11 NYCRR 65-2.4(c) states that "[u]pon request by the self-insurer, the eligible injured person or that person's assignee or representative shall:

(1) execute a written proof of claim under oath;
(2) as may reasonably be required submit to examinations under oath by any person named by the self-insurer and subscribe the same;
(3) provide authorization that will enable the self-insurer to obtain medical records; and

(4) provide any other pertinent information that may assist the self-insurer in determining the amount due and payable."

The failure to appear for IMEs requested by an insurer when, and as often as, it may reasonably require is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine and plaintiff has the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (Unitrin Advantage Insurance Company v. Bayshore Physical Therapy, PLLC, 82 A.D. 3d 559, 918 N.Y.S. 2d 473 [1st. Dept. 2011]). Plaintiff is not required to prove that the assignee's failure to appear at the IME was willful (Bath Ortho Supply, Inc., a/a/o Clarence Echols, v. New York Central Mutual Fire Insurance Company, 34 Misc. 3d 150(A), 2012 N.Y.Slip Op. 50271 (U) [App. Term 1st. Dept. 2012]).

Plaintiff annexes the appointment letters requesting Lalane's appearance at the IME that were sent via regular mail to both Lalane and his attorney. (Mot. Exh. D & E). Plaintiff also annexes affidavits from Plaintiff's personnel attesting to its regular business practices and procedures regarding the basis of Plaintiff's IME requests, attesting to the mailing of these IME requests and the issuance of the denial of claim form. (Mot. Exhs. F, G, and I). (See Hertz, Supra).

However, Plaintiff does not provide proof of Lalane's failure to appear at the scheduled IME's. Plaintiff asserts that it attached to Fatima Zuhra's Affidavit copies of the log-in sheets that a claimant who appears for an IME is required to sign, that the log-in sheets for Lalane's scheduled IME dates show that he did not sign-in, and that this is proof of his failure to appear on both dates. Plaintiff fails to attach said log-in sheets, however. Nor does Plaintiff attach an affidavit from an individual with personal knowledge who was working at the facility where the IME was to be held, and who was present on the subject dates, attesting to Lalane's failure to appear. Therefore, Plaintiff has not established a basis for summary judgment.

Cross-Movants cross-move to amend their Answer to include a counterclaim for Plaintiff's breach of contract in wrongfully denying their claims for reimbursement for services rendered to Lalane with respect to the May 18, 2014 accident. Cross-Movants attach their Proposed Amended Answer with Counterclaim (Cross-Mot. Exh. 2).

Leave to amend pleadings pursuant to CPLR § 3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st. Dept., 2012]).

Plaintiff opposes the cross-motion arguing, among other things, that leave to amend the Answer should be denied as Defendant Chiropractic Associates chose

arbitration for these claims, which were denied by a lower arbitrator decision and a master arbitrator decision. (Aff. In Opp. to Cross-Mot., NYSCEF Docs # 39 & 40). Plaintiff also argues that leave to amend the Answer should be denied as Defendant Kanter has already commenced an action for these claims in Queens County Supreme Court under Index No. 705965/16. (Id. at NYSCEF Doc # 41).

"The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." (Roggio v. Nationwide Mut. Ins. Co., 66 N.Y.2d 260, 487 N.E.2d 261, 496 N.Y.S.2d 404 [1985], citing De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 362 N.Y.S.2d 843, 321 N.E.2d 770 [1974]). "[P]arties are not permitted to participate in arbitration on the merits and yet maintain a right to litigate the issues." (See Roggio, Supra; see also Sherrill v. Grayco Bldrs., 64 N.Y.2d 261, 486 N.Y.S.2d 159, 475 N.E.2d 772 [1985]). "In the setting of no-fault benefits, while each denial of medical expense reimbursement may- for purposes of facilitating quick recoveries - give rise to an independent claim, there is all the more reason why an election to arbitrate should foreclose litigation of subsequent disputes over medical bills growing out of the same accident." (See Roggio, Supra).

The Cross-Motion for leave to amend the Cross-Movant's Answer is denied. The claims set forth by Defendant Chiropractic Associates in the Proposed Amended Answer with Counterclaim are the subject of the lower arbitrator's decision dated February 15, 2015, which was later affirmed by the master arbitrator's decision on May 27, 2016. (See NYSCEF Docs # 39 & 40). Further, Defendant Kanter's claims set forth in the Proposed Amended Answer with Counterclaim are also the same claims set forth by it in the Summons and Complaint it filed in Queens County Supreme Court in July of 2016. (See NYSCEF Doc # 41). Defendants assert that they would stipulate to terminate the Article 75 proceeding in Queens County if their motion for leave to amend was granted. However, Defendants do not provide any such Stipulation, and further, the time for the Defendants to withdraw that action has since passed as Plaintiff (as the Defendant in the Queens Action) has already filed an Answer. (See NYSCEF Doc # 42).

CPLR 3217(a) provides in relevant part that, "Any party asserting a claim may discontinue it without an order by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served...; or "by filing with the clerk of the court before the case has been submitted to the court...a stipulation in writing signed by the attorneys of record for all parties." Further, "an action shall not be discontinued by a party asserting a claim except upon order of the court" and "The court may not order an action discontinued except upon the stipulation of all parties appearing in the action." (CPLR 3217(b)).

Accordingly, it is hereby ORDERED that this motion by Plaintiff for summary judgment in its favor against the Defendants, is denied, and it is further,

ORDERED, that the Cross-Motion by Defendants for leave to amend their Answer to include a counterclaim, is denied.

ENTER:

Dated: January 9, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**