Hereford Ins. Co. v Physical Medicine & Rehabilitation of N.Y., P.C.
2020 NY Slip Op 33377(U)
October 15, 2020
Supreme Court, New York County
Docket Number: 153072/2017
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

----------X

INDEX NO. 153072/2017

MOTION SEQ. NO. 004

HEREFORD INSURANCE COMPANY,

Plaintiff,

- v -

PHYSICAL MEDICINE & REHABILITATION OF NEW YORK, P.C. A/K/A PHYSICAL MEDICINE & REHABILITATION OF NY, P.C. A/K/A PMR OF NY BUSHWICK A/K/A PMR OF NY REGO PARK, NICKY BHATIA, MD, P.C.,ADVANCED RECOVERY EQUIPMENT AND SUPPLIES, LLC,LENOX HILL RADIOLOGY AND MEDICAL IMAGING ASSOCIATES, P.C. A/K/A LENOX HILL RADIOLOGY MEDICAL IMAGING, NEW YORK SPINE SPECIALISTS, LLP A/K/A NEW YORK SPINE SPECIALIST, ADVANCED SURGERY CENTER, L.L.C., KATZMAN ORTHOPEDICS, P.C.,JASON W. BROWN, M.D., P.C. A/K/A JASON BROWN, M.D., P.C.,NU AGE MED SOLUTIONS, INC.,ICONIC WELLNESS SURGICAL SERVICES, L.L.C., JON-PAUL DADAIAN, P.C.,ADVANCED ORTHOPAEDICS, P.L.L.C., SENIORCARE EMERGENCY MEDICAL SERVICES, INC.,INTERFAITH MEDICAL CENTER, INTERFAITH PROFESSIONAL PHYSICIAN SERVICES, P.C.,DOV J. BERKOWITZ, M.D., AUTORX, LLC,RAMAPO VALLEY ANESTHESIA ASSOCIATES, L.L.C., JARVONE PAGE, DESMOND JULIEN and KENNETH RICHBOW,

Defendants.

----------X

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 150, 151, 152, 153, 154, 155, 156, 157, 158, 160

were read on this motion to/for DISMISS.

In this action seeking, *inter alia*, a declaratory judgment, defendants Iconic Wellness Surgical Services, LLC and Advanced Surgery Center, LLC ("the moving defendants") move, pursuant to CPLR 3211(a)(5), for dismissal of this action on the ground that it "may not be maintained because of arbitration and award" (Docs. 150-158). The moving defendants also seek,

pursuant to CPLR 3214 (b), a stay of all disclosure as against all defendants (Docs. 150-158). Plaintiff Hereford Insurance Company ("Hereford") opposes the motion (Doc. 160). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order entered February 6, 2020 ("the 2/6/20 order"), which vacated a default judgment previously rendered against the moving defendants (Doc. 154). However, the relevant facts are briefly summarized below.

In March 2017, Hereford commenced this action against defendants, seeking a judgment declaring that it owed no duty to pay no-fault claims arising from a July 2016 motor vehicle accident on the grounds that it maintained a founded belief that the alleged collision was not an insured incident ("first cause of action"); that Claimants materially misrepresented the circumstances and facts surrounding the collision ("second cause of action") and that the medical treatment submitted by the medical provider defendants was not causally related to the alleged collision ("third cause of action") (Doc. 1). Hereford also requested a "stay of all arbitrations, lawsuits and/or claims by the defendants" arising from the July 2016 collision ("fourth cause of action") (Doc. 1).

As relevant here, in December 2017, the moving defendants interposed an answer with several affirmative defenses, including that this action was precluded, pursuant to CPLR 3215(a)(5), by "arbitration and award, collateral estoppel . . . [and] res judicata" (Doc. 66).

The moving defendants exercised their right to resolve the dispute through arbitration and, on March 30, 2018, following a hearing on March 14, 2018, the arbitrator found that the moving defendants had established, *prima facie*, their entitlement to reimbursement for medical services that they rendered relating to the July 2016 incident (Doc. 136). The arbitrator also rejected Hereford's defense that the July 2017 accident was staged and it found that Hereford's founded belief defense had been previously adjudicated in a prior arbitration hearing and that it was collaterally estopped from relitigating this issue (Doc. 136). The arbitrator's decision was affirmed by the master arbitrator (Doc. 136).

The moving defendants now argue that Hereford is barred from relitigating in this action whether the underlying medical services rendered for no-fault claims relating to the same July 2016 accident are reimbursable, arguing that this issue has already been adjudicated before the New York No-Fault Arbitration Tribunal and that an "arbitral award conclusively disposed of [Hereford's] founded belief defense" (Docs. 136; 151 ¶ 8, 15). Thus, the moving defendants contend that Hereford's causes of action against them are ripe for dismissal pursuant to CPLR 3211(a)(5) (Doc. 151 ¶ 27). Additionally, the moving defendants maintain that they are entitled to a stay of this Court's discovery schedule pursuant to CPLR 3214(b) given that their motion was filed pursuant to CPLR 3211 (Doc. 151 ¶ 28).

In opposition, Hereford argues that, although "this action and any arbitration filed by [the moving defendants] would overlap, the two proceedings are in fact distinct" because "[t]his action seeks[, *inter alia*,] a determination regarding the larger issue of insurance coverage on the entire claim" and "does not examine each bill and each denial to determine what should and should not be paid" (Doc. 160 ¶ 5). Hereford also contends that the moving defendants fail to offer proof that the bills in dispute constitute "*all of the bills that they have filed related to this action*" (Doc. 160

¶ 9). Hereford further argues that "[t]he arbitrations referenced by [the moving defendants] concern only the specific bills set forth in [the arbitration proceedings]" and that "if the Court were to dismiss this action as against [them] based solely on those awards, it would deprive Hereford of other bills that may exist, or of the issue of treatment which may be provided in the future" (Doc. 160 ¶ 10).

Hereford also argues that this Court should deny that branch of the motion seeking a stay of all discovery in this action insofar as the moving defendants have failed to set forth any arguments establishing their entitlement to the same (Doc. 160 ¶ 11).

LEGAL CONCLUSIONS:

New York Insurance Law § 5106(b) provides that "[e]very insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits . . . to arbitration." "However, despite a medical provider's statutory right to submit its dispute to arbitration, an insurer has the right to bring a declaratory judgment action in court for an order declaring that it has no duty to provide first-party no-fault benefits" (*Permanent Gen. Assur. Co. v Thomas*, 2016 NY Slip Op 30631[U], 2016 NY Misc LEXIS 1339, *4 [Sup Ct, NY County 2016], citing *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011]).

However, "[a] party may move for dismissal of one or more causes of action asserted against him [or her] on the ground that . . . the cause of action may not be maintained because of arbitration and award, collateral estoppel . . . [or] res judicata" (CPLR 3211[a][5]). "In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of

competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Am. Tr. Ins. Co. v Albis*, 2020 NY Slip Op 31563[U], 2020 NY Misc LEXIS 2308, *3 [Sup Ct, NY County 2020] [internal quotation marks and citations omitted]; *see Matter of People of the State of NY, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008]). Further, "the doctrines of collateral estoppel and res judicata between the same parties apply as well to arbitration awards as to judicial adjudications" (*Kern v Excelsior 57th Corp., LLC*, 77 AD3d 500, 501 [1st Dept 2010]).

Moreover, "an insurer cannot collaterally attack an arbitration award via a plenary action for declaratory judgment; an award can only be vacated on the grounds set forth in CPLR 7511. Following arbitration and award, dismissal of the action pursuant to CPLR 3211(a)(5) is required" (*Country-Wide Ins. Co. v Avalon Radiology, PC*, 2017 NY Slip Op 30606[U], 2017 NY Misc LEXIS 1104, *5 [Sup Ct, NY County 2017]; *see Home Ins. Co. v Country-Wide Ins. Co.*, 134 AD2d 570, 571 [2d Dept 1987]).

This Court finds that the moving defendants have established that Hereford's causes of action, based on a founded belief that the alleged collision was not an insured accident and that Claimants materially misrepresented the circumstances and facts surrounding the collision, are identical to the issues previously decided by the arbitrator and affirmed by the master arbitrator.

The arbitrator stated, in relevant part:

> "[i]n this [m]atter, the [r]espondent has not provided sufficient evidence to support the allegations that the accident was in fact intentionally caused or that the individuals involved colluded to cause said accident. The circumstantial evidence does not demonstrate that the discrepancies among the testimony of the parties involve[d], sufficiently warrant a denial based upon material misrepresentations . . . The driver's statement is not sufficient to establish collusion. Further[,] I note that there is no evidence in front of me in the form of an SIU affidavit supporting the allegations made by the Respondent and although fraud may be proven via circumstantial evidence, it is my finding that the evidence before me today is not sufficient to make such a determination" (Doc. 136).

Since the underlying arbitration conclusively disposed of Hereford's defenses, which are identical to those raised herein, the moving defendants have established their entitlement to dismissal pursuant to CPLR 3211(a)(5) (*see American Transit Insurance Company v Haar Orthopaedics & Sports Medicine, P.C., et al*, Sup Ct, New York County, November 15, 2018, Cohen, J., Index No. 655397/2017). Moreover, although not raised in opposition to the motion, this Court is persuaded that Hereford had a full and fair opportunity to litigate its defenses in the arbitration proceeding (*see Uptodate Med. Servs., P.C. v State Farm Mut. Auto. Ins. Co.*, 23 Misc 3d 42, 45 [2d Dept, App Term 2009]; *see generally Clemens v Apple*, 65 NY2d 746, 748-749 [1985]).

This Court also rejects Hereford's contention that the motion should be denied on the ground that "there is always a possibility that the eligible injured parties continue to treat, or seek further treatment on this claim" (Doc. 160) because "[a]n [a]rbitration award will bar subsequent litigation for first-party benefits under an automobile policy which [was] subject of arbitration, even if medical expenses for which benefits sought are incurred after arbitration" (*Country-Wide Ins. Co. v Avalon Radiology, PC*, 2017 NY Slip Op 30606[U], 2017 NY Misc LEXIS 1104, *4 [Sup Ct, NY County 2017]; *compare Monroe v Providence Washington Ins. Co.*, 126 AD2d 929, 929 [3d Dept 1987]).

Further, that portion of the motion seeking an enforcement of the stay contained within CPLR 3214 (b) is denied as moot insofar as the motion has been decided and is no longer pending (*see Joseph v Rassi*, 2018 NYLJ LEXIS 469, *19 [Sup Ct, Kings County 2018]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants Iconic Wellness Surgical Services, LLC and Advanced Surgery Center, LLC is granted to the extent that they seek dismissal of the action pursuant to CPLR 3211(a)(5); and it is further

ORDERED that the branch of the motion, pursuant to CPLR 3214(b), seeking a stay of all discovery is denied as moot; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, plaintiff for Iconic Wellness Surgical Services, LLC and Advanced Surgery Center, LLC shall serve a copy of this decision and order, with notice of entry, on all parties, and on County Clerk (60 Centre Street, Room 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the remaining parties are to participate in a preliminary conference (virtually by internet enabled video conference or telephone conference) in Part 2 on January 6, 2021 at 11:30 a.m.; and it is further

ORDERED that this constitutes the decision and order of the Court.

10/15/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE