Autoone Ins. Co. v Eastern Is. Med. Care P.C.
2014 NY Slip Op 33756(U)
September 30, 2014
Supreme Court, Nassau County
Docket Number: 601259/14
Judge: Randy Sue Marber

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 13

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AUTOONE INSURANCE COMPANY,

Plaintiff,

-against-

EASTERN ISLAND MEDICAL CARE P.C.
a/a/o JAMIE BENITEZ,

Defendant.

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Motion Date...08/21/14
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Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Notice of Cross-Motion.....x
Affirmation of Corrected Caption.....x
Reply Affirmation.....x
Reply Affirmation.....x

Upon the foregoing papers, the Motion by the Plaintiff, Autoone Insurance Company ("Autoone"), seeking an Order of this Court, (i) pursuant to CPLR § 3212 (b), granting the Plaintiff summary judgment on its Second Cause of Action, ordering, adjudging and decreeing that the Defendant is not owed any additional monies under the insurance policy; (ii) finding that, pursuant to CPLR § 3212 (g), the denials are timely and limiting the issues at trial to the lack of medical necessity of the rendered services; (iii) pursuant to CPLR § 3211 (b) dismissing the Defendant's First, Second, Third, Fourth, Fifth, Seventh and

Eleventh Affirmative Defenses; and (iv) pursuant to CPLR § 3211 (a) (7), dismissing portions of the First Counterclaim and the entire Second Counterclaim; and the Cross-motion by the Defendant, Eastern Island Medical Care, P.C. a/a/o Jaime Benitez ("Island Medical") seeking an Order, pursuant to CPLR § 7510, confirming the October 29, 2013 arbitration award, and the January 24, 2014 master arbitration award, are decided as hereinafter provided.

Jamie Benitez, an insured under an Autoone automobile policy, allegedly sustained injuries resulting from a March 25, 2012 motor vehicle accident. He presented at medical provider, Eastern Island, for complaints which included neck pain, weakness and tingling to both upper and lower extremities and bi-lateral trapezius pain.

The Plaintiff, Autoone, denied the claim for EMG/NCV testing, under the June, 2012 recommendation and evaluation conducted by an Independent Medical Examiner, P. Leo Varriale, M.D., where he determined that the medical testing and/or services were medically unnecessary. Consequently, all chiropractic and orthopedic benefits were terminated.

The Defendant, Eastern Island, filed for arbitration, seeking a claim in the amount of $6,406.82 and the matter was heard before Carol Terrell-Nieves, Esq. on September 19, 2013. The issue at bar was whether Autoone established a lack of medical necessity for the treatment. While the Arbitrator, Nieves, after hearing the evidence before her, determined that Autoone's denials were timely, she also indicated that the medical

reports from both parties were in direct contradiction to each other. However, on October 29, 2013, she awarded the full claimed benefit of $6,406.82 to Eastern Island.

In November, 2013, Autoone appealed the award to the Master Arbitrator and the matter was heard by Victor J. Hershdorfer in January, 2014. Arbitrator, Hershdorfer, noted that the Appellant, Autoone, did not submit a brief, although it requested and was granted an extension to file one. He affirmed the arbitrator's award as Autoone failed to provide any basis for its claim.

In March, 2014, Autoone filed the underlying action demanding a trial *de novo* and declaratory relief declaring that there is no coverage for the services rendered to Benitez from July 3, 2012 through January 15, 2013. In turn, Eastern Island set forth eleven Affirmative Defenses, and the following are at issue: the Plaintiff failed to timely exhaust all administrative remedies; the Plaintiff defaulted in its submission to Master Arbitration; the Plaintiff failed to timely file for a trial *de novo*; the Plaintiff's claims are barred by the failure to satisfy a condition precedent as to the underlying action; the Plaintiff is guilty of unclean hands; the Plaintiff's claims are barred by ratification, waiver, laches and/or equitable estoppel; and the Complaint fails to state a cause of action.

The Plaintiff, Autoone, contends that certain services rendered by the Defendant, Eastern Island, lacked medical necessity, and the denials issued to the Defendant were timely. It further asserts that the Court has proper jurisdiction over the matter, pursuant to Insurance Law § 5106 (c), CPLR § 7511 (a), and 11 NYCRR § 65-4.10 (h) (2), which

entitles it to a *de novo* review when a master arbitrator's award exceeds the statutory threshold of $5,000. In addition, the Plaintiff argues, the Defendant failed to present independent objective evidence supporting medical necessity in opposition. Finally, it asserts that the arbitration awards were arbitrary, capricious, and erroneous as a matter of law.

The Defendant, Eastern Island, argues that the arbitration awards were rendered on a "rational basis" and because the Plaintiff refused to make any submission to the Master Arbitrator, it failed to exhaust its administrative remedies. In addition, the Defendant argues, the Plaintiff failed to timely file its application for a *de novo* review with this Court.

An insurer establishes an entitlement to summary judgment, in an action to recover no-fault benefits, on the grounds that medical treatment and/or testing were not medically necessary, by presenting proof in evidentiary form establishing a factual basis and medical rationale for concluding the treatment and testing was not medically necessary. If the insurer presents such evidence, the burden of proof shifts to the plaintiff to present proof in evidentiary form rebutting the proof of lack of medical necessity (See *Boulevard Multispec Medical, P.C. v. Tri-State Consumer Ins. Co.*, 43 Misc3d 802 [NY.Dist Ct 2014]).

However, because the Defendant raised the issue of timeliness regarding the filing of the underlying action, the Court must dispense with that issue before considering the merits of the Plaintiff's instant motion.

> 22 NYCRR § 28.12 provides:
> (a) Demand may be made by any party not in default for a trial *de novo* in the court where the action was commenced or, if the action was transferred, the court to which it was transferred,

> with or without a jury. Any party who is not in default, within 30 days after service upon such party of the notice of filing of the award with the appropriate court clerk, or if service is by mail, within 35 days of such service, may file with the clerk of the court where the award was filed and serve upon all adverse parties a demand for a trial *de novo*.

The 30-day period set forth in 22 NYCRR § 28.12 appears to be analogous to the 30-day appeal provision set forth in CPLR § 5513. This Court has no more power to waive the time requirement for demanding a trial *de novo* than it would to waive the time limit for taking an appeal. In the case of an appeal, the court has the power to extend the time to perform any act other than the time for serving and filing a notice of appeal. Similarly 22 NYCRR § 28.12 (b) of the rules governing trial de novo's of arbitrations permits the court to grant an extension of time for curing any omission *once the party has timely filed the demand* for a trial *de novo*. There is no provision in 22 NYCRR § 28.12 (a) for curing the defect of an untimely filing of the demand in the first instance (See *Parker, Clark Associates, Inc. v. E S M Data Systems, Inc.*, 108 Misc2d 827 [NY City Civ Ct 1981]; where the defendant did not demand a trial *de novo* until after the 30 day period had expired. The Court held that the defendant was therefore bound by the award of the arbitration panel).

Here, according to the Plaintiff, the American Arbitration Association mailed the award affirming the decision of Arbitrator, Nieves, on January 24, 2014 (See Notice Motion, ¶ 8). However, a careful reading by the Plaintiff would have noted that the January 24, 2014 date was the date of the Master Arbitrator's signature and January 31, 2014 was the actual mailing date (See Notice of Motion, Exhibit 3). Notwithstanding the seven day

discrepancy, it is noted that the underlying Summons is dated March 6, 2014. However, the Plaintiff indicated that it filed the demand for *de novo* relief on March 20, 2014 (See Affirmation in Support of Jason Tenenbaum, dated June 18, 2014 at ¶ 9).

Since the Plaintiff commenced this action well over thirty days after the presumed mailing of the award, even considering an extra five days for mailing, the action is untimely and therefore must be dismissed. The Court notes that the Plaintiff has not contested the date that the Master Arbitration Award was mailed. However, since, according to the rules of the arbitration panel, the date of the award's mailing is a significantly time-sensitive event, an affidavit of mailing, while not an issue in this case, would be necessary proof when the mailing date is a contested issue. Whatever the case, the Plaintiff conceded to filing the action well after the mailing date (See *DeFilippo v. Gerbino*, 12 Misc.3d 1153(A) [NY City Civ Ct 2005]).

The Plaintiff has failed to offer any explanation for this late filing under the statute and it is noted that it did not address the issue in its Reply papers. As such, there is no need to reach the merits as set forth in the Plaintiff's motion.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion is **DENIED** in its entirely; and it is further

ORDERED, that the Defendant's Cross-motion seeking confirmation of the Master Arbitrator's award, is **GRANTED**.

This constitutes the decision and order of this court.

DATED: Mineola, New York
September 30, 2014

Hon. Randy Sue Marber, J.S.C.
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