

Encompass Home & Auto Ins. Co. v Makendy

2017 NY Slip Op 32084(U)

October 3, 2017

Supreme Court, New York County

Docket Number: 160580/2015

Judge: Erika M. Edwards

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

ENCOMPASS HOME & AUTO INSURANCE
COMPANY,

Index No: 160580/2015

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequence: 008

ELIZINDA MAKENDY, MAXIME MAKENDY,
MARCLISH DAVIDSON, ALICE ALARCON,
JEFFERSON JUSTE, BEMBA KEITA, JEAN
ADOLPHE, JOSEPH BLANC, VANESSA BLANC,
SHANA DABADY, JEAN BAPTISTE EDRISZCARD,
JOSEPH CARLINE, STEPHANIE LAURENT, MARIE
LOUIS, ACCELERATED SURGICAL CENTER,
ATLANTIC CHIROPRACTIC P.C., AXIAL
CHIROPRACTIC P.C., BARNET SURGICAL
CENTER, COASTAL ANESTHESIA SERVICES,
CPM MED SUPPLY INC., EFFECTIVE
HEALTHCARE MEDICAL P.C., HUMAN TOUCH
REHAB PT PLLC, ISURPLY LLC, LLJ
THERAPEUTIC SERVICES PT P.C., MAXIM
TYORKIN, MD, MEDICSURG, MIDDLE VILLAGE
DIAGNOSTIC IMAGING P.C., NATASHA KELLY
MD, NEW BEGINNING CHIROPRACTIC P.C.,
PRECISION MEDICAL PRODUCTS INC., PROMPT
MEDICAL SUPPLY INC., SPECIALTY SURGERY
OF SEACAUCUS, STAR OF N.Y. CHIROPRACTIC
DIAGNOSTIC P.C., STATE CHIROPRACTIC P.C.,
TONG LI, MD, P.C., VISION REHAB PT P.C.,
VLADIMIR SHUR, XU GAO ACUPUNCTURE P.C.,
XVV, INC, YEVGENIY MARGULIS, PHD,
AMERICAN ALTERNATIVE INSURANCE CORP.,

Defendants,

-against-

ADDITION ACUPUNCTURE P.C., ADVANCED
RECOVERY EQUIPMENT AND SUPPLIES, LLC,
AHMED MEDICAL CARE P.C., ANGELIC
PHYSICAL THERAPY P.C., AOM MEDICAL
SUPPLY, A.R.A MEDICAL CARE, P.C., APOLLO
IMAGING MANAGEMENT LLC, ATLANTIC

CHIROPRACTIC, PC, AXIAL CHIROPRACTIC
P.C., BROOKLYN CARDIOVASCULAR CARE,
P.L.L.C., CLEAR WATER PSYCHOLOGICAL
SERVICES P.C., DUNAMIS REHAB PT P.C., EAST
SIDE PRIMARY MEDICAL CARE, P.C.,
EFFECTIVE HEALTHCARE MEDICAL P.C.,
EXCEL SURGERY CENTER, L.L.C., HAN XU
ACUPUNCTURE, P.C., HORIZON PT CARE P.C.,
HUMAN TOUCH REHAB, PT, PLLC,
KENSINGTON RADIOLOGY GROUP, P.C.,
LENEX SERVICES INC., LLJ, THERAPEUTIC
SERVICES, P.T. P.C., NEW BEGINNING
CHIROPRACTIC P.C., NOEL BLACKMAN
PHYSICIAN PC, ORTHOPRO SERVICES, INC.,
PARK AVENUE ORTHOPAEDICS, PC,
PRECISION IMAGING OF NEW YORK, P.C.,
PROFESSIONAL CHIROPRACTIC CARE P.C.,
PROMPT MEDICAL SUPPLY, INC., REGENCY
HEALTHCARE MEDICAL, PLLC, SOVERA
MEDICAL SUPPLY, CORP, SP ORTHOTIC
SURGICAL & MEDICAL SUPPLY, INC.,
THERAPEUTIC CHIROPRACTIC SERVICES P.C.,
STATE CHIROPRACTIC, PC, TISBURY
PSYCHOLOGICAL SERVICES P.C., TONG LI, MD,
PC, US TECH REHAB INC., VISION REHAB PT,
P.C., WEALTH OF HEALTH MEDICAL P.C.,
WINTHROP FIRST CARE MEDICAL SERVICES,
P.C., XU GAO ACUPUNCTURE PC,
ACCELERATED SURGICAL CENTER OF NORTH
JERSEY, ANGELICA SARENAS, BARNETT
SURGICAL CENTER, BARRY HUGHES, OR
ASSIST, PA, DANA WOLFSON, LMT, DR. LEE
LOEWINGER, ELECTRO PHYSIOLOGIC
MEDICAL DIAGNOSTICS, PC, EXCEL SURGERY
CENTER, LLC, FRANCES SARIYA, GOTHAM
MEDICAL SERVICES, HAAR ORTHOPEDICS &
SPORTS MEDICINE, HEALTH EAST
AMBULATORY SURGICAL CENTER, ILYCE
MARANGA, JEFFREY BECK, JOHN IOZZIO,
JUAN XU D.B.A. ADDITION ACUPUNCTURE, PC,
KSENIA PAVLOVA, D.O., MAXIMUM
ORTHOPAEDICS AND SPORTS MEDICINE,
MEDRITE URGENT CARE, MIDMARK
DIAGNOSTICS GROUP, NATASHA KELLY, MD,
NEW YORK ORTHOPAEDIC SURGERY &

REHABILITATION, NORTHEAST ANESTHESIA AND PAIN MANAGEMENT, PDCN EMERGENCY AMBULANCE, SOUTH DEAN ORTHOPAEDICS, SPECIALTY SURGERY OF SECAUCUS, LLC, SPORTS MEDICINE & ORTHOPAEDIC REHAB, PC, SPINE & ORTHOPAEDIC REHABILITATION CENTER, TITAN PHARMACY, USAA HEALTH PRODUCTS, INC., WINTHROP UNIVERSITY HOSPITAL,

Cross-Claim Defendants.

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

Papers	Numbered
Notice of Motion/Affidavits/Affirmations/ Memoranda of Law annexed	<u>1</u>
Opposition Affidavits/Affirmations/Memoranda of Law annexed	<u>2</u>
Reply Affirmation	<u>3</u>

ERIKA M. EDWARDS, J.:

Defendant/Cross-Claim Plaintiff American Alternative Insurance Company ("American") moves to renew and/or reargue the Decision and Order of the court dated, October 3, 2016, which denied American's application for injunctive relief including to stay multiple arbitrations involving the August 25, 2014, accident that is the subject of the underlying matter. Upon the court granting leave to renew and/or reargue, American also moves to vacate the Decision and Order of the court dated, October 3, 2016. Defendants Sovera Medical Supply, Corp., SP Orthotic Surgical & Medical Supply, Inc., and Ksenia Pavlova, D.O. (collectively "Defendants") oppose the motion. For the reasons set forth herein, the court grants Plaintiff's motion to renew, upon renewal, vacates the Decision and Order of the court dated, October 3, 2016, and grants American's application for injunctive relief.

Pursuant to CPLR 2221 (a) and (d), a motion for leave to reargue is left to the sound discretion of the court and may be granted only where the moving party contends that an issue of law or fact had been overlooked or misapprehended by the court when deciding the original motion (CPLR 2221 [a], [d]). It is not designed to provide the unsuccessful party successive opportunities to reargue issues previously decided by the court or to present new evidence or different arguments than previously raised (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal citations and quotation marks omitted]). A motion for leave to renew shall be based upon new facts that were not offered on the prior motion that would change the court's prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion (CPLR 2221 [e] [2], [3]). Renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation; nor is it available to argue new legal theories which could have been previously relied upon but were not on the assumption that what was submitted was adequate (*Matter of Beiny*, 132 AD2d 190, 210 [1st Dept 1987], citing *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought (CPLR 2221 [f]). The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made (*id.*). If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination (*id.*).

On October 3, 2016, the Honorable Geoffrey D. Wright ruled that although American demonstrated it would suffer irreparable harm, its failure to provide adequate proof of the likelihood of succeeding on the merits defeated its request for a preliminary injunction. In support of its motion to reargue, American argues in substance that the evidence before the court,

including the transcripts of multiple defendants' Examinations Under Oath ("EUOs"), established that the subject incident arose out of an intentionally staged "accident" and provided sufficient proof to support the likelihood of success on the merits. In support of its motion to renew, American argues that new facts, including this court's declaration that the subject accident arose out of an intentional staged accident, support its argument that it has demonstrated the likelihood of success on the merits to warrant injunctive relief. Furthermore, American argues that the results from an ongoing National Insurance Crime Bureau ("NICB") investigation indicate that the subject accident has been linked to at least eight other automobile collisions designed to appear as automobile accidents. Four of those eight suspicious accidents, including one that occurred on January 3, 2016, are subject to a similar declaratory action pending before the court entitled *Kemper v. Best Touch PT, PC*. Index Number 154010/2016, Supreme Court, New York County. Defendants oppose the motion and argue in substance that the court should deny American's motion because American failed to demonstrate that this court overlooked any facts or misapplied any law in reaching its prior decision. Defendants further argue that American's motion to reargue is mere repetition of the arguments within American's original application for the injunctive relief. However, Defendants failed to address American's motion to renew based on the new alleged facts.

This court finds that American failed to set forth a sufficient legal or factual basis to demonstrate that the court overlooked an issue of law or fact. The court properly considered the applicable legal standards and relevant facts and determined that American failed to demonstrate a likelihood of success on the merits based on the submitted EUO transcripts and other evidence presented to the court at the time of the application for injunctive relief. As such, the court denies American's motion to reargue. However, this court finds that American has presented

new facts that were not offered on the prior motion that would change the court's prior determination and grants American's motion to renew. These new facts include this court's June 9, 2017, Decision and Order declaring that the subject accident was the product of a staged and/or intentional event and the ongoing NICB investigation that linked the subject action to the *Kemper* matter. The court notes that Alice Alarcon who is a named defendant in this matter is also a named defendant in the *Kemper* matter where one of the defendants to the action admitted in a stipulation that the January 3, 2016, collision was an intentionally caused accident. This court's ruling and the *Kemper* stipulation occurred after American's prior application was fully submitted to the court. As such, American's failure to present these facts on the prior motion is justified. Since American included these new facts in its motion to renew, it has demonstrated the likelihood of succeeding on the merits and this court has previously determined that American demonstrated it will suffer irreparable injury in the absence of the requested injunctive relief. Accordingly, this court vacates the Decision and Order dated October 3, 2016, and grants American's application for injunctive relief.

As such it is hereby

ORDERED that American Alternative Insurance Company's motion for leave to renew and/or reargue is granted to the extent that American Alternative Insurance Company's motion to renew is granted; and is further

ORDERED that the Decision and Order of the court, dated October 3, 2016, is vacated; and it is further

ORDERED that American Alternative Insurance Company's Order to Show Cause seeking injunctive relief filed on March 9, 2016, is granted; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Wealth of Health Medical, P.C. a/a/o Joseph Blanc v. Paris Limousine Service Co. C/O Network Adjusters, Inc.* (American Arbitration Association, Case Number 41-15-1022-8398) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Horizon PT Care P.C. a/a/o Shana Dabady v. Paris Limousine Service Co. C/O Network Adjusters, Inc.* (American Arbitration Association, Case Number 41-15-1020-7664) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Wealth of Health Medical, P.C. a/a/o Stephanie Laurent v. Paris Limousine Service Co. C/O Network Adjusters Inc.* (American Arbitration Association, Case Number 17-15-1022-8428) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Wealth of Health Medical, P.C. a/a/o Shana Dabady v. Paris Limousine Service Co. C/O Network Adjusters Inc.* (American Arbitration Association, Case Number 41-15-1022-8393) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Electrophysiologic Medical Diagnostics, PC a/a/o Edridzcard Jean Baptiste v. Paris Limousine Service C/O Network Adjusters Inc.* (American Arbitration Association, Case Number 17-15-1015-6973) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *LLJ Therapeutic Services PT PC a/a/o Vanessa Blanc v. AAIC C/O Network Adjusters* (American Arbitration Association, Case Number 41-15-1024-4510) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Horizon PT Care PC a/a/o Edridzcard Jean-Baptiste v. Paris Limousine Service Co C/O Network Adjusters, Inc.* (American Arbitration Association, Case Number 41-15-1020-9884) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *LLJ Therapeutic Services PT PC a/a/o Carline Joseph v. AAIC C/O Network Adjusters* (American Arbitration Association, Case Number 41-15-1025-7848) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Ahmed Medical Care, P.C., Horizon PT Care PC a/a/o Carline Joseph v. Network Adjusters, Inc. C/O Paris Limousine Service Corp.* (American Arbitration Association, Case Number 41-15-1020-5623) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Ahmed Medical Care, P.C., Horizon PT Care PC a/a/o Vanessa Blanc v. Paris Limousine Service Corp. C/O Network Adjusters, Inc.* (American Arbitration Association, Case Number 41-15-1020-7641) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Hax Xu Acupuncture PC a/a/o Shana Dabady v. American Alternative Insurance Company C/O Network Adjusters Inc.* (American Arbitration Association, Case Number 41-15-1020-0477) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Wealth of Health Medical PC a/a/o Joseph Blanc v. Paris Limousine Service Corp. C/O Network Adjusters. Inc.* (American Arbitration Association Case Number not yet assigned) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Dana Wolfson, LMT a/a/o Shana Dabady v. Network Adjusters* (American Arbitration Association, Case Number 41-16-1029-9520) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Dana Wolfson, LMT a/a/o Joseph Blanc v. Network Adjusters* (American Arbitration Association Case Number not yet assigned) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Dana Wolfson, LMT a/a/o Jean Adolphe v. American Alternative Insurance Corporation* (American Arbitration Association Case Number not yet assigned) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Dana Wolfson, LMT a/a/o Joseph Blanc v. American Alternative Insurance Corporation* (American

Arbitration Association Case Number not yet assigned) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Dana Wolfson, L.M.T. a/a/o Caroline Joseph v. American Alternative Insurance Company* (American Arbitration Association, Case Number 41-15-1023-6396) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Dana Wolfson, L.M.T. a/a/o Edridzcard Jean Baptiste v. American Alternative Insurance Company* (American Arbitration Association, Case Number 41-15-1023-6420) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant CPLR § 2201 and § 6301, the arbitration entitled *Ahmed Medical Care, PC, Horizon PT Care PC a/a/o Edridzcard Jean-Baptiste v. American Alternative Insurance Company C/O Network* (American Arbitration Association, Case Number 41-16-1027-8405) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the arbitration entitled *Professional Chiropractic Care, PC a/a/o Stephanie Laurent v. American Alternative Insurance Company* (American Arbitration Association, Case Number 17-15-1010-5481) is immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that pursuant to CPLR § 2201 and § 6301, the lawsuit entitled *Jean Adolphe, Joseph Blanc, Vanessa Blanc, Shana Dabady, Edridzcard Jean-Baptiste, Marie Judith-Louis, Stephanie Laurent and Carline Joseph v. Paris Limousine Service Corp., Bemba Keith, Elizinda Maxine and Marclish Davidson* (Supreme Court, Kings County, Index Number 9238/15) is

immediately stayed pending the resolution of the instant declaratory judgment action; and it is further

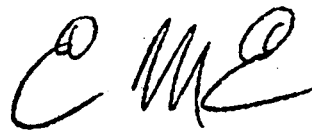
ORDERED that pursuant to CPLR § 2201 and § 6301, all current and future proceedings, lawsuits, and arbitrations concerning no-fault benefits, uninsured motorist benefits, underinsured motorist benefits, personal injury claims, property damage claims, and liability/indemnity coverage issues involving any and all of the Defendants and Cross-Claim Defendants arising from the motor vehicle incident of August 25, 2014, are stayed pending the resolution of the instant declaratory judgment action; and it is further

ORDERED that AMERICAN is not required or obligated to honor any pending and/or future No-Fault bills or provide any coverage, reimbursements or pay any monies, sums or funds to any of the Defendants and Cross-Claim Defendants names herein for any and all no-fault related services for which claims/bills have been, or may be in the future, submitted by Defendants and/or Cross-Claim Defendants to AMERICAN pending the hearing and the resolution of the declaratory judgment action in the above-captioned matter; and it is further

ORDERED that any relief not expressly addressed in this order has nonetheless been considered and is hereby denied.

This constitutes the decision and order of the court.

Date: October 3, 2017



HON. ERIKA M. EDWARDS