

Kadah v Byrd

2016 NY Slip Op 32733(U)

October 14, 2016

Supreme Court, Onondaga County

Docket Number: 2014EF361

Judge: Walter W. Hafner, Jr.

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**STATE OF NEW YORK COUNTY OF ONONDAGA
SUPREME COURT
Present: Hon. Walter Hafner, Jr., ASCJ**

MIA KADAH,

Plaintiff,

v.

**KEITH N. BYRD and ALPHONSO BRADSHAW
Defendants**

**DECISION AND ORDER
INDEX NUMBER 2014EF361**

DECISION and ORDER on motion argued before the Hon. Walter Hafner, Jr., Acting Justice of the Supreme Court, on October 7, 2016.

APPEARANCES: C. Daniel McGillicuddy, Esq.
William Mattar, P.C.
Attorneys for Plaintiff

Heather K. Zimmermann, Esq.
Goldberg Segalla, LLP
Attorneys for Defendants

In an Order dated September 14, 2015, the Court granted the Defendants' motion to dismiss the complaint pursuant to CPLR §§ 3121, 3124, and 3136 due to the Plaintiff's failure to attend a court-ordered Independent Medical Examination (IME) with Dr. Daniel Carr. That motion was granted after the Plaintiff failed to file any Response to the motion and failed to appear for motion argument on September 10, 2015. The Plaintiff filed a Notice of Appeal on October 20, 2015. According to the Parties, the Appeal has been perfected and is currently scheduled to be heard by the Appellate Division, Fourth Department in February of 2017.

On October 23, 2015, the Plaintiff Mia Kadah, hereinafter "Ms. Kadah," filed a motion for leave to renew the prior motion or, in the alternative, a motion vacating the September 14, 2015 Order in its entirety. In support of the motion, Ms. Kadah filed an Attorney Affidavit of C. Daniel McGillicuddy.

The Defendants filed an Affirmation of Heather K. Zimmerman, Esq. dated November 25, 2015. The motion was argued by counsel on December 3, 2015.

In a Decision and Order dated January 7, 2016, the Court denied Ms. Kadah's motion. On the same date, in a case arising from the same automobile accident as the present case, *Liberty Mutual v. Kadah*, Index Number 2015EF3442, the Court denied Liberty Mutual's Petition for a Permanent Stay of Arbitration of a SUM coverage claim. The SUM coverage claim was made by Ms. Kadah on her mother's automobile policy with Liberty Mutual. The Court expressly found that Liberty Mutual conceded at oral argument that it appeared Ms. Kadah was entitled to SUM coverage, or at least entitled to arbitrate the matter.

Liberty Mutual then filed a Notice of Appeal. They also filed a motion to re-argue. The Court denied Liberty Mutual's motion to re-argue in a Decision and Order dated June 7, 2016. In that Decision and Order, the Court expressly found that Liberty Mutual had "unclean hands" by improperly denying SUM coverage. Liberty Mutual filed a Notice of Appeal of that decision on February 1, 2016. The Plaintiff filed a Notice of Appeal regarding the January 7, 2016 Decision and Order on January 26, 2016.

On August 31, 2016, Ms. Kadah filed her second motion to renew the prior motion to dismiss or, in the alternative, a motion vacating the September 14, 2015 Order in its entirety. In an Attorney Affidavit of Mr. McGillicuddy dated August 31, 2016, Ms. Kadah alleges, inter alia, that this Court's finding in *Liberty Mutual v. Kadah* that Liberty Mutual improperly denied Ms. Kadah SUM coverage constitutes new facts not set forth in either of the prior motions argued before the Court. Ms. Kadah alleges that these new facts "would have changed the outcome" of the Court's Decision and Order of September 14, 2015, since Ms. Kadah was "prevented from issuing release and discontinuing the action"

due to Liberty Mutual's unclean hands. Ms. Kadah alleges that she was subjected to a "barrage of motion practice" by Defendants Byrd and Bradshaw.

In the alternative, Ms. Kadah alleges that the Court should exercise its inherent authority to vacate its September 14, 2015 Decision and Order. Ms. Kadah alleges that Defendants Byrd and Bradshaw would not be prejudiced by that result.

Defendants Byrd and Bradshaw opposed Ms. Kadah's second motion to renew the motion to dismiss or, in the alternative, a motion vacating the September 14, 2015 Order in its entirety. In an Affirmation of Heather K. Zimmerman dated September 27, 2016, Defendants Byrd and Bradshaw allege that the present motion should be denied both on procedural grounds and on the merits. Defendants Byrd and Bradshaw allege that Ms. Kadah's present motion fails to contain facts that would change the outcome of the September 14, 2015 Decision and Order. Defendants Byrd and Bradshaw allege that any "bad faith" of Liberty Mutual as the SUM carrier to Ms. Kadah's insurance policy are completely irrelevant to this action. Defendants Byrd and Bradshaw allege that any such "bad faith" settlement practices by Liberty Mutual as the SUM carrier on Ms. Kadah's mother's policy do not excuse Ms. Kadah's failure to attend a court-ordered IME nor her attorney's failure to respond to the motion to dismiss or appear for argument of that motion.

Ms. Zimmerman alleged that neither she nor the Liberty Mutual adjuster on the claim against Defendant Bradshaw had any contact with the Liberty Mutual adjuster that denied the SUM claim on Ms. Kadah's mother's policy. Ms. Zimmerman noted that Liberty Mutual is not a party to this action.

Ms. Kadah, by Mr. McGillicuddy's Attorney Affidavit in Reply dated October 4, 2016, alleges the motion is not procedurally barred due to a pending appeal. Ms. Kadah further alleges the Court

should find that Liberty Mutual's actions in the denial of SUM coverage on Ms. Kadah's mother's policy were performed as an agent of Defendant Bradshaw.

The Court finds that the pending appeal is not a procedural bar to the present motion. The Court finds that Ms. Kadah failed to establish her default in responding to the motion to dismiss was excusable, as required by CPLR §5015(a)(1). The Court further finds that the motion should be denied on the merits.

Ms. Kadah was allegedly injured in an automobile accident on May 16, 2012. Ms. Kadah was a passenger in a vehicle rented from Hertz Vehicles, LLC by Defendant Bradshaw and driven by Defendant Byrd. The original complaint under this Index Number in this matter named Defendant Bradshaw as the sole Defendant. A separate action was commenced against Defendant Byrd and Hertz Vehicles, LLC. The separate actions were consolidated in an Order of the Honorable Donald F. Cerio, Jr., AJSC dated August 27, 2014. For reasons that are unknown to the Court, Hertz Vehicles, LLC was omitted from the caption of that Order.

Defendant Hertz, LLC was self-insured and offered its bodily injury policy limit of \$25,000.00 to settle this matter. Defendant Byrd was insured by Progressive Insurance, which also offered its bodily injury policy limit of \$25,000.00 to settle this matter. Defendant Bradshaw was insured by Liberty Mutual Insurance and offered \$55,000.00 to settle this matter, which was less than its bodily injury policy limit of \$100,000.00.

Ms. Kadah apparently was a named insured on her mother's automobile policy with Liberty Mutual. Ms. Kadah informed Liberty Mutual that Hertz Vehicle, LLC and Progressive Insurance tendered their policy limits and sought Liberty Mutual's consent to settle the matter with them. Liberty

Mutual, as the SUM carrier refused, falsely believing that SUM coverage was not available to Ms. Kadah since Defendant Bradshaw's policy limits had not been tendered. Ms. Kadah alleges, in sum and substance, that Liberty Mutual's failure to provide her consent to settle the matter with Hertz Vehicles, LLC and Progressive Insurance should excuse her failure to attend the Court ordered IME and failure to oppose the motion to dismiss.

The Court finds that Liberty Mutual's denial of SUM coverage does not constitute a new fact that would have changed the outcome of the Court's Decision and Order of September 14, 2015.

As the Decision and Order of January 7, 2016 expressly stated:

"The Court further finds that Ms. Kadah, through her counsel, has repeatedly represented to the Court and opposing counsel that an IME is unnecessary as, in his opinion, the matter was "settled." The matter obviously is not settled, as no stipulation of discontinuance has been filed. The Court further finds that Ms. Kadah misrepresented the status of the SUM issue, causing further delays, by not promptly informing the Court and opposing counsel that SUM coverage was denied by Liberty Mutual. For all these reasons, the Court finds Ms. Kadah's repeated failures to appear for an IME and the misrepresentations regarding the SUM issue constitutes a pattern of willful default or neglect that should not be excused by the Court."

The fact that the matter may have been settled if not for Liberty Mutual's unclean hands regarding the SUM coverage on Ms. Kadah's mother's policy is irrelevant. Ms. Kadah, after missing previously scheduled IMEs, was ordered by this Court to appear for an IME and failed to do so. Ms. Kadah also failed to oppose the motion to dismiss. Liberty Mutual's unclean hands regarding the SUM coverage on Ms. Kadah's mother's policy is irrelevant on that issue.

In fact, instead of repeatedly insisting to the Court and Defendants Byrd and Bradshaw that the matter had been "settled," Ms. Kadah could have responded to the motion to dismiss and alerted the Court and Defendants Byrd and Bradshaw that the matters were not settled. Ms. Kadah, at the time of

the motion to dismiss was certainly aware that Liberty Mutual had denied the SUM claim and could have informed the Court of the incorrect basis of that denial by responding to the motion to dismiss, or timely submitting that issue to arbitration under the terms of Ms. Kadah's mother's policy. The Court further finds Ms. Kadah has failed to provide any evidence that Liberty Mutual was acting as an agent of Defendant Bradshaw when it denied SUM coverage under Ms. Kadah's mother's automobile insurance policy.

The Court further finds that any "barrage of motion practice" was due to Ms. Kadah and Mr. McGillicuddy's neglect in prosecuting this matter and failure to comply with valid discovery requests.

NOW THEREFORE IT IS HEREBY

ORDERED, that the Plaintiff, Mia Kadah's second motion to renew the motion to dismiss is **DENIED**, without costs. The papers upon which this Decision and Order is based are listed on EXHIBIT 1 attached hereto. This constitutes the Decision and Order of the Court.

Dated: October 14, 2016

ENTER,



HON. WALTER HAFNER, JR.
ACTING SUPREME COURT JUSTICE