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

PRESENT: ~~S~~ ALICE SCHLESINGER PART IA/PART 1

Justice

MITTENTHAL, RICHARD, ET AL.

-v-

NEW YORK UNIVERSITY SCHOOL OF MEDICINE, ET AL.

INDEX NO. 106332/09

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by Vivendi Universal Holdings to intervene is granted in accordance with the accompanying memorandum decision.

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 20 2012

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

----------X

RICHARD MITTENTHAL and PATRICIA GLAZER,

Plaintiffs,

-against-

NEW YORK UNIVERSITY SCHOOL OF MEDICINE; NYU MEDICAL CENTER; ANTHONY K. FREMPONG-BOADU, M.D.; MARC J. BLOOM, M.D.; and NYU ANESTHESIA ASSOCIATES,

Defendants.

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Index No. 106332/09
Motion Seq. No. 001

SCHLESINGER, J.:

Before the Court is a motion by Vivendi Universal Holdings to intervene in this medical malpractice action pursuant to CPLR §§ 1012 and 1013. Vivendi maintains and funds, at least in part, the health insurance plan that has been paying for the medical care received by the plaintiff Richard Mittenthal for the injuries he allegedly suffered due to the defendants' claimed malpractice. While the plaintiffs have opposed Vivendi's motion, the most vigorous opposition is offered by the defendants.

Background Facts

According to the affidavit of Robert C. Greenberg, Senior Vice President for Human Resources at Vivendi, through a series of transactions that began in 2001, Vivendi assumed the sponsorship of the Omnibus Retiree Plan of Joseph E. Seagram & Sons, Inc. that covers the plaintiff Richard Mittenthal. The Base Medical Plan is self-funded, meaning that the benefits are financed by Vivendi and/or member contributions, rather than through insurance purchased from a health insurance company. Greenberg certifies in his affidavit that the "Plan is established pursuant to the Employee Retirement Income Security Act of 1974 (ERISA)." Vivendi contracts with Aetna to administers the claims.

In addition to providing the required Plaintiff-Intervenor's Proposed Complaint (Exh D), Vivendi includes in its moving papers documentation that it has paid medical claims on behalf of the plaintiff totaling about $450,000 as of September 2011 (Exh C). It also includes a copy of the governing nineteen-page Base Medical Plan, which states that it is governed by ERISA (Exh B, M-19). Vivendi claims that, pursuant to theories of equitable and/or contractual subrogation, it is entitled to recover from the defendants the payments it has made on behalf of the plaintiff for medical expenses incurred. In support of that claim Vivendi cites page M-18, which advises the member that benefits must be coordinated so as to avoid duplicate payments for the same expense covered under two or more benefit plans. It further cites the following subrogation language included at page M-19 of the Plan:

> **Subrogation**
>
> This non-duplication of benefits rule provides for the recovery of similar expenses reimbursed to employees as a result of a successful third-party suit. For example, you may incur medical expenses as a result of an accident involving another party. If you are awarded medical expense reimbursement in a lawsuit, [Vivendi] would expect to recover amounts it has already paid to you in connection with these expenses.

None of these facts are in serious dispute. While initially the opponents of the motion argued that the statement in the Plan regarding ERISA coverage was insufficient proof of that fact, the affidavit subsequently offered by Mr. Greenberg resolved that issue to the satisfaction of the Court.

Discussion

The Civil Practice Law and Rules contains two sections relating to intervention. CPLR § 1012 (a)2 governs intervention as of right and provides that:

> Upon timely motion, any person shall be permitted to intervene in any action ... when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment.

CPLR § 1013 governs permissive intervention and provides that:

> Upon timely motion, any person may be permitted to intervene in any action ... when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Regarding §1012, Vivendi argues that intervention should be granted as of right because it will be bound by any judgment rendered in the matter, as the collateral source rule codified in CPLR § 4545 will exclude from any judgment medical expenses incurred by the plaintiff that were paid by Vivendi, and neither party would have reason to protect Vivendi's interest in being reimbursed. Regarding § 1013, Vivendi argues that intervention should be permitted because its subrogation claims share common questions of law and fact with plaintiff's cause of action, as both arise from the same underlying occurrence and include an accurate accounting of medical expenses incurred. No prejudice will result from intervention, Vivendi asserts, as it does not require additional discovery and agrees to be limited to the submission of documentation during the pre- and post-trial phases of litigation. (See Bender Aff in Support of Motion at ¶11). Vivendi concludes by citing various cases for the proposition that intervention is the proper vehicle for an insurer to assert subrogation claims.

In opposition, plaintiff's counsel asserts that Vivendi has failed to establish to that intervention is either necessary or proper, and he expresses particular concern that plaintiff will be prejudiced at trial by the injection of insurance issues. Further, counsel

correctly notes that Vivendi has not cited a single case that is directly on point and binding on this Court, and he points to cases such as *Halloran v Don's 47 W. 44th St. Rest. Corp.*, 255 AD2d 206 (1st Dep't 1998) which affirmed the trial court's denial of a motion to intervene made by plaintiff's health insurance carrier.

Like plaintiff's counsel, defense counsel points to General Obligations Law (GOL) § 5-335, enacted in response to the ruling in *Fasso v Doerr,* 12 NY3d 80 (2009), claiming it extinguishes an insurer's right to intervene in a New York action. That section provides in relevant part that:

> (a) When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include any compensation for the cost of health care services ... to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, ***except for those payments as to which there is a statutory right of reimbursement.*** (Emphasis added).

However, that argument must fail. As indicated earlier, Vivendi ultimately established that the Plan is subject to ERISA. Thus, this case falls under the highlighted exception based on ERISA's statutory right of reimbursement. Also, Vivendi is seeking to intervene in the action while it is ongoing, and not at the settlement stage when the GOL might apply.

Defendants' other arguments pose greater challenges. Regarding contractual subrogation, defendants correctly note that the subrogation clause on which Vivendi relies (quoted above), when read literally, applies only if the plaintiff is "awarded medical expense reimbursement in a lawsuit ...." Thus, defendants argue, intervention is premature. As to Vivendi's claim for equitable subrogation, that right is no greater

than the rights which the plaintiff himself can assert. Therefore, defendants contend, since the collateral source rule codified at CPLR § 4545 would bar the plaintiff from recovering from the defendants at trial any medical expenses paid by its insurer, the insurer cannot recover those expenses. Lastly, defendants contend that Vivendi's claim is time-barred, as it must have been asserted within two and one-half years of plaintiff's date of injury, just as the plaintiff was obligated to assert his claim within that time.

This Court finds that, notwithstanding the arguably limiting language in the contract, Vivendi has a claim under the common law for equitable subrogation. Simply stated: "Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss." *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.,* 3 NY3d 200, 206 (2004), quoting *Winkelmann v Excelsior Ins. Co.,* 85 NY2d 577, 581 (1995). As the Court of Appeals noted that same year in *Allstate Ins. Co. v Stein*, 1 NY3d 416, 422 (2004), the doctrine of equitable subrogation was established some 80 years ago "based upon principles of equity and natural justice." Quoting *Ocean Acc. & Guar. Corp. v Hooker Electrochemical Co.,* 240 NY 37, 47 (1925), the Court added: "We recognize at once the fairness of the proposition that an insurer who has been compelled by his contract to pay to or in behalf of the insured claims for damages ought to be reimbursed by the party whose fault has caused such damages ..."

Putting aside for the moment the issue of intervention, Vivendi has a claim for equitable subrogation based on these well-established principles of law. Contrary to the defendants' argument, the collateral source rule does not deprive Vivendi of its

subrogation rights. Indeed, the Court of Appeals boldly rejected such an argument in *Blue Cross, supra,* plainly stating as follows:

> This statute does not alter [an insurer's] traditional remedy because "a defendant still may be held responsible in subrogation" ....

3 NY3d at 208 (citations omitted).

The rationale for this rule was discussed more fully, and quite persuasively with citations to opinions by the Court of Appeals, by the trial court facing an intervention motion by Oxford Health Plans, Inc. similar to the one at issue here in *Nossoughi v Federated Dept. Stores,* 175 Misc.2d 585, 589-90 (Sup. Ct., NY Co. 1998):

> At common law an injured party was entitled to recover medical expenses both from his own health insurer as well as from the tortfeasor on the concept that such party paid premiums for the extra protection. Since the principle purpose of CPLR 4545 was to modify the common-law collateral source rule so as to prohibit a double recovery, permitting the health insurer to recover its out-of-pocket expenses from the tortfeasor's insurer does not violate such intent as the claims of the subrogee are separate and distinct from those of the subrogor, being "divisible and independent" ...
>
> While the intent of the Legislature in enacting the several provisions of CPLR 4545 (first in malpractice cases and then in other tort litigation) was also to reduce the costs of liability insurance, it cannot be said that its intent was to do so at the expense of health insurers. This view was implicitly expressed by the Court of Appeals in *Teichman* where it authorized intervention by Met Life so that "tortfeasors, not ratepayers, will ultimately bear the expense" of medical costs ....
>
> Moreover, since CPLR 4545 may be considered in derogation of common-law principles, it should receive a strict interpretation so as to limit the change in common law only to the clear meaning of the words used ...(citations omitted).

The next threshold issue to address relates to timeliness. As Vivendi stands in the shoes of the plaintiff while asserting its equitable subrogation claim, it is bound by the same two and one-half year statute of limitations as binds the plaintiff and the statute runs from the date of injury. *Allstate*, 1 NY3d at 3-4. Here, since the medical treatment at issue was provided during the period from about January 25, 2008 through April 11, 2008, the deadline for asserting a claim expired in October 2010. Vivendi did not file its Order to Show Cause to intervene until a year later, in October of 2011. Therefore, on its face the claim would appear to be time-barred.

However, Vivendi is saved here by the relation-back doctrine codified at CPLR § 203(f), which provides that:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

The transactions or occurrences at issue in both the plaintiff's claims and those asserted by Vivendi relate to the medical care and treatment that the defendants provided to the plaintiff. Plaintiff put the defendants on notice early on in this action that the claim included expenses incurred for physician and nursing services, medical supplies, and hospital expenses. Specifically, in response to defendants' Demands, plaintiff stated in his Bill of Particulars (at ¶ 13) that: "Plaintiff will claim past damages to the full extent of any amounts claimed by lien holders to be due and owing and/or to the full extent of any amounts attached by lien holders claimed to be due and owing. Furthermore, plaintiff claims that any attached liens are the full responsibility of the defendant. The full extent of such liens in unknown at this time." (Plaintiff's Aff in Opp,

Exh B). In light of this express statement and defendants' receipt of a collateral source authorization early on in the discovery phase of this litigation, defendants cannot reasonably dispute that they were on notice of existing claims by plaintiff's health insurer.

The courts have repeatedly held that, for purposes of intervention, an insurer's claims relate back to those asserted by the insured against the tortfeasor. For example, in *McHale v Anthony,* 41 AD3d 265 (1st Dep't 2007), the appellate court affirmed the trial court's order granting plaintiff leave to amend the complaint to add a subrogation claim on behalf of the uninsured motorist carrier with whom they had entered into a settlement agreement. The court found that since the insurer's claim arose out of the same occurrence that had given rise to plaintiff's claim and was similar enough in nature, "defendant was thereby placed on notice of [the insurer's] claim" and the relation-back provision of CPLR §203(f) applied. 41 AD3d at 266, *citing Omiatek v Marine Midland Bank, N.A.,* 9 AD3d 831, 831-32 (4th Dep't 2004), *appeal dismissed* 3 NY3d 738; *Kaczmarski v Suddaby*, 9 AD3d 847, 848 (4th Dep't 2004), *appeal dismissed* 3 NY3d 738. *See also, Glazer v Lutz*, 9 Misc.3d 1104 (Sup Ct., NY Co. 2005)(allowing GHI to intervene in a medical malpractice action and assert a subrogation claim after a settlement had been reached, finding that the claims related back to the main action). Defendants' reliance on *Stewart v Atwood*, 10-CV-00848S(f) (WDNY 2011) is misplaced, as the federal court did not consider the relation-back doctrine available under state law and instead allowed the insurer to assert its claim post-judgment.

Having disposed of all the threshold issues in favor of Vivendi, the Court now turns to the ultimate question whether Vivendi is entitled to intervene in this medical

malpractice action. While each party cites countless cases and proceeds at length to distinguish those cases cited by the other, no single case binding on this Court presents the exact scenario presented here: an insurer moving pre-note of issue to intervene for the limited purpose of submitting documentation pre- or post-trial so as to confirm its right to recover from the defendant tortfeasors medical expenses paid on behalf of the plaintiff. The cases are nevertheless instructive to the extent they raise certain caveats that are relevant here.

On the whole, this Court finds that Vivendi has not established its claim of intervention as of right pursuant to CPLR § 1012. Although Vivendi correctly asserts that neither the plaintiffs nor the defendants have an interest in representing Vivendi's interests at trial, Vivendi will not necessarily be barred by any judgment from asserting its claim of contractual subrogation; as noted above, the contract between Vivendi and the plaintiff expressly allows Vivendi to assert its claim post-judgment.

Nevertheless, this Court finds that Vivendi has established that permissive intervention is appropriate pursuant to CPLR § 1013 based on the facts and circumstances presented here. Because Vivendi's claim for medical expenses incurred is based on the treatment at issue in this action, its claim shares common questions of law or fact with the plaintiff's main claim, and that commonality is all that the statute requires. The key for this Court in exercising its discretion is to fashion the intervention so as to avoid delay or prejudice to any party, while remaining mindful of the caveats raised in the various cited cases.

The parties shall proceed as follows: Vivendi shall be permitted to intervene to assert its claim against the defendants for reimbursement of medical expenses paid on

behalf of the plaintiff relative to the treatment at issue in this action, but no reference to Vivendi shall be made at trial in the caption of the action or otherwise. Clearly, no mention of insurance may be made at trial. Counsel for Vivendi shall be entitled to be served with all future papers served in this action and notice of all future dates.

Vivendi shall be entitled to have admitted into evidence at the trial appropriate documentary evidence of the payments it has made for medical expenses so that a request for medical expenses may be included on the Verdict Sheet and any such award shall be paid to Vivendi. However, Vivendi's counsel shall not be permitted to otherwise participate in the trial, and in fact it does not seek such permission. *See Nossoughi, supra; Humbach v Goldstein,* 229 AD2d 64 (2nd Dep't), *lv dismissed* 91 NY2d 921. In the alternative, and as recommended by the Court, counsel shall stipulate that any award in favor of the plaintiff at trial shall be increased by the amount documented by Vivendi for payments made.

To avoid a conflict of interest, Vivendi shall not have veto power over any settlement. *See Halloran v Don's 47 W. 44th St. Rest. Corp.,* 255 AD2d 206 (1st Dep't 1998); *Marshall v 426-428 W. 46th St. Owners, Inc.*, 33 AD3d 444 (1st Dep't 2006); *Rizzo v Moseley,* 30 Misc.3d 773 (Sup. Ct., Westchester Co., 2010). Further, should the insurance coverage prove to be insufficient to cover both the claims of the plaintiffs and those asserted by Vivendi, the plaintiffs' claims shall be paid first and Vivendi's claims shall yield. *See Glazer v Lutz, supra, citing Winkelmann v Excelsior Ins. Co.,* 85 NY2d 577 (insurer was not entitled to part of settlement monies where plaintiff had settled for less than its loss due to the limited insurance coverage available under the defendant doctor's policy). Only in this way can Vivendi's claims be protected without jeopardizing

the rights of the plaintiffs. Certainly, however, if Vivendi finds that these limitations are resulting in prejudice not intended by this Court, a further application may be made either pre-trial or to the trial court.

Accordingly, it is hereby

ORDERED that the motion by non-party Vivendi Universal Holdings to intervene in the above-captioned matter is granted to the extent provided in the accompanying memorandum decision. Counsel shall appear for a pre-trial conference on April 18, 2012 at 10:00 a.m. prepared to select a trial date.

Dated: March 20, 2012

MAR 20 2012

J.S.C.

ALICE SCHLESINGER

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE