21st Century Advantage Ins. Co. v Cabral
2012 NY Slip Op 31490(U)
May 24, 2012
Sup Ct, Nassau County
Docket Number: 12683-11
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 12683-11

MOTION SUBMISSION
DATE: 4-3-12

MOTION SEQUENCE
NOS. 1 and 002

21st CENTURY ADVANTAGE INSURANCE COMPANY,

Plaintiff,

-against-

PEDRO CABRAL, NATHANIEL QUINTERO, ASHER CAMPBELL, ANTIONIO ANDIRO, VERONICA GAINER, ALLEN DEWITT, SHAMEKA MOORE, LARA ANDRETTI, KAYLA VICTORIA, FRANK RAMIREZ, JOSE LOPEZ, CARLOS EUSIBO-BRITO, RASINDER KAUR, BALWINDER KAUR, SUN AUTO ENTERPRISE, CLAYTON WRIGHT, ALEXIS DEJESUS, RAYGUAIN HYATT, EUDI CALCANO-MOREL, DANILSA FLORES, CARMEN SUERO, ROXANNA CHOWDRY, ANDREW WILSON, CHARGLES BANKS, REGINALD GOLDMAN, MABEL CASTILLO, TATIANA RAMIREZ, LIZA ASH, KATHERINE DOHERTY, JOHN MEMMIS AKA ERIC JOHN MCGUINESS, LIZBETH SANCHEZ, SAMUEL ABRUE, AMAURY JAVIER AKA AMAURYS JAVIER, DIANA GUZMAN, U-HAUL RENTAL, MARSIBEL CASTILLO-FELIX, OMAR FELIX AKA OMAR CASTILLO, PEDRO CASTILLO, JULIAN SILVERIO, DARIEL FERMIN, ORDANNY GERMAN, BILLY SHUFF, SHAUNDEL JACKSON, TIQUAN BRACEY, RAFAEL CRUZ, MJJ SERVICE, INC. ("INDIVIDUAL" DEFENDANTS"),

-AND-

ADVANCED MEDICAL CARE, P.C., ALL BORO PSYCHOLOGICAL SERVICES, P.C., ALL MEDICAL CARE OF BRONX, P.C., AMEGA, INC., ANDREW GARCIA, D.C., AVICENNA MEDICAL ARTS PLLS, BETTER HEALTH CARE

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CHIROPRACTIC, P.C., BIG APPLE
CHIROPRACTIC, BORIS KHAIMOV, PA, BR
CLINTON CHIROPRACTIC, P.C., BRONX
ACUPUNCTURE THERAPY, P.C., CLINTON
PLACE MEDICAL, P.C., COPESTHESIA,
DANIEL P. KLEIN, M.D., DAVIDSON
MEDICAL, P.C., DIAGNOSTIC
CHIROPRACTIC SERVICES, P.C., DOCTOR
OF MEDICINE IN THE HOUSE, P.C, DOVPHIL
ANESTHESIOLOGY GROUP, EASTCHESTER
PRECISION MEDICAL, P.C., EGA GROUP, INC.
EMERGENCY MED ASSOCS OF SLR, EPOCA
CHIROPRACTIC CARE, P.C., FDNY EMER-
GENCY MEDICAL SERVICE, FELICITY
MEDICAL CARE, P.C., FOREST PARK
ACUPUNCTURE, P.C., GREEN HEIGHTS
PHYSICAL THERAPY, P.C., H20 PHYSICAL
THERAPY, HABIBA PT, P.C., HARLEM
HOSPITAL MEDICAL, P.C., HEALING ART
ACUPUNCTURE, P.C., HEAVEN'S TOUCH
MASSAGE THERAPY, P.C., HILLSIDE
SURGICARE, IDF MEDICAL DIAGNOSTIC,
P.C., J.C. HEALING TOUCH REHAB PT, P.C.,
JEFFREY MENEGAS, M.D., JEREMY
WHITFIELD, D.C., P.C., JYOTI SHAH, M.D.,
LEICA SUPPLY, INC., LENOX HILL
ANESTHESIOLOGY, LENOX HILL HOSPITAL,
LEX PSYCHOLOGICAL SERVICES, P.C.,
LEXINGTON FAMILY CHIROPRACTIC CARE,
P.C., LYNNBROOK ADV ACUPUNCTURE, P.C.,
MANHATTAN COMPREHENSIVE MEDICINE,
MANHATTAN EYE EAR THROAT, MARK S.
MCMAHON, M.D., NEW AGE CHIROPRACTIC
CARE, P.C., NEW WAY ACUPUNCTURE, NORTH
EAST EMPIRE MEDICAL, P.C., OLMEUR MEDICAL,
P.C., ORANGE ACUPUNCTURE, P.C., ORTHO-
PEDIC SPECIALIST OF GREATER NEW YORK,
PARK AVENUE MEDICAL CARE, P.C., PREMIER
SURGICAL SERVICES, P.C., PRO HEALTH
ACUPUNCTURE, P.C., PROFESSIONAL
ORTHOPEDICS, PLLC, QUALITY PSYCHOLOGICAL
SERVICES, P.C., QUALITY SERVICE SUPPLIES,
INC., RONALD DISCENZA, M.D., RX PLUS
PHARMACY, RX WAREHOUSE PHARMACY, INC.,

ROYAL MEDICAL SUPPLY, INC., SLR DIAGNOSTIC RADIOLOGY, P.C., SS MEDICAL CARE, P.C., SHERYL TOMACK, SOCRATES MEDICAL HEALTH, P.C., SOHO MEDICAL SUPPLIES, INC., SOUTH END CHIROPRACTIC, P.C., ST CHIROPRACTIC, P.C., ST. LUKES ROOSEVELT HOSPITAL, STAR MEDICAL & DIAGNOSTIC, PLLC, SUPREME ACUPUNCTURE, P.C., SYLVIA LOBO, SYNERGY FIRST MEDICAL, PLLC, TC AMBULANCE CORP., TRUE ALIGN CHIROPRACTIC CARE, P.C., UNITED ORTHO SUPPLY, INC., UNLIMITED PRODUCTS LTD, V & T MEDICAL, P.C., VARUZHAN DOVLATYAN, M.D., WINDY CITY MEDICAL SUPPLY, ZG CHIROPRACTIC CARE, P.C., ("PROVIDER DEFENDANTS"),

COLLECTIVELY, THE DEFENDANTS.

The following papers read on this motion:

Order to Show Cause and Affirmation	X
Notice of Cross Motion and Affirmation	X
Affidavit	X
Opposition to Defendant's Cross Motion	X
Affirmation in Opposition	X
Affirmation in Support	X
Reply in Support	X
Reply	X

Order to show cause pursuant to CPLR 6301 and 2201 by the plaintiff 21st Century Advantage Insurance Company for an order, *inter alia,* staying and enjoining all presently pending and future lawsuits and arbitrations instituted as against the plaintiff for (1) the recovery of no-fault benefits; and/or (2) reimbursement for

health care services rendered pursuant to stated automobile insurance polices previously issued by the plaintiff.

Cross motion pursuant by codefendant All Boro Psychological Services, P.C., for an order: (1) dismissing the plaintiff's complaint to CPLR 3211[a][4]; or alternatively, (2) severing the claims asserted against it pursuant to CPLR 603 and 1002[c]; and/or (3) extending its time to serve an answer to the verified complaint pursuant to CPLR 3012[d] and 2004.

In August of 2011, the plaintiff 21st Century Advantage Insurance Company ["the plaintiff"], commenced the within insurance fraud action as against various no-fault, health care providers and individual defendant-policyholders. The verified complaint alleges in substance that during a ten-month period between June of 2009 and January of 2010, certain individual defendants engaged in a fraudulent scheme to illegally procure approximately ten automobile insurance policies (Cmplt., ¶¶ 5-7; 142; 161, 181, 195).

More specifically, the plaintiff contends, *inter alia*, that: the named individual defendants and others, applied for the subject policies by telephone or over the internet by using common telephone and facsimile numbers; that the applicants used invalid bank accounts and bogus credit cards to do so; and that thereafter – mostly within 60 days of the policy issuance dates and before non-

payment-based cancellation notices could become effective – the fraudulently insured vehicles were involved in "staged," side-swipe or rear-end type accidents, for which false claims were filed (Keane Aff., ¶¶ 4-8; 10-11; Mirabella Aff., ¶¶ 9-11).

The verified complaint further alleges that after the allegedly false claims were filed, the plaintiff requested information from its insureds and others, and also scheduled examinations under oath ["EUO"], as authorized by the policies (Cmplt., ¶¶ 154-159; 192-195, 249-250, 280). The defendants, however, either failed to appear for the EUOs or testified in an evasive, suspicious and inconsistent manner with respect to the policy application process and the occurrence of the subject accidents (Keane Aff., ¶¶ 9-10; Cmplt., ¶¶ 153-155; 172-173; 194; 203-204, 229; 280).

With respect to one policy transaction in particular, the complaint avers that the "unlisted" driver who was actually operating the insured's vehicle during the accident (which occurred nine days after the policy was issued), appeared for an EUO and testified that: *inter alia*, he was offered money by the named insured to become involved in an accident; that specifically, he was instructed to rear-end another vehicle; and that he was then told by the named insured to apply for no-fault therapy benefits after the accident occurred (Cmplt., ¶¶ 203-204).

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The plaintiff asserts that in sum, and based on its investigation, none of the individual defendants provided evidence demonstrating that the policy applications and ensuing accidents were *bona fide* – as opposed to intentionally staged, sham incidents designed to defraud the plaintiff (Keane Aff., ¶¶ 11-12).

The plaintiff's verified complaint sets forth five causes of action and demands, among other things, declaratory relief rescinding and/or voiding the policies (Cmplt., ¶¶ 325- 361).

In light of its assertion that the subject policies were fraudulently obtained and void, the plaintiff thereafter declined to reimburse certain health care providers who supplied no-fault medical services to the insured defendants (Cmplt., ¶¶ 56-140). As a result, approximately 100 of those health care providers later commenced no-fault reimbursement actions against the plaintiff in the New York City Civil Court (Mirabella Reply Aff., ¶ 6).

In December of 2011, the plaintiff moved by order to show cause (with temporary restraining order) to enjoin the prosecution and/or commencement of all actions and arbitrations – pending or to be commenced in the future – arising out of the issuance of the subject policies (OSC, ¶¶ [a]-[c]).

Upon receipt of the plaintiff's papers, the Court signed the proposed temporary restraining order contained therein, which effectively stayed all current

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and future actions and/or arbitrations pending the return date of the plaintiff's main application (Jaeger, J.).

Codefendant All Boro Psychological Services, P.C ["All Boro"] has opposed the plaintiff's application and also cross moved for stated relief, including dismissal of the plaintiff's complaint pursuant to CPLR 3211[a][4] based on a Civil Court reimbursement action it commenced against the plaintiff. Alternatively, All Boro has requested a severance (CPLR 603; 1002[c]), and if that relief is denied, All Boro has sought leave to file a late answer to the verified complaint (*see*, CPLR 2004; 3012[b]).

With respect to its CPLR 3211[a][4] dismissal claim ("another action pending"), All Boro asserts that in June of 2011 a few months before the plaintiff commenced this action – it instituted its own no-fault, reimbursement action against the plaintiff in the New York City Civil Court (Chin Aff., ¶¶ 2–6; Exh., "3"). The All Boro Civil Court complaint alleges in sum, that All Boro provided covered, no-fault medical services to one of the individual defendants in this action, "Shameeka Moore" (Chin Aff., ¶¶ 2–6; Exh., "3"). According to All Boro's Civil Court complaint, despite due demand, the plaintiff has declined to pay the sum of $1181.73 – the amount allegedly now due and owing for the health care services it rendered.

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A number of additional, non-moving providers have also opposed the plaintiff's motion, *i.e.*, codefendants Amega, Inc., Healing Art Acupuncture, P.C.; J.C. Healing Touch Rehab PT, P.C.; North East Empire Medical, P.C.; SS Medical Care, P.C.; True Align Chiropractic Care, P.C.; True Align Chiropractic Care P.C., and ZG Chiropractic Care, P.C – and also Roxana Chowdhry (a non-insured alleged accident victim).

The plaintiff's order to show cause is now before the Court for review and resolution. The order to show cause should be granted. All Boro's cross motion is granted to the limited extent indicated below.

Preliminarily, although the plaintiff cites to, *inter alia,* CPLR 2201 as authority for its application, CPLR 2201 applies to stays issued in matters pending before the motion Court (*e.g., Peluso v Red Rose Rest., Inc.,* 78 AD3d 802, 803; *St. Paul Travelers Ins. Co. v. Nandi*, ___Misc.3d___, 2007 WL 1662050, at 8 [Supreme Court, Queens County 2007]; Siegel, New York Practice, § 256, at 435-436 [4th ed] *see, New York Cent. Mut. Ins. Co. v. McGee*, ___Misc.3d ___, 2009 WL 4068474, at 6 [Supreme Court, Kings County 2009], *modified on different grounds*, 87 AD3d 622 *see also, Autoone Ins. Co. v. Manhattan Heights Medical, P.C.*, ___Misc.3d.___, 2009 WL 2357009, at 2-3 [Supreme Court, Queens County 2009]). Here, the plaintiff's order to show cause demands relief enjoining actions

and arbitrations pending in a variety of different forums. Accordingly, the motion is properly viewed as one for a preliminary injunction – to which the requirements prescribed by Article 63 are therefore applicable (*St. Paul Travelers Ins. Co. v. Nandi, supra see also*, *Mercury Cas. Co. v. Inger Grant Lynbrook Adv Acupuncture*, *supra*, 2011 WL 4874666 [Supreme Court, Nassau County 2011]; *New York Cent. Mut. Ins. Co. v. McGee, supra cf., Urban Radiology, P.C. v. GEICO Ins. Co.*, ___Misc.3d.___, 2010 WL 3463018, at 2-3 [New York City Civil Court 2010]).

With respect to those requirements, "[a] party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (*Perpignan v. Persaud*, 91 AD3d 622, 623 *see also, Nobu Next Door, LLC v. Fine Arts Housing, Inc.,* 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v. Capasso,* 75 NY2d 860, 862 [1990]; *Doe v. Axelrod*, 73 NY2d 748, 750 [1988]). However, conclusive proof is not required (*Arcamone-Makinano v. Britton Property, Inc*., 83 AD3d 623; 624; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605), and the mere existence of an issue of fact will not itself be

grounds for the denial of the motion (*see,* CPLR 6312[c]; *Reichman v. Reichman*, 88 AD3d 680, 681; *Ruiz v Meloney*, 26 AD3d 485, 487).

"The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*91-54 Gold Road, LLC v. Cross-Deegan Realty Corp.*, 93 AD3d 649).

With these principles in mind, and in the exercise of its discretion, the Court agrees that the plaintiff has established its entitlement to the injunctive relief sought. It is settled that "[a] deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident" (*State Farm Mut. Auto. Ins. Co. v. Laguerre*, 305 AD2d 490, 491 *see, Matter of Liberty Mut. Ins. Co. v Goddard*, 29 AD3d 698, 699; *Eagle Ins. Co. v. Davis*, 22 AD3d 846, 847; *Matter of Metro Med. Diagnostics v Eagle Ins.* Co., 293 AD2d 751, 752).

At bar, the plaintiff's submissions include the affidavit of its Special Investigator, Sandra Keane, who was involved in the investigation, and the plaintiff's 361 paragraph, complaint (verified by Ms. Keane), which provides a highly fact-specific, case-by case description of, *inter alia*, the manner in which the policies were acquired; the insured defendants' alleged non-cooperation, and other relevant transactional facts depicting the allegedly suspicions and questionable nature of the applications made and the accidents which later

occurred (*see, Autoone Ins. Co. v. Manhattan Heights Medical, P.C., supra*, 2009 WL 2357009, at 2-3 *cf., Felsen v. Stop & Shop Supermarket Co., LLC*, 83 AD3d 656, 657). These non-conclusory factual assertions are sufficient to *prima facie* establish a likelihood of success on the merits of the plaintiff's fraud-based claims, *i.e.*, that the policies were fraudulently acquired and therefore subject to rescission (*Autoone Ins. Co. v. Manhattan Heights Medical, P.C., supra*; *St. Paul Travelers Ins. Co. v. Nandi, supra*, 2007 WL 1662050, at 8).

The plaintiff has additionally demonstrated that the requested injunctive relief will serve to minimize repetitive litigation and arbitrations in which the same, potentially dispositive defenses and claims relating to the disputed policies will be raised (*Autoone Ins. Co. v. Manhattan Heights Medical, P.C., supra*). Similarly, and, "in view of the multiplicity of lawsuits and the possible inconsistent outcomes in the absence of an injunction, [the] plaintiff has established the elements of irreparable injury and the balancing of the equities in its favor" (*St. Paul Travelers Ins. Co. v. Nandi, supra*, 2007 WL 1662050, at 8).

Contrary to the plaintiff's contentions, however, "[t]he Second Department has repeatedly emphasized that CPLR 6312[b] 'clearly and unequivocally requires the party seeking an injunction to give an undertaking'" (*Schneck v. Schneck*,___, Misc.3d.___, 2008 WL 5192626, at 6 [Supreme Court, Nassau County 2008],

quoting from, *Glorious Temple Church of God in Christ v. Dean Holding Corp.*, 35 AD3d 806, 807; 6312[b] *see also, 91-54 Gold Road, LLC v. Cross-Deegan Realty Corp., supra,* 93 AD3d 649, 650; *Putter v. Singer*, 73 AD3d 1147, 1149; *Buckley v. Ritchie Knop, Inc.*, 40 AD3d 794, 796; *Massapequa Water Dist. v. New York SMSA Ltd. Partnership*, ___ Misc.3d.___, 2008 WL 779259 at 9 [Supreme Court, Nassau County, 2008])(Mirabella [Opp] Aff., ¶ 16).

Therefore, and as a condition to the granting of the above-referenced injunctive relief, the plaintiff shall file an undertaking as directed below in accord with the dictates of CPLR 6312(b)(*Schneck v. Schneck, supra*, 2008 WL 5192626, *see also*, *Massapequa Water Dist. v. New York SMSA Ltd. Partnership, supra*, 2008 WL 779259 at 9 [Supreme Court, Nassau County, 2008]; *Buckley v. Ritchie Knop, Inc., supra*).

Turning to All Boro's cross motion, that branch the motion which is to dismiss the complaint based on the Civil Court reimbursement action should be denied (CPLR 3211[a][4]). In the exercise of its broad discretion pursuant to CPLR 3211[a][4](*see*, *Clark v. Clark*, 93 AD3d 812, 815), the Court agrees that dismissal of the subject action based on the pending, Civil Court matter is unwarranted, since, *inter alia*, the two actions lack the requisite degree of identity

in terms of the issues presented and the relief sought (*Clark v. Clark*, *supra*, at 815; *Goldman v A&E Club Props., LLC*, 89 AD3d 681, 683).

All Boro's alternative demand for relief – denominated as a request for a severance – appears to be miscast (CPLR 603, 1002[c]). In substance, a severance is a discretionary measure which is "sparingly" exercised so as to minimize prejudice where, *inter alia*, common factual and legal issues are lacking and/or where a single trial of differing claims would negatively effect a substantial right (*Herskovitz v Klein*, 91 AD3d 598, 599; *New York Cent. Mut. Ins. Co. v. McGee, supra*, 87 AD3d at 624; *Bentoria Holdings, Inc. v Travelers Indem. Co.*, 84 AD3d 1135, 1137; *Cole v Mraz*, 77 AD3d 526, 528; *Quiroz v Beitia*, 68 AD3d 957, 960 *see generally, Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]).

Here, however, All Boro is apparently making the opposite claim; namely, that common legal and factual issues do, in fact, exist (*see,* Chin Reply Aff., ¶¶ 1-4). Where commonality exists, courts have denied severance requests, reasoning "that the interests of judicial economy and consistency of verdicts will be served by having a single trial" (*Herskovitz v Klein, supra*; *Golden Eagle Capital Corp. v Paramount Mgt. Corp.*, 88 AD3d 646, 648; *Quiroz v Beitia, supra*, 68 AD3d 957, 960). Alternatively, to the extent that All Boro is arguing that its Civil Court action should be exempted from the subject injunction (Chin Reply Aff., ¶¶ 1-2),

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that result would be inconsistent with the Court's granting of that remedy and could reintroduce the potential for conflicting results which the injunction was, in part, designed to minimize (*cf., St. Paul Travelers Ins. Co. v. Nandi*, *supra*, 2007 WL 1662050, at 8).

Lastly, that branch of the All Boro's cross motion which is for leave to file a late answer, in the form annexed to its motion papers, is granted as unopposed (Chin Reply Aff., Exh., "1").

The Court has considered the parties' remaining contentions and concludes that they do not support an award of relief beyond that granted above.

Accordingly, it is,

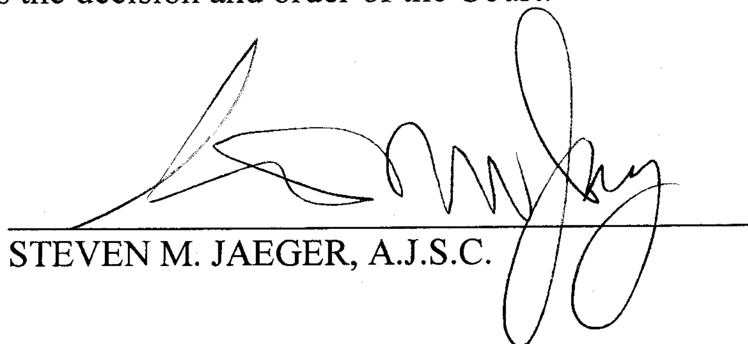
ORDERED that the plaintiff's motion for a preliminary injunction is granted to the extent that terms of the temporary restraining order previously approved by the Court shall be continued during the pendency of the subject action, and it is further,

ORDERED that the plaintiff shall post an undertaking in the sum of $50,000.00 pursuant to CPLR 6312(b) within twenty (20) days of the date of this Order, and if such undertaking is not posted, the order to show cause is denied, and it is further,

ORDERED that the cross motion pursuant by codefendant All Boro Psychological Services, P.C., is granted to the limited extent that its application to serve the proposed answer annexed to its moving papers is granted, and the cross motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 24, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED

MAY 29 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE