Uptown Healthcare Mgt. Inc. v Alstate Ins. Co.
2012 NY Slip Op 33515(U)
October 5, 2012
Supreme Court, Bronx County
Docket Number: 306322/11
Judge: Norma Ruiz
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NEW YORK SUPREME COURT - COUNTY OF BRONX

C

PART 22

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

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

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UPTOWN HEALTHCARE Index №. **0306322/2011**

-against- Hon..**NORMA RUIZ** ,

ALLSTATE INSURANCE Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **October 25 2011** and duly submitted as No. ____ on the Motion Calendar of 3-5-12

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion was decided in accord with the annexed decision and order of the Court

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10/5/12

Hon. _____
NORMA RUIZ, J.S.C.

NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 306322/11

UPTOWN HEALTHCARE MANAGEMENT INC., d/b/a EAST TREMONT MEDICAL CENTER and HISHAM ELZNATY,

Plaintiffs

-against-

ALLSTATE INSURANCE COMPANY, ROBERT P. MACCHIA and MEHMET F. GOKCE,

Defendants..

DECISION/ORDER

Present: HON. NORMA RUIZ

The following papers numbered 1 to13 Read on this motion DISMISSAL
Noticed on 10/25/12 & 11/29/12 and duly submitted as No. __ on the Motion Calendar of 3/5/12

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

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	1- 6
Notice of Cross Motion and Answering Affidavits.....	7-9
Replying Affidavits	10-13
Memorandum of Law	
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Robert P. Macchia ("Macchia") and Mehmet F. Gokce ("Gokce") move for an order dismissing the complaint as against them pursuant to CPLR § 3211(a)(7) and for an order sanctioning plaintiffs for filing a frivolous action against them. Defendant Allstate Insurance Company ("Allstate") moves to dismiss this action pursuant to CPLR 3211(a)(4) on the grounds that the same cause of action is currently pending between the parties in the Unites States District Court for the Eastern District of New York or in the alternative stay this action pursuant to CPLR § 2201

pending a determination in the federal action. Allstate made a second motion in which it seeks to dismiss counts I-III in the amended complaint. Plaintiffs Uptown Healthcare Mangement, Inc. d/b/a East Tremont Medical Center ("Uptown"), and Hisham Elzanaty ("Elzanaty") cross- move for summary judgment. Upon a review of the moving papers and opposition submitted thereto, Maccia and Gokce's motion is granted in part and denied in part. Allstate's motions are granted to the extent that this action is dismissed. Plaintiffs' cross motion is denied.

According to the plaintiffs, Uptown is a medical center incorporated pursuant to Article 28 of the New York Public Health Law and does business as East Tremont Medical Center. Elzanaty, the owner of Uptown, is not and never was licensed to practice medicine. Uptown rendered medical treatment to individuals covered by No-Fault insurance who, in turn, assigned their respective claims for the covered medical expenses to Uptown so that Uptown could seek reimbursement directly from the appropriate No-Fault insurance carrier.

Allstate, through its counsel, sought verification from Uptown regarding its incorporation.

In interpreting Insurance Law § 5102 *et seq.*, the Superintendent of Insurance promulgated 11 NYCRR 65-3.16 (12), which provides that "[a] provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York or meet any applicable licensing requirement necessary to perform such service in any other state in which such service is performed." Thus, unlicensed or fraudulently licensed providers are ineligible for reimbursement (*State Farm v. Mallela*, 4 NY3d 313 [2005]) . In *Mallela*, the Court of Appeals relied on the principle of administrative law that "if the Superintendent's interpretation is not irrational or unreasonable, it will be upheld in deference to his special competence and expertise with respect to the insurance industry, unless it runs counter to the clear wording of a statutory provision" (*Mallela*, at 321). The Court stated that where " the Superintendent has properly crafted a rule within the scope of his authority, that rule has the force of law and represents the policy choice of this State" (*Id*).

The medical facilities involved in the *Mallela* case were incorporated pursuant to N.Y. Business Law §§1507, 1508 and N.Y. Education Law § 6507(4)(c). There, it was alleged that unlicensed defendants paid physicians to use their names on paperwork filed with the State to

establish medical service corporations. Once the medical service corporations were established under the facially valid cover of the nominal physician-owners, the non-physicians actually operated the companies. To maintain the appearance that the physicians owned the entities, the non-physicians caused the corporations to hire management companies (owned by the non-physicians), which billed the medical corporations inflated rates for routine services. In this manner, the actual profits did not go to the nominal owners but were channeled to the non-physicians who owned the management companies (*Mallela* at 319). The Court found that 11 NYCRR 65-3.16 (a)(12) allowed insurance carriers to withhold reimbursement from fraudulently licensed medical corporations. The Court went on to find as follows

> [T]hat on the strength of this regulation, carriers may look beyond the face of licensing documents to identify willful and material failure to abide by state and local law . . . The regulatory scheme, however, does not permit abuse of the truth-seeking opportunity that 11 NYCRR 65-3.16 (a) (12) authorizes. Indeed, the Superintendent's regulations themselves provide for agency oversight of carriers, and demand that carriers delay the payment of claims to pursue investigations solely for good cause (see 11 NYCRR 65-3.2 [c]). In the licensing context, carriers will be unable to show "good cause" unless they can demonstrate behavior tantamount to fraud. Technical violations will not do. For example, a failure to hold an annual meeting, pay corporate filing fees or submit otherwise acceptable paperwork on time will not rise to the level of fraud. We expect, and the Legislature surely intended, vigorous enforcement action by the Superintendent against any carrier that uses the licensing-requirement regulation to withhold or obstruct reimbursements to nonfraudulent health care providers (Mallela at 321).

Notwithstanding the fact that 11 NYCRR 65-3.16 (a) (12) excludes reimbursement to any "provider of health care services" that fails to meet any applicable New York state or local licensing requirement without making any distinction between health care providers incorporated pursuant to Public Health Law or by Business Corporation Law, the plaintiffs contend they are not subject to any verification process because Uptown was incorporated pursuant Article 28 of the Public Health Law. Plaintiffs heavily rely on the fact that in *Mallela* the defendants were incorporated pursuant to Business Corporation and Education laws and not Article 28 of the Public Health Law. In essence, plaintiffs contend that the rigorous licensing process of Article 28 of the Public Health Law should

suffice to qualify them to receive reimbursement under Insurance Law § 5102(a)(1) without any further verification process from an insurance carrier. Plaintiffs did not submit to any of the verification requests of the defendants. Instead, they commenced this declaratory action in which they seek an order declaring that: (1) Uptown is a licensed and accredited Article 28 medical facility and operated in compliance with all of the regulations set forth by the New York State Department of Health; (2) Allstate may not demand verification procedures (such as documents and examinations under oath) regarding Uptown's incorporation.; (3) Allstate may, upon a good faith basis, verify claims to determine if they were medically necessary, the facts/legitimacy of the accident and the insured's coverage; (4) Uptown is entitled to submit No-Fault claims and receive reimbursement for services rendered to Allstate's injured insureds.

Plaintiffs' Cross Motion

Plaintiffs' cross motion for summary judgment is denied as premature since it was made before issue was joined (CPLR 3212).

Defendants Macchia and Gokce's Motion

Macchia and Gokce, ("moving defendants")make a motion to dismiss pursuant to CPLR § 3211(a)(7) on the grounds that the complaint fails to state a cause of action as against the individual named defendants.

According to Macchia's affirmation in support of the motion, he is an attorney licensed to practice law in the State of New York and the owner of The Law Offices of Robert P. Macchia & Associates, ('law firm"). Gokce is an employee and non-equity partner of the law firm. Defendant Allstate retained the law firm for various legal matters which included representation in actions brought against it for non-payment of bills to healthcare providers pursuant to the New York State Comprehensive Motor Vehicle Insurance Reparations Act (New York Insurance Law § 5101 *et seq.*)("No-Fault laws") and the regulations promulgated thereto (11 NYCRR 65, *et seq*) in both the Civil Court and in the arbitration forum.

The moving defendants argue in their capacity as counsel to Allstate, they authored and sent letters to the plaintiffs seeking verification in connection with claims for No-Fault benefits they submitted to Allstate. The letters sought examinations under oath of the physicians who treated the eligible injured person(s) in order to verify the service(s) rendered to the claimants and to verify Uptown's compliance with all laws, including but not limited to Article 28 of the New York State Public Health Law, to determine its standing to recover reimbursement under the New York State No-Fault Laws. In addition, the letters requested verification documents. The moving defendants contend that the letters where made in accord with the rights afforded to an insurer by 11 NYCRR 65-3.5. Movants further contend that the letters contained the necessary language notifying the party that they would be reimbursed for any loss of earnings and reasonable transportation expenses. Thus, the moving defendants' letters seeking additional verification were will within the bounds of the law and as such the plaintiffs' complaint as against the moving defendants fails to state a cause of action.

The plaintiffs filed a summons and complaint on July 15, 2011 and personally served the moving defendants. The complaint alleges three causes of action. The second cause of action is against the moving defendants and seeks a declaratory judgment as follows:

a. Allstate, Macchia and Gokce cannot seek examinations under oath and submit requests for documents in the guise of verifications of claims which question:

   1. Whether [Uptown] was properly incorporated pursuant to and properly operated under Article 28 of the Public Health Law;
   2. [Uptown's] corporate status and the status of its employees;
   3. Whether [Uptown] had a properly licensed medical director;
   4. Whether [Uptown] operates in violation of its operating certificate;
   5. Whether [Uptown] engaged in improper referrals and/or unlawfully shared fees with non-medical personnel and/or made improper kickbacks.

b. Allstate, Macchia and Gokce are only entitled to seek verification on claims on a non-adversarial basis where there is good faith

basis to question: (a) the medical necessity of the treatment; and/or (b) the facts of the accident; and/or (c) the legitimacy of the accident; and/or (d) the insured's coverage.

c. That [Uptown] is entitled to submit No-Fault claims and receive reimbursement for services rendered during the relevant period of time.

The moving defendants persuasively maintain that the letters they sent were on behalf of Allstate in their respective capacity as counsel to Allstate. Thus, no cause of action lies against them.

Plaintiffs argue in their cross motion that Macchia and Gokce facilitated Allstate's effort to avoid making payments to [Uptown] and they are entitled to seek the relief requested to prevent them from continuing with the improper verification requests. In addition, plaintiffs stated that they have "set forth sufficient facts in the Amended Verified Complaint to support two additional causes of action against Macchia and Gokce for abuse of process and violations of New York Judiciary Law § 487" (see plaintiffs' cross motion at paragraph 16).

The Court notes that the plaintiffs first annexed a copy of the amended complaint in its Reply Affirmation, in further support of its cross motion. However, there is no evidence, not even an allegation, that the plaintiffs first obtained leave prior to amending the complaint. Pursuant to CPLR § 3025(a) "A party may amend his pleadings once without leave of the court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it" (id). The defendants all moved to dismiss prior to answering the original summons and complaint. Annexed to the moving defendants motion were stipulations which extended the time to respond up to and including September 9, 2011. Clearly, the amended complaint which was filed on October 3, 2011, was not filed within twenty days after service of the complaint or during the time before responding to the complaint expired. Hence, the plaintiffs were required to obtain leave prior to amending the complaint or in the alternative obtain a stipulation by all parties (see CPLR § 3025). Failure to obtain such leave renders the amended complaint a nullity[1] (*see Nikolic v. Federation Employment and Guidance Service, Inc.*, 18 AD3d 522 [2d Dept 2005]).

Turning now to the second cause of action in the complaint, the Court notes that the

[1] Defendants rejected the plaintiffs' amended complaint as procedurally defective.

relationship created between an attorney and his client is that of principal and agent (*see Burger v. Brookhaven Medical Arts Bldg., Inc.*, 131 AD2d 622, 623 [2d Dept 1987] citing 6 NY Jur 2d, Attorneys at Law § 82, et seq.). "Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client" (*Burger* at 623). Here, the complaint does not set forth facts to support any fraud, collusion, or malicious or tortious act. As such, the Court grants the motion to dismiss the complaint as against Maccia and Gokce.

Accordingly, the motion is granted to the extent that this action is dismissed as against defendants Maccia and Gokce. That branch of the motion which seeks sanctions is denied.

Allstate's Motion to Dismiss

Allstate's motion to dismiss this action pursuant to CPLR § 3211(a) on the grounds that the same cause of action is pending between the parties pending in the United States District Court for the Eastern District of New York (the Federal action) is granted.

The Federal action which is encaptioned *Allstate v. Hisham Elzanaty, Jadwiga Pawlowski, MD, Hosam Ahmed El-Sherbiny a/k/a Hisham Ahmed El-Sherbiny a/k/a hisham Ahmed, Alan Goldenber, J.P. Medical, P.C, Accurate Medical, P.C., Nolia Medical, P.C. and Uptown Health Care Managment, Inc. d/b/a East Tremont Medical Center, New York Neuro & Rehab Center and Jerome Family Health Center* (CV-11 3262) was commenced one month after the plaintiffs commenced this declaratory judgment action. In the Federal action, Allstate alleges violations of the Federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 USC § 1962(c)-(d); common law fraud; unjust enrichment; unfair and deceptive trade practices in violation of New York General Business Law § 349 and declaratory relief pursuant to the Federal Declaratory Judgment Act, 28 USC §§ 2201 and 2202. With respect to Elzanaty, the complaint alleges that he illegally operated Uptown in violation of Article 28 and systematically billed various insurers, including Allstate, fraudulent charges. The Federal complaint links Elzanaty to the other five defendant medical facilities which are also accused of fraudulent incorporation and/or billing.

The action pending before this Court is one of a declaratory nature which will, by its very

nature, only declare the rights of the parties on the limited issue before this Court. The federal action, on the other hand, will resolve all issues in this declaratory action, as well as, all the issues between the parties.

"The rule is clear that a declaratory judgment action should not be entertained if another action between the same parties raising the same issues was actually pending at the time of its commencement . . . chronology is not the sole test to be applied in resolving the question whether an action for a declaratory judgment should be entertained . . .Consideration must be given to the utility and necessity of a purely alternative remedy" (*Ithaca Textiles v. Waverly Lingerie Sales Co.*, 24 AD2d133, 134 [3d Dept 1965] *aff'd* 18 N.Y.2d 885 (1966) *citing Reynolds Metals Co. v. Speciner*, 6 A D 2d 863 [1st Dept 1958][Where there is another action pending, which when tried, will dispose of all the issues involved in the declaratory judgment action, the court should not, in the exercise of discretion entertain an action for a declaratory judgment).

In light of the above, the Court grants Allstate's motion to dismiss this action pursuant to CPLR § 3211(a)(4).

Accordingly, this action is hereby dismissed.

This constitutes the decision and order of the court.

Dated: 10/5/12
Bronx, New York

HON. NORMA RUIZ, J.S.C.