Government Empl. Ins. Co. v Avanguard Med. Group PLLC
2013 NY Slip Op 33697(U)
December 10, 2013
Supreme Court Nassau County
Docket Number: 16313/11
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 33
NASSAU COUNTY

GOVERNMENT EMPLOYEES INSURANCE CO., GEICO INDEMNITY CO., GEICO GENERAL INSURANCE CO. and GEICO CASUALTY CO.,

Plaintiffs,

Index No.: 16313/11
Motion Seq. No.: 03
Motion Date: 11/06/13

- against -

AVANGUARD MEDICAL GROUP PLLC,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits and Memorandum of Law	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 2304, for an order quashing plaintiffs' subpoenas *duces tecum* and subpoenas *ad testificandum* served upon defendant, non-party Mark Gladstein, M.D. and non-party JP Morgan Chase Bank in all pending litigations, arbitrations and other proceedings; and moves for an order compelling plaintiffs, their attorneys, employees and/or agents to provide defendant with copies of all documents received from third-parties in response to the subpoenas *duces tecum*; and moves for an order compelling plaintiffs, their attorneys, employees and/or agents to destroy and/or dispose of all documents received from third-parties in response to the subpoenas *duces tecum*; and moves for an order precluding plaintiffs from

utilizing, in any litigation, arbitration or other proceeding the use of any information obtained by, or obtained through, any documents received from third-parties in response to the subpoenas *duces tecum*; and moves for an order enjoining plaintiffs, their attorneys, employees and/or agents from serving any further subpoenas *duces tecum* on defendant or third-parties for proprietary corporate and/or personal information of its owners and/or employees; and moves for an order enjoining plaintiffs, their attorneys, employees and/or agents from serving any further demands for Examinations Under Oath or demands for documentary production for issues surrounding defendant's corporate structure, accreditation and/or licensing. Plaintiffs oppose the motion.

As detailed in this Court's May 31, 2012 and January 24, 2013 Decisions and Orders, in November of 2011, plaintiffs commenced the within action as against defendant, an "Office Based Surgical Facility" ("OBS") and domestic professional service corporation formed under Section 230-d of the Public Health Law. *See* Defendant's Affirmation in Support Exhibit B Verified Complaint ¶¶ 3, 6-11.

In substance, plaintiffs aver that, over the past several years, they have received a large number of No-Fault claims from defendant, in which defendant has requested substantial, non-physician generated "facility" fees or "office-based" costs – claims which plaintiffs have, to date, declined to pay. *See* Defendant's Affirmation in Support Exhibit B Verified Complaint ¶¶ 26-28; Defendant's Affirmation in Support Exhibit D pp. 1-2. According to plaintiffs, pursuant to allegedly governing regulations promulgated by the Department of Health, only providers duly licensed under Article 28 of the Public Health Law are authorized to bill No-Fault carriers for office-based facility fees. *See* Defendant's Affirmation in Support Exhibit B Verified Complaint ¶¶ 30-38. Although defendant is a physician-owned OBS in which certain surgical

procedures may be performed, it is not an Article 28-licensed surgical facility or hospital. *See* Defendant's Affirmation in Support Exhibit B Verified Complaint ¶ 38. In light of plaintiffs' refusal to pay the disputed facility fees, defendant has commenced a series of lawsuits and arbitrations arising out of the unpaid bills. *See* Defendant's Affirmation in Support Exhibit B Verified Complaint ¶¶ 28-29.

By a prior Decision and Order dated May 31, 2012, this Court denied plaintiffs' application for a preliminary injunction which, if granted, would have precluded defendant from commencing proceedings as against plaintiffs for the recovery of facility fees pending resolution of the subject action. Plaintiffs contend that, after this Court's injunction Decision and Order was issued, defendant instituted additional arbitration proceedings. *See* Plaintiffs' Memorandum of Law in Opposition p. 19. Thereafter, defendant moved for summary judgment, which motion was ultimately denied by the Decision and Order of this Court dated January 14, 2013.

In May of 2013, plaintiffs filed a Note of Issue and a Certificate of Readiness. Defendant claims that, after the Note of Issue was filed, plaintiffs served a number of subpoenas, including subpoenas requesting: (1) various documents directly from defendant; (2) the testimony under oath of defendant principal, Mark Gladstein, M.D.; and (3) materials from third-party JP Morgan Chase Bank, N.A ("JP Morgan"), as contained in a June 26, 2013 subpoena. *See* Defendant's Affirmation in Support ¶¶ 11-12 and Exhibit G.

Significantly, the parties have already engaged in related litigation with respect to the June 26, 2013 non-party JP Morgan subpoena. More particularly, by Verified Petition dated July 18, 2013, defendant commenced proceedings in the Supreme Court, New York County, for injunctive relief precluding non-party JP Morgan from producing the materials referenced in that subpoena and other bank subpoenas. In that proceeding, defendant alleged that plaintiffs

were intentionally demanding irrelevant materials – including those sought from non-party JP Morgan – for the sole purpose of harassment. *See* Defendant's Affirmation in Support Exhibit A.

By Decision dated September 3, 2013, the Honorable Cynthia S. Kern, Justice of the Supreme Court, New York County, rejected defendant's claims and denied the petition, ruling that plaintiff[s] "has shown a sufficient basis for this discovery [pursuant to the subpoena] to be produced." *Avanguard Medical Group, PLLC, et. al., v. GEICO Insurance Company, et. al.*, ___ Misc.3d. ___, Index No. 156645-13 (Supreme Court, New York County, 2013). *See* Plaintiffs' Affirmation in Opposition ¶ 29 and Exhibit 24. Non-party JP Morgan then produced the disputed bank records, which are currently in plaintiffs' possession. *See* Plaintiffs' Affirmation in Opposition ¶¶ 30-31. Defendant later filed a Notice of Appeal from Justice Kern's September, 2013 denial order, although no appellate ruling has, to date, been rendered. *See* Plaintiffs' Affirmation in Opposition Exhibit 24.

Defendant now moves, by Order to Show Cause, for relief, *inter alia*, quashing the various arbitration-based subpoenas attached to its papers – including the same JP Morgan subpoena which was recently considered by Justice Kern in New York County. *See* Defendant's Affirmation in Support Exhibit G.

A review of the five attached subpoenas, reveals that the first four – all dated October, 2013 – were served directly on defendant (and its alleged affiliate, Metropolitan Medical & Surgical, P.C. ("Metropolitan")), while the fifth is the above-referenced, JP Morgan subpoena, dated June, 2013. None of the annexed subpoenas request that defendant produce its principal, Mark Gladstein, for an Examination Under Oath. *See id.*

In support of its motion, defendant claims that plaintiffs have adopted a policy of serving a multiplicity of subpoenas in order to improperly obtain Post-Note of Issue discovery in this

action and to harass defendant. The motion should be denied.

Preliminarily, the "bank" subpoena claim has already been litigated and resolved in plaintiffs' favor by Justice Kern. Specifically, Justice Kern rejected defendant's claims – effectively the same claims raised here – that the banking materials sought were irrelevant, and declined to quash and/or issue a protective order with respect to the JP Morgan subpoena now being challenged once again in this action. *See Avanguard Medical Group, PLLC, et. al., v. GEICO Insurance Company, et. al., supra*. Moreover, defendant has taken an appeal from Justice Kern's order, which is currently pending and unresolved. *See* Plaintiffs' Affirmation in Opposition Exhibit 24. Accordingly, the ultimate propriety of Justice' Kern's decision and the disputed JP Morgan subpoena itself is a matter to be resolved by the Appellate Division, First Department.

That branch of defendant's motion which is to quash the remaining four subpoenas should also be denied.

Contrary to defendant's contentions, the record does not support the assertion that plaintiffs are impermissibly engaging in Post-Note of Issue discovery merely because the remaining arbitration subpoenas were served after the Note of Issue was filed in this action. Those subpoenas – which request various documents directly from defendant and Metropolitan – do not derive from a Court proceeding in which discovery has been certified as complete. *See Blinds To Go (U.S.), Inc. v. Times Plaza Development, L.P.*, __ A.D.3d ___, 975 N.Y.S.2d 355 (2d Dept. 2013). *See also Matter of Terry D.*, 81 N.Y.2d 1042, 601 N.Y.S.2d 452 (1993); *Wahab v. Agris & Brenner, LLC*, 106 A.D.3d 993, 965 N.Y.S.2d 352 (2d Dept. 2013). Rather, said subpoenas arise out of independent, No-Fault arbitration proceedings commenced by defendant itself. *See* New York State Insurance Law § 5105(b); CPLR § 7505. *See generally Medical Society of State v. Serio*, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003). Moreover,

subpoenas may be permissibly issued as discovery vehicles in No-Fault arbitration proceedings. *See* 11 NYCRR § 5-4.5(o)(2); *Medical Society of State v. Serio*, *supra* at 872. *Cf. Matter of Progressive Northeastern Ins. Co. (New York State Ins. Fund)*, 56 A.D.3d 1111, 870 N.Y.S.2d 478 (3d Dept. 2008).

In any event, and in general, to succeed on a motion to quash a subpoena, the movant bears the burden of establishing that the requested information is "utterly irrelevant to any proper inquiry." *Matter of Hogan v. Cuomo*, 67 A.D.3d 1144, 888 N.Y.S.2d 665 (3d Dept. 2009); *Gertz v. Richards*, 233 A.D.2d 366, 650 N.Y.S.2d 584 (2d Dept. 1996). *See also Anheuser–Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 525 N.Y.S.2d 816 (1988); *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 A.D.3d 931, 845 N.Y.S.2d 357 (2d Dept. 2007); *Liberty Company v. Rogene Industries, Inc.*, 272 A.D.2d 382, 707 N.Y.S.2d 911 (2d Dept. 2000). The Court of Appeals has relevantly emphasized that "[o]nce a claimant resorts to arbitration, the statute neither entitles the claimant to withhold relevant evidence nor precludes inquiry into issues the arbitrator deems relevant." *Medical Society of State v. Serio, supra* at 872. Upon a review of the papers produced here – including plaintiffs' extensively detailed opposing submissions – the Court agrees that defendant has failed to sustain its burden on the motion to quash.

The Court has considered defendant's remaining contentions and concludes that they do not otherwise support an award of the relief sought.

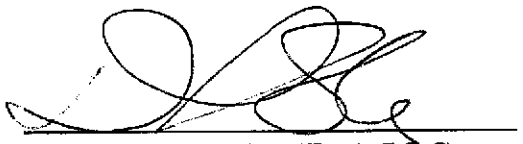
Accordingly, defendant's motion pursuant to CPLR § 2304, for an order quashing plaintiffs' subpoenas *duces tecum* and subpoenas *ad testificandum* served upon defendant, non-party Mark Gladstein, M.D. and non-party JP Morgan Chase Bank in all pending litigations, arbitrations and other proceedings; for an order compelling plaintiffs, their attorneys, employees and/or agents to provide defendant with copies of all documents received from third-parties in

response to the subpoenas *duces tecum*; for an order compelling plaintiffs, their attorneys, employees and/or agents to destroy and/or dispose of all documents received from third-parties in response to the subpoenas *duces tecum*; for an order precluding plaintiffs from utilizing, in any litigation, arbitration or other proceeding the use of any information obtained by, or obtained through, any documents received from third-parties in response to the subpoenas *duces tecum*; for an order enjoining plaintiffs, their attorneys, employees and/or agents from serving any further subpoenas *duces tecum* on defendant or third-parties for proprietary corporate and/or personal information of its owners and/or employees; and for an order enjoining plaintiffs, their attorneys, employees and/or agents from serving any further demands for Examinations Under Oath or demands for documentary production for issues surrounding defendant's corporate structure, accreditation and/or licensing is hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on January 7, 2014, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

E N T E R :



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 10, 2013