Allstate Ins. Co. v Lev Aminov, Internal Medicine, P.C.
2017 NY Slip Op 31172(U)
June 1, 2017
Supreme Court, New York County
Docket Number: 160309/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY, ALLSTATE FIRE & CASUALTY INSURANCE COMPANY, ALLSTATE NEW JERSEY INSURANCE COMPANY and ALLSTATE NEW JERSEY PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiffs,

-against-

LEV AMINOV, INTERNAL MEDICINE, P.C.,

Defendant.

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DECISION/ORDER

Index No.: 160309/2016

Mot. Seq. 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging fraudulent No-Fault billing practices, plaintiffs Allstate Insurance Company, Allstate Indemnity Company, Allstate Property & Casualty Insurance Company, Allstate Fire & Casualty Insurance Company, Allstate New Jersey Insurance Company and Allstate New Jersey Property & Casualty Insurance Company ("plaintiffs") move to dismiss the counterclaims of defendant Lev Aminov, Internal Medicine, P.C. ("defendant") on the grounds that: (1) documentary evidence conclusively establishes a defense to the counterclaims (CPLR 3211 (a)(l); (2) they fail to state a cause of action (CPLR 321 l(a)(7); and (3) they do not have a basis in law (CPLR 3211 (g)).

Factual Background

Plaintiffs commenced this action to recover more than $300,000.00 that defendant allegedly obtained from plaintiffs by submitting fraudulent No-Fault insurance charges relating to medically unnecessary and illusory healthcare treatment that were allegedly provided to New

York automobile accident victims. Plaintiffs also seek a declaration that it is not obligated to pay reimbursement in pending no-fault insurance claims that have been submitted under defendant's name.

In his Answer, defendant asserts two counterclaims[1] alleging, *inter alia*, that plaintiffs filed the instant lawsuit as part of a "strategic lawsuit against public participation ("SLAPP") campaign" in retaliation for his complaints to the New York Department of Financial Services ("DFS") of plaintiffs' abusive and illegal practices in evaluating his No-Fault automobile insurance claims. According to defendant, plaintiffs "designed the instant suit to" cause him to withdraw and/or cease submissions of any No-Fault claims (Answer, ¶¶1-3, 6).

Defendant asserts that 11 N.Y.C.R.R. § 65-3.5 governs the No-Fault claims procedure, including verification procedures. Section 65-3.2 requires that the insurer only demand verification if it has good reasons and that verifications be performed expeditiously. Section 65-3.2(b) requires No-Fault insurers to "[a]ssist the applicant in the processing of a claim [and to] not treat the applicant as an adversary." (Answer, ¶¶18-22). Under the Insurance Law, plaintiffs' license may be revoked or renewal denied for violating any of these laws or rules and violating Ins. Law §2601 (Answer ¶¶11-14). For more than four years, plaintiffs violated these sections by treating defendant as an adversary, unreasonably delaying payment of claims, requesting the same documents from defendant repeatedly despite having received the documents, and requesting documents from defendant, despite denying his claims for the injured party's failure to appear for an Examination Under Oath. Thus, in October of 2015, defendant

[1] The first counterclaim for $2 million in damages including costs and attorneys fees cites N.Y. Civil Rights Law § 70-a and 76-a. The second counterclaim also cites New York Civil Rights Law §§ 70-a and 76-a and seeks damages including costs and attorneys fees pursuant to N.Y. Civil Rights Law 70-a(1).

filed a complaint with the DFS, which passed the complaint on to plaintiffs, and took no further action. Defendant filed another complaint with DFS in October of 2016.

According to defendant, plaintiffs' instant action, which comes "on the heels" of defendant's 2016 complaint, constitutes an action "involving public petition and participation" because it is "materially related to any effort of [defendant] to report on, comment on, . . . challenge or oppose" plaintiffs' "continued licensure to sell insurance in the state of New York." (Answer, ¶¶23-32)

In support of dismissal, plaintiffs argue that the complaint, answer, defendants' complaints in October 2015 and October 2016, as well as his previous complaint in August 2015, establish that his complaints were related solely to plaintiffs' claims handling procedures, and not materially related to plaintiffs' license or any application by plaintiffs for licensure to operate an Insurance Company in New York State. The anti-SLAPP statute must be strictly construed, and defendant has not identified any application or permit being challenged or commented on. And, defendant would only be entitled to costs and attorneys' fees if the instant action was commenced without substantial basis in fact and law. Plaintiffs have a right to seek declaratory relief and have set forth in detail the fraudulent scheme perpetrated by defendant. The Answer also contains numerous misstatements of fact and law. Thus, the instant action cannot be considered an anti-SLAPP suit and the counterclaims must be dismissed.

In opposition, defendant argues that his claim pursuant to the anti-SLAPP statute is adequately stated. Insurance Law §2601 admonishes that no insurers doing business in New York State shall engage in unfair claim settlement practices, and broadly defines "unfair claims settlement" as failing to implement reasonable standards for the prompt investigation of claims.

Plaintiffs cite no caselaw exempting insurers from complying with this section and claims handling. Defendant is not required to identify the application or permit being challenged in order to maintain his counterclaim; instead, plaintiffs' complaint must identify the application or permit being challenged and plaintiffs misconstrue the caselaw it cites. Plaintiffs' mishandling of defendant's No-Fault claims amounts to unfair claims handling practices barred by Ins. Law 2601 and 11 NYCRR 65-3.2, for which DFS may deny plaintiffs' license renewal.

In reply, plaintiffs contend that the pleadings and defendant's complaints, which are the foundation of defendant's counter-claims, constitute adequate documentary evidence. Defendant's DFS complaints never discuss, comment, raise issue with, or mention plaintiffs' license to do business as an Insurance Company in the State of New York. Thus, plaintiffs' complaint cannot be considered a SLAPP lawsuit. And, plaintiffs' instant complaint has no relation to defendant's DFS complaints. Nor does Ins. Law §2601, even if controlling, deal with "unfair claims handling practices" as defendant claims. Ins. Law §2601, which deals with an insurer's settlement practices, is inapplicable to the handling of no-fault claims.

Discussion

Pursuant to CPLR 3211 (a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]). "Dismissal pursuant to CPLR 3211(a)(1) is

warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial, LLC v. Gillett*, supra, citing Art and Fashion Group Corp. v. Cyclops Production, Inc., 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]).

To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")). To constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1st Dept 2014] *citing* Siegel, Practice Commentaries, supra, at 2)).

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 A.D.3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged

fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 A.D.3d 401, *supra; Nonnon v City of New York*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *see also Leon v Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150, 730 N.Y.S.2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 [1st Dept], *lv denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 [1993] [CPLR § 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

CPLR 3211(g) provides that a motion to dismiss based on CPLR (a)(7) "in which the moving party has demonstrated that the . . . counterclaim subject to the motion is an action involving public petition and participation as defined in [CRL 76-a (1)(a)] shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in

law or is supported by a substantial argument for an extension, modification or reversal of existing law."

Civil Rights Law § 76-a(1)(a) defines an "action involving public petition and participation" as an "action ... for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission" (*see, Guerrero v Carva*, 10 A.D.3d 105, 779 N.Y.S.2d 12 [1st Dept 2004]). "The anti-SLAPP provisions of Civil Rights Law § 70-a and § 76–a were enacted in 1992 to protect citizen activists from lawsuits commenced by well-financed public permit holders in retaliation for their public advocacy" (*Guerrero v Carva, supra, citing Harfenes v Sea Gate Assn.*, 167 Misc 2d 647, 648, 647 N.Y.S.2d 329 [Sup. Ct. N.Y. Co. 1995]).

"A determination whether the anti-SLAPP statute pertains to a particular action requires a twofold inquiry. First, under Civil Rights Law § 76-a (1)(b), the court must determine whether the plaintiff is 'a public applicant or permittee,' who is defined as any person who has applied to obtain a permit, zoning change, lease, license, or other permission from any government body." (*Duane Reade, Inc. v Clark*, 2 Misc 3d 1007(A), 784 N.Y.S.2d 920 (Table) [Supreme Court, New York County 2004]). "Next, under Civil Rights Law § 76–a (1)(a), the court must decide whether the lawsuit is an "action involving public petition and participation," which is "an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." (*Id.*).

The anti-SLAPP law is in derogation of the common law and must be strictly construed (*Hariri v Amper*, 51 A.D.3d 146, 854 N.Y.S.2d 126 [1st Dept 2008]). Thus, a SLAPP-suit defendant "must directly challenge an application or permission in order to establish a cause of action under the Civil Rights Law" (*Guerrero v Carva, supra, citing Harfenes, supra*; *Foley v CBS Broadcasting, Inc.*, 28 Misc 3d 1227(A), 958 N.Y.S.2d 60 (Table) [Supreme Court, New York County 2006]). It has been stated that the "anti-SLAPP statute should be read to require that a defendant identify, at least in general terms, the application or permit being challenged or commented on, and that the defendant's communications be substantially related to such application or permit" (*Guerrero*, 10 A.D.3d at 117).

Guerrero v Carva (*supra*), is instructive. In *Guerrero*, plaintiff William Guerrero was the owner of rental properties and president of the management companies for such properties. Many of Guerrero's properties received subsidies from the New York City Department of Housing, Preservation and Development ("HPD"). One of Guerrero's commercial tenants, defendant George Carva, and residential tenants defendant Fernando Torres drafted and distributed flyers containing highly inflammatory, and allegedly false, accusations against Guerrero concerning his management of buildings. The flyers were intended to rally opposition to any future applications by Guerrero for public subsidies and were sent to, *inter alia*, various officials at HPD. Two months after Carva spoke to the press about Guerrero's alleged discriminatory rental practices, Guerrero then filed suit against defendants for defamation, trespass, and injunctive relief. Upon the parties' respective motions for various relief, the lower court rejected defendants' claim that the action was an impermissible SLAPP suit, and found that "the instant action, which seeks damages based on trespass and property damages resulting from

criminal mischief and to prevent a pattern of harassment, was not, as defendants argue, 'materially related' to defendants' efforts to report on, comment on, rule on, challenge or oppose plaintiffs' applications, as required by Civil Rights Law § 76–a(1)(a)." (10 A.D.3d at 110).

On appeal on the issue of whether plaintiffs' action constituted an impermissible SLAPP suit, the Court held that defendants' flyers "did not meet this narrow construction in that they did "not directly challenge an application or permission" (*id.* at 117). The Court explained:

> defendants' flyers do not identify any particular application or permit that plaintiffs have sought or received. Nor do they cite any specific proceeding pending before an administrative agency in which they were advocating in opposition to the plaintiffs. Although the flyers were sent to HPD and DHCR, agencies presumably empowered to revoke plaintiffs' contracts or permits, plaintiffs make no specific demand in the flyers that these agencies undertake such action, or even investigate plaintiffs' alleged misconduct. Instead, the clear gist of the flyers is to cause embarrassment or injury to plaintiffs' reputation by a public airing of the allegations of misconduct.

Similarly, in *Harfenes v Sea Gate Ass'n, Inc.*, 167 Misc 2d 647 [Supreme Court, New York County 1995]), a homeowner's association was denied a permit to undertake a shoreline stabilization project, and was later fined by the New York Department of Environmental Conservation ("DEC") for hiring its own waste haulers to perform the unpermitted work. Certain of the association's residents sued the association to uncover the names of the waste haulers to obtain their contribution towards the fine. In the meantime, the association brought an action against the residents for interfering with a small business loan requested to repair storm damage. The residents counterclaimed that the association's complaint was a SLAPP suit designed to prevent them from uncovering the identity of the waste haulers. The Court found that plaintiffs did not have a cause of action under Civil Rights Law § 76-a because plaintiffs were unaware of the Association's application to the DEC at the time it was made, and never

participated in the application process in any manner. The residents' suit to uncover the haulers' identities, which plaintiffs commenced three years after the DEC denied the association's permit, "could not have been an effort to 'report on, comment on, rule on, challenge or oppose' the association's "1990 application." Thus, with respect to the association's DEC application, the plaintiffs "are missing an element necessary to receive protection under section 70-a. That is, they never made any effort with respect to defeating any application or permission" (*see also, Stolatis v Hernandez*, 51 Misc 3d 1203(A), 36 N.Y.S.3d 410 (Table) [Supreme Court, Westchester County 2016] (finding that defendant failed to demonstrate that plaintiff's suit is "materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose such application or permission" where defendant was not in the process of petitioning the Village Board regarding . . . [a] demolition permit [filed by a development company of which plaintiff was a member], which had been granted eight years prior to defendant's opposing [comments on] Facebook . . . .")).

Here, the three complaints defendant made to DFS concerning plaintiffs' claim handling procedures were not made to defeat any application or permission sought by plaintiffs' to the DFS.[2] The complaints are silent to any application or permit sought or previously sought by the plaintiffs. No application or permit to conduct business as an insurance company in New York State was pending at the time of the complaints. The mere fact that DFS is the governing body responsible to issuing and renewing plaintiffs' license to conduct business as an insurance

[2] The Court notes that pursuant to Ins. Law 2601(c), "If it is found, after notice and an opportunity to be heard, that an insurer has violated this section, each instance of noncompliance with subsection (a) hereof may be treated as a separate violation of this section for purposes of ordering a monetary penalty pursuant to subsection (b) of section one hundred nine of this chapter. A violation of this section shall not be a misdemeanor."

company in New York State, in and of itself, is insufficient to trigger the protections afforded by Civil Rights Law § 76-a, which must be strictly construed. In the absence of any indicia that defendant's complaints to the DFS directly challenged any application or permission sought by plaintiffs, it cannot be said that plaintiffs' instant action affected defendant's rights of "public petition and participation before public agencies" under Civil Rights Law §§ 70–a and 76–a." (*see, Guerrero v Carva, supra*).

In any event, plaintiffs have demonstrated that their complaint has a substantial basis in law. For example, as to plaintiffs' fraud claim, to state a cause of action for fraud, plaintiff must allege a misrepresentation or omission of a material fact, falsity, knowledge by the wrongdoer, justifiable reliance on the deception, and the resulting injury (*Rather v CBS Corp.*, 886 NYS2d 121 [1st Dept 2009]; *Waggoner v Caruso*, 886 NYS2d 368 [1st Dept 2009]). Further, a claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b), sufficient to permit a "reasonable inference" of the alleged misconduct (*Eurycleia v Seward & Kissel*, 12 NY3d 553, 883 NYS2d 147 [2009]). The Complaint explains in great detail the investigation plaintiffs undertook and the scheme defendant allegedly employed, including referring "patients to other medical providers, which paid rent to the Defendant, who in turn would render extensive and medically unnecessary treatment and/or testing." (¶2). Plaintiffs allege that nearly all of defendant's patients "received the same or similar course of [initial, follow-up, physical therapy, range of motion and muscle testing] treatment without regard to their complaints of pain or medical condition" for "minor 'fender-bender' accidents" and that defendant misrepresented billing codes and exaggerated services provided to inflate the charges. (¶3)

And, plaintiffs' claim for declaratory relief is adequately stated.

Defendant's remaining arguments are insufficient to defeat plaintiffs' motion.

Therefore, plaintiffs' motion to dismiss the counterclaims brought under Civil Rights Law is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion to dismiss the counterclaims of defendant Lev Aminov, Internal Medicine, P.C. pursuant to CPLR 3211 (a)(l), CPLR 321 l(a)(7); and CPLR 3211 (g) is granted; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 22, 2017, 2:15 p.m.; and it is further

ORDERED that plaintiffs shall serve a copy of the order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 1, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.