Liberty Mut. Ins. Co. v Branch Med., P.C.

2016 NY Slip Op 31706(U)

September 9, 2016

Supreme Court, New York County

Docket Number: 652212/16

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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LIBERTY MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE CORPORATION, LIBERTY MUTUAL MID-ATLANTIC INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AMERICAN STATES INSURANCE COMPANY, GENERAL INSURANCE COMPANY OF AMERICA, and SAFECO INSURANCE COMPANY OF INDIANA,

Plaintiffs,

-against-

BRANCH MEDICAL, P.C., NICHOLAS JONES, D.O., SCOTT JONES, D.O., WINDSOR MEDICAL, P.C., SCOTT SPRINGER, D.O., and MARK LEVITAN,

Defendants.

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Index No. 652212/16

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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By order to show cause, plaintiffs move pursuant to CPLR 6312 for an order granting them a preliminary injunction staying existing and future arbitration and/or litigation by defendants seeking reimbursement of no-fault benefits. Defendants oppose.

I. BACKGROUND

Defendants Branch Medical, P.C. and Windsor Medical, P.C. are healthcare providers specializing in electrodiagnostic testing and imaging. Defendants Nicholas Jones, D.O., Scott Jones, D.O., and Scott Springer, D.O. are licensed physicians employed by them. Sometime

before this action, Branch and Windsor filed claims for no-fault benefits with plaintiffs.

In connection with one such claim, at an examination under oath (EUO) held on March 31, 2014, Nicholas testified that he and his brother, Scott, solely owned and controlled Branch, that their compensation was tied to company profits, and that defendant Mark Levitan served as Branch's "administrative executive," overseeing company staff, marketing, bookkeeping, and internal HIPAA procedures, with online access to Branch's bank account. He was not a physician. When questioned further about Levitan, Nicholas was instructed by counsel not to answer questions about Levitan's compensation relative to his and Scott's, nor whether Levitan had been involved in any business owned by Nicholas before Branch. (NYSCEF 5).

Between February 3, 2015 and February 17, 2016, plaintiffs served Windsor and Branch with verification requests seeking copies of leases and subleases, bank statements, invoices, federal and state tax returns, payroll records, identifying information of third-party technicians, and Levitan's employment agreement with each entity. (NYSCEF 8-11). Windsor and Branch responded to the requests, providing their technicians' credentials and intake/referral records, and objecting to the rest as "onerous, improper, immaterial and unnecessary," or concerning matters already addressed at Nicholas's EUO. (NYSCEF 10-11).

On or about April 25, 2016, plaintiffs commenced this action, asserting 12 causes of action, including, *inter alia*, declarations that Windsor and Branch were fraudulently incorporated entities ineligible to receive no-fault benefits. (NYSCEF 1). To date, there are approximately 295 actions pending in Civil Court and 97 active arbitration proceedings involving no-fault claims filed by Windsor and Branch. (NYSCEF 14-15, 30).

II. DISCUSSION

A. Contentions

Plaintiffs allege that Branch and Windsor are fraudulently incorporated enterprises, owned and controlled by a nonphysician, and thus ineligible to receive no-fault benefits. They claim that defendants are currently pursuing reimbursement claims in Civil Court and through arbitration, and thus seek stays of those actions and any future actions until the issue of fraud is determined. (NYSCEF 3).

Plaintiffs contend that Nicholas's EUO testimony reflects that Levitan, a nonphysician, owns and controls both entities, and that Nicholas, Scott, and Springer are only nominally affiliated with the businesses in order to disguise Levitan's ownership and control which they maintain is evidenced by his fixed base salary and access to Branch's online bank account. Relying on Springer's EUO testimony, they allege that Levitan owned a predecessor entity, Cambridge Medical, P.C., which he solicited physicians such as Springer to join, and which he eventually split into Branch and Windsor to evade claims investigators. Plaintiffs also assert that defendant improperly employed independent contractors to perform services, and that they will suffer irreparable harm in expending time and resources litigating this issue in multiple, individual actions. Moreover, they observe that defendants failed to answer verification requests following their EUOs, claiming that the documents sought contain pertinent financial information regarding the entities' improper formation, and that Nicholas was directed to not answer pertinent questions. (*Id.*; NYSCEF 1, 10-12).

In opposition, defendants argue that plaintiffs offer no evidence that Branch and Windsor were fraudulently incorporated, and assert that Scott and Nicholas, not Levitan, own, control, and

retain decision-making authority over Branch and exclusively treat its patients, and that Levitan only schedules appointments. They contend that independent contractors only administer testing equipment at the direction of physicians, the results of which are reviewed by physicians, and that the independent contractors are otherwise treated and compensated as employees. (NYSCEF 27, 29).

Defendants also observe that the last EUO was held two years ago, and the verification request was advanced approximately a year and a half ago, that plaintiffs provide no explanation for the delay in bringing their emergency application, and that in any event, the alleged irreparable harm is economic, as all of the underlying no-fault claims at issue are compensable as damages. They argue that the balance of equities weighs against plaintiffs, as Springer will suffer personal economic loss during the pendency of this action, and dispute the relevancy of plaintiffs' verification requests, to which, in any event, they were under no obligation to timely respond. (NYSCEF 30).

B. Analysis

Pursuant to CPLR 6301, the court may grant a preliminary injunction "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights." To obtain a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, the likelihood of success on the merits, a danger of irreparable injury, and that the balance of equities is in its favor. (*Hairman v Jhawarer*, 122 AD3d 570, 571-572 [2d Dept 2014]; *Gilliland v Acquafredda Enter., LLC*, 92 AD3d 19, 24 [1st Dept 2011]). While the proponent need not provide conclusive proof of the claim, he or she must nonetheless establish "a clear right to that relief under the law and the

undisputed facts upon the moving papers"; conclusory statements lacking factual detail to that end are insufficient to warrant the drastic remedy. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011], *quoting Gagnon Bus Co. v Vallo Transp., Ltd.*, 13 AD3d 334, 335 [2d Dept 2004]).

Under New York's no-fault insurance law, claimants and their assignees may obtain compensation from no-fault carriers for economic loss resulting from automobile accidents. (Insurance Law §§ 5102, 5103; *Aetna Health Plans v Hanover Ins. Co.*, 27 NY3d 577, 582 [2016]). However, a carrier is under no obligation to reimburse claims for medical expenses "if the [medical services] provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York" (11 NYCRR 65-3.16[a][12]), such as where a medical services corporation is fraudulently incorporated or owned and controlled by nonphysicians (*State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 320-321 [2005]; *Liberty Mut. Ins. Co. v Raia Med. Health, P.C.*, 140 AD3d 1029, 1031 [2d Dept 2016]; *Allstate Ins. Co. v Belt Parkway Imaging, P.C.*, 78 AD3d 592, 592 [1st Dept 2010]; *see also* BCL §§ 1503[b], 1507, 1508).

Nothing in Nicholas's testimony evidences fraud, nor do the unanswered verification requests. Moreover, the requests were improper. (*See Is. Chiropractic Testing, P.C. v Nationwide Ins. Co.*, 35 Misc 3d 1235[A], 2012 NY Slip Op 51001[U], *2 [Dist Ct, 3d Dist, Suffolk County 2012] [request for documents pertinent to fraudulent incorporation defense inappropriate for verification request]; *Concourse Chiropractic, PLLC v State Farm Mut. Ins. Co.*, 35 Misc 3d 1213[A], 2012 NY Slip Op 50676, *5 [Dist Ct, 1st Dist, Nassau County 2012], *affd as modified* 42 Misc 3d 131[A], 2013 NY Slip Op 52225[U] [App Term, 2d Dept, 9th & 10th

Jud Dist 2013] [same]). Even if the alleged gaps in Nicholas's testimony support an inference that Levitan earned more than him and Scott, it is consistent with Levitan, as staff, earning a salary, whereas Nicholas and Scott, as owners/shareholders, earned compensation based on the corporation's profits. And even if Levitan was affiliated with a prior business owned by Nicholas, it proves nothing absent evidence he owned or controlled it.

Plaintiffs' remaining allegations are unsubstantiated and based on speculation, and to the extent that plaintiffs rely on Springer's EUO, they fail to provide or point to the pertinent portions of his testimony. Plaintiffs thus fail to establish, by clear and convincing evidence, the likelihood of success on the merits of their claim that Branch and Windsor were fraudulently incorporated and ineligible to receive no-fault benefits. (*Cf. Liberty Mut. Ins. Co.*, 140 AD3d at 1032 [plaintiffs demonstrated likelihood of success on merits by establishing that professional corporation's principal had no pertinent qualifications, that corporation's predecessor was controlled by nonphysician, and that predecessor's "medical director" had been charged by New Jersey AG for being "employed by unlicensed MRI facilities and negligently misreading MRI studies"]).

Moreover, the prospect of further litigation and additional expenditure does not constitute irreparable harm absent a preliminary injunction. (*See eg*, *Founders Ins. Co. Ltd. v Everest Natl. Ins. Co.*, 41 AD3d 350, 351 [1st Dept 2007] ["The cost of arbitration does not constitute irreparable injury."]).

III. CONCLUSION

Accordingly, it is hereby,

ORDERED, that plaintiffs' application for an order granting them a preliminary

injunction is denied.

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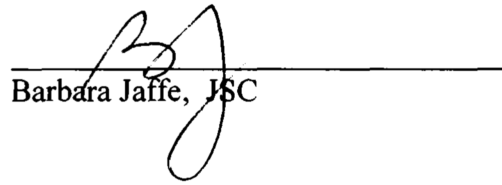

Barbara Jaffe, JSC

DATED: September 9, 2016
New York, New York