National Union Fire Ins. Co. of Pittsburgh, PA v Fresenius Med. Care Holdings, Inc.
2018 NY Slip Op 31614(U)
March 2, 2018
Supreme Court, New York County
Docket Number: 653108/2016
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Plaintiff,

- v -

FRESENIUS MEDICAL CARE HOLDINGS, INC.,

Defendant.

INDEX NO. 653108/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 43, 50, 51, 52, 53, 54, 55

were read on this application to/for DISMISSAL

HON. SALIANN SCARPULLA:

Defendant Fresenius Medical Care Holdings, Inc. ("Fresenius") moves to dismiss or stay this action commenced by plaintiff National Union Fire Insurance Company of Pittsburgh, PA ("National"), because a later filed action is pending in Massachusetts state court.

Background

Fresenius is incorporated in New York and has its headquarters and principal place of business in Massachusetts. National is incorporated in Pennsylvania and has its principal place of business in New York.

Fresenius manufactures two products which make part of dialysate, a liquid solution used in removing waste products from the blood of a patient undergoing dialysis. Fresenius sells its products to clinics and hospitals, and itself operates clinics at which its products are used. National provided Fresenius with an excess coverage policy for each policy year from September 9, 2002 to October 1, 2013, totaling eleven policies.

Beginning in 2012, Fresenius was served with thousands of lawsuits and notices of claims alleging that its products brought about serious bodily injury, including cardiopulmonary arrest and sudden cardiac death, in dialysis patients. By April 2016, more than 12,000 claims had been asserted against Fresenius. Injuries were alleged to have occurred in each policy year. Many lawsuits were filed in Massachusetts. In March 2013, all the federal court actions were consolidated in a multi-district litigation ("MDL"), pursuant to 28 USC § 1407, in the United States District Court for the District of Massachusetts. All lawsuits filed in Massachusetts state court were consolidated in one action in Massachusetts State Court in Middlesex County.

On February 17, 2016, Fresenius and the committee representing the plaintiffs in the personal injury suits reached an agreement, in principle, to settle all the lawsuits. According to Fresenius, the agreement with the personal injury plaintiffs was to be finalized and signed in August 2016. National and Fresenius also made an agreement, in principle, in February 2016. Although the agreement has not been memorialized in any formal written document, neither party disputes that they agreed that National would provide $220 million of the settlement, and the primary insurer would provide $30 million. The agreement was contingent on certain conditions, including that 97% of the

personal injury plaintiffs agreed to the terms of a final settlement with Fresenius, and executed releases by July 15, 2016. If those and other conditions were met, National would provide its part of the coverage in August 2016. The agreement was subject to National's reservation of rights, including the right to deny coverage for all or part of the settlement amount, and the right to seek reimbursement from Fresenius of all or part of the $220 million more than what National was legally obligated to pay under the policies.

According to Fresenius, the parties were to negotiate coverage disputes after the personal injury settlement agreement was concluded. In contrast, National asserts that it agreed to the funding amount to help finalize the settlement with the personal injury plaintiffs, and that it intended to settle policy disputes between February and the obligation to fund in August. National's attorney states that, on March 16, 2016, it initiated a conference call with Fresenius's attorneys, during which the latter expressed no interest in any negotiations that would lead to a material reduction in National's commitment to pay $220 million. On May 11, 2016, National's attorney emailed a draft settlement funding agreement to Fresenius's attorney. In early June, Fresenius responded that it was not interested.

National subsequently filed this New York action on June 10, 2016 ("New York Action"). On June 14, 2016, National's attorney forwarded to Fresenius's attorney a copy of the New York summons and complaint, asking if the latter's firm was authorized to accept service. Fresenius did not respond and, on June 22, 2016, filed its complaint in Massachusetts state court ("Massachusetts Action").

The parties agree that there is a justiciable controversy concerning the coverage that National is to furnish to Fresenius. For example, the parties dispute the number of occurrences National is obligated to cover and how many retentions there are under the policies. The parties further agree that, except for Fresenius's contract claim, the complaints in the New York Action and the Massachusetts Action are very similar.

Specifically, National's complaint in the New York Action seeks a declaratory judgment addressing: the allocation of the settlement payment to each policy year; the retained limits; the limits of liability; the medical malpractice self-insured retention; the pharmaceutical products self-insured retention for the 2011 policy and 2012 policy; the prior knowledge exclusion for the 2012 policy; the continuous or related acts exclusion for the 2012 policy; the pending or prior litigation exclusion for the 2012 policy; and the duty to defend.

Similarly, Fresenius's complaint in the Massachusetts Action seeks a declaratory judgment on the following: indemnity with respect to National's obligations to fund the lawsuits; the proper allocation of the settlement payment to each policy year; the number of occurrences; and the duty to defend. The claim for breach of contract in the Massachusetts Action is based on National's alleged failure to defend and indemnify.

Fresenius seeks dismissal or stay of the New York Action pursuant to CPLR § 3211(a)(4). Fresenius argues that the New York Action is an improper anticipatory filing by National because the parties were in settlement discussions and only planned to discuss coverage once the personal injury settlement was finalized. Fresenius also asserts that the Massachusetts Action is more comprehensive than the New York Action, in that

the plaintiffs in the former consist of Fresenius and all its subsidiaries and affiliates sued in the personal injury actions while the New York Action only names Fresenius as defendant.

Fresenius also points out that Massachusetts is the location of both the federal MDL and the state court consolidated action, and that the personal injury settlement was negotiated there. Additionally, Fresenius's insurance and risk management departments, related records, and witnesses are in Massachusetts. The parties also agree that Massachusetts law would most likely apply.

National relies on the first-filed-rule and claims that it commenced its action when it realized that Fresenius would not negotiate. National states that its witnesses are in New York and because two of those witnesses are no longer National employees, *i.e.*, non-parties, the case must be litigated here for National to compel their testimony. National argues that Fresenius can claim breach of contract in the New York Action and that its subsidiaries and affiliates can become defendants in the New York Action.

Discussion

CPLR § 3211(a)(4) allows for the dismissal, or other such disposition as justice requires, of an action when another action is pending between the same parties for the same cause of action. When considering such a motion, "New York courts generally follow the so-called 'first-in-time' rule, which provides 'the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the

rules of comity to interfere'" *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 A.D.3d 87, 95 (1st Dep't 2013) (citation omitted). Here, the New York Action was filed first.[1]

Fresenius asserts that I shouldn't follow the "first in time" rule because the New York Action is an anticipatory action seeking only declaratory relief. However, Fresenius does not dispute that, in early June, Fresenius told National that it was not interested in negotiating the settlement amount. At that time, National took the position that the $220 million settlement amount could be reduced and Fresenius took the position that the amount was fixed and nonnegotiable. When Fresenius' position became clear, National commenced this action. Fresenius has submitted no information to support its claim that National was disingenuous in commencing this action once it determined that Fresenius was wrongfully refusing to negotiate.

Moreover, National's action is based on genuine disputes. The parties do not agree to what extent the policy must provide coverage, and insurers routinely assert declaratory judgment actions against insureds to resolve coverage disputes. *See, e.g., Automobile Ins. Co. of Hartford v Cook*, 7 N.Y.3d 131 (2006); *Certain Underwriters at Lloyd's London Subscribing to Policy No. QK0903325 v Huron Consulting Group, Inc,* 127 A.D.3d 663 (1st Dep't 2015). Notably, a declaratory judgment action may be

[1] Although service of process in the Massachusetts Action preceded that in the New York Action by a week, "[a]n action is commenced when the summons and complaint are filed" *Reckson Assoc. Realty Corp. v Blasland, Bouck & Lee, Inc.*, 230 A.D.2d 723, 725 (2d Dep't 1996).

maintained before a determination of liability against the insured in the underlying action. *See, e.g.*, *Cabrini Med. Ctr. v. KM Ins. Brokers*, 142 A.D.2d 529, 530 (1st Dep't 1988).

I am also unpersuaded by Fresenius's argument that I should dismiss this action because the Massachusetts Action is more comprehensive. The two actions seek determination of the same issues, except that Fresenius adds a claim for breach of contract for failure to defend and/or indemnify and adds its subsidiaries and affiliates as parties. These differences do not weigh against priority of the first-in-time action when both actions involve the same policies and Fresenius may simply counterclaim its breach of contract cause of action in New York and have its subsidiaries and affiliates intervene as defendants.

Lastly, determining a motion under CPLR § 3211(a)(4) "is similar to that undertaken in applying the doctrine of *forum non conveniens* - whether the litigation and the parties have sufficient contact with this State to justify the burdens imposed on our judicial system" Flintkote *Co. v American Mut. Liab. Ins. Co.*, 103 A.D.2d 501, 506 (2d Dep't 1984). Fresenius is incorporated in New York and National has its principal place of business in New York. New York is a proper place for National to bring this action. Although Fresenius points out that the underlying personal injury actions occurred in Massachusetts and that its witnesses are in Massachusetts, this action is an insurance coverage dispute National filed here because its witnesses are in New York. Therefore, Massachusetts is no more convenient of a forum than New York.

For the foregoing reasons, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED that defendant shall answer the complaint within 30 days of the date of this decision.

This constitutes the decision and order of the Court.

3/2/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE