Carpentieri v Kahn
2018 NY Slip Op 31704(U)
July 21, 2018
Supreme Court, New York County
Docket Number: 805068/2017
Judge: George J. Silver
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. George J. Silver PART 10
Justice

JOSEPH CARPENTIERI

Plaintiff

v.

STUART KAHN, EDWARD LIBFELD, MOUNT SINAI HOSPITALS GROUP, INC., and WEST SIDE RADIOLOGY ASSOCIATE, P.C.,

Defendants

INDEX NO. 805068/2017
MOTION DATE
MOTION SEQ. NO. 001

This is a medical malpractice action arising from the alleged failure of defendants EDWARD LIBFIELD and WEST SIDE RADIOLOGY ASSOCIATES ("the Libfield Defendants") to properly interpret an imaging study conducted on September 30, 2015 and the alleged failure of Defendants STUART KAHN and MOUNT SINAI HOSPITALS GROUP, INC. ("the Kahn Defendants") to render treatment in accordance with appropriate standards of care (hereinafter collectively "defendants"). The Kahn Defendants answered the complaint on April 12, 2017, while the Libfield Defendants answered the complaint on August 3, 2017. Thereafter, an Order of Liquidation was entered in the Superior Court of the District of Columbia staying all litigation pending against any party or entity insured by Fairway Physicians Insurance Company ("Fairway").

Fairway is a risk retention group domiciled in the District of Columbia. In 2017, the District of Columbia's Department of Insurance, Securities and Banking ("DISB") issued an Order providing that, "the Commissioner has determined that Fairway's capital and surplus balance renders the company statutorily insolvent ...". Thereafter DISB petitioned the Superior Court for an Order authorizing the Commissioner to liquidate Fairway. The Superior Court issued an Order that *inter alia* appointed the Commissioner as Liquidator of Fairway and provided that,

> **"all litigation pending against any Fairway policyholder is hereby stayed and that all persons and entities are enjoined**

from commencing or continuing any litigation against a Fairway policyholder until further order of this Court."

Counsel for the named defendants argues that this action constitutes such a litigation, and is requesting that the matter be stayed in its entirety.

Plaintiff disagrees and submits that the appropriate remedy in this case, particularly given plaintiff's advanced stage cancer, is severance of the claims against the Fairway defendants (i.e. the Libfield Defendants) and a directive for his immediate videotaped deposition, at his home if necessary. Plaintiff states that he would be severely prejudiced by any delay in the prosecution of his claims given his tenuous prognosis.

On October 4, 2017, counsel for the Libfield Defendants filed a letter with the court notifying that Fairway, which is where the Libfield Defendants maintained their medical malpractice insurance, was ruled to be statutorily insolvent by order of the Superior Court of the District of Columbia. As such, the letter asserted that the pending bankruptcy imposed a stay on the instant litigation proceedings.

On November 15, 2017, the parties appeared for a preliminary conference, at which time counsel for the Libfield Defendants maintained once again that the liquidation order issued by the Superior Court of the District of Columbia imposed a stay on this matter. At that time, plaintiff's counsel pushed for an order directing plaintiff to be produced for a videotaped deposition within two (2) weeks, as his client only had "a few weeks left to live." Based on that representation, the court ordered oral argument on these issues to occur on November 22, 2017.

On that date, defendants asserted that plaintiff's counsel had failed to provide any evidence that plaintiff's condition was terminal, specifically by failing to provide an expert affirmation indicating the same. Plaintiff's counsel asserted that plaintiff had a "50/50 shot" of either going into remission or dying. Following the conclusion of arguments, the court made an informal suggestion that the matter may be stayed. Subsequently, plaintiff made the instant application by Order to Show Cause.

In support of his application for severance, plaintiff annexes expert affirmations attesting to the terminal nature of plaintiff's illness. Plaintiff's expert affirmations describe plaintiff's condition as "high risk" and his prognosis as "guarded."

Conversely, at this early stage in the discovery process, the Kahn Defendants submit that severance of the Libfield Defendants in a case involving a failure to diagnose and treat cancer would substantially prejudice them. Collectively, both sets of defendants submit that they have not yet received a complete set of plaintiff's medical records and, as such, have not been afforded an opportunity to fully investigate plaintiff's care and treatment. While defendants are obviously in possession of their own medical records maintained during their alleged involvement, plaintiff has an extensive history of treatment, both prior and subsequent to the allegations herein, and defendants state that they are entitled to procure said records and appropriately assess the merits of the claims. Defendants further aver that they have attempted to obtain medical records since the commencement of this action, but have not been afforded an opportunity to obtain and review these records. As such, they submit that deposing plaintiff without a full inventory of his relevant medical records would be highly prejudicial.

CPLR § 2201 provides that "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." The Full Faith and Credit Clause mandates that the judgment of a court in one state "qualifies for recognition throughout the land" *(Baker v. General Motors Corp.*, 522 U.S. 222 [1998][affirming the general principle that a judgment of a competent state court on an issue over which it has adjudicatory power must be given effect in other states]). That principle has consistently been embraced in New York.(*see e.g. O'Connell v. Corcoran*, 1 NY3d 179, 184 [2003]["In accordance with the Full Faith and Credit Clause, a 'judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced'"). Therefore a "stay by a court in another state enjoining and restraining all claims against insureds of

an insolvent liability insurer is entitled to full faith and credit, and has the effect of suspending all proceedings against the insured as of its effective date" (*Dambrot v REJ Long Beach, LLC*, 39 AD3d 797 [2d Dept 2007]; *see Beecher v Lewis Press Co.*, 238 AD2d 927, 927-928 [4th Dept 1997][holding that non-enforcement of a Rhode Island court ordered stay "would violate the purpose of the injunction, which is to preserve and protect the assets of [the insurer in liquidation] for an equitable distribution amongst its claimants and assured."]).

The Uniform Insurers Liquidation Act (hereinafter "UILA"), which has been adopted in New York, requires New York courts to honor and enforce injunctions issued in an order of rehabilitation or liquidation of a reciprocal state in which the UILA has been adopted.[1] Indeed, New York courts have abided by orders enjoining prosecution of actions against insurers placed into rehabilitation or liquidation.

Here, defendants correctly assert that generally, a "stay by a court in another state enjoining and restraining all claims against insureds of an insolvent liability insurer is entitled to full faith and credit, and has the effect of suspending all proceedings against the insured as of its effective date" (*Dambrot v. REJ Long Beach, LLC*, 39 AD3d 797 [2d Dept 2007]; *Beecher v Lewis Press Co.*, 238 AD2d 927, 927-928 [4th Dept 1997]).

The doctrine of comity is distinguished from Full Faith and Credit, "in that the latter is an explicit constitutionally based provision involving relationships only among the States, whereas comity is based not on a constitutional provision, but on concepts such as harmony, accommodation, policy, and compatibility, in either an interstate context" (*Morrison v Budget Rent A Car Systems, Inc.*, 230 AD2d 253, 265 [2d Dept 1997][citations omitted]).

Insurance Law § 7408[b][6] defines a "reciprocal state" as "any state other than this

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[1] Washington D.C. law stipulates that "no action at law or equity or in arbitration shall be brought against the insurer or liquidator, *whether in the District or elsewhere*" (D.C. Code § 31-1322[a][emphasis added]).

state in which in substance and effect the provisions of this act are in force, including the provisions requiring that the insurance commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer." The UILA defines a delinquency proceeding as any proceeding commenced against an insurer for the purposes of liquidating, rehabilitating, reorganizing, or conserving such insurer (Insurance Law §7408 [b][2]). The UILA provides that "during the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment, or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets." (Insurance Law § 7414). The purpose of the UILA is to provide "a uniform system for the orderly and equitable administration of the assets and liabilities of defunct multi-state insurers" (*Levin v National Colonial Ins. Co.*, 1 NY3d 350, 356 [2004]).

Pursuant to the UILA, New York courts have granted the motion of an insurance carrier or insured to stay New York litigation pursuant to the rehabilitation order of another state's court which stayed the commencement or continuation of any action or proceeding against nonparty insurer or any of its insureds (*A. J. Pegno Constr. Corp.*, 39 AD3d 273 [1st Dept 2007] [insurer a party]; *A.B. Med. Svcs. PLLC v Highlands Ins. Co.*, 4 Misc3d 1020[A] [Civ Ct, NY County 2004] [insurer a party]; *Century Indem. Co. v Brooklyn Union Gas Co.*, 2003 WL 25788108 [Sup Ct, NY County 2003][nonparty insurer's motion granted]).

However, there is no statutory automatic stay of litigation pursuant to the UILA (*see In re Rehabilitation of Frontier Ins. Co.*, 27 AD3d 274 [1st Dept 2006], *lv denied*, 7 NY3d 713 [2006]). Rather, the UILA provides that a court may issue injunctions or orders as deemed necessary to, inter alia, prevent "waste of the assets of the insurer, or the commencement or prosecution of any actions" (Insurance Law §7419[b]). The court has considerable discretion considering the scope of injunctions prohibiting commencement or prosecution of litigation during rehabilitation of an insolvent insurer (*Matter of Frontier Ins. Co.*, 57 AD3d 1302, 1304 [3d Dept 2008]). Indeed, at least one New York court has

recently held that staying an action pending resolution of liquidation proceedings was not warranted (*Hala v. Orange Regional Medical Center*, 2018 WL 2013018 [Sup Ct, Orange County 2018]).

Here, the court notes that defendants have cited no authority for the premise that a stay issued in another state for the benefit of a risk retention group, as distinguished from an insurance company, is entitled to Full Faith and Credit, comity or reciprocity under the UILA. Notably, all recent decisions in which stays have been imposed pending the resolution of liquidation proceedings have failed to distinguish between risk retention groups and traditional insurers (*see Rojas v Concannon, et al*, 2018 WL 1508861 [Sup Ct, New York County, 2017]; *Leon v Waldman, M.D.*, 2018 NY Slip Op 30483(U); 2018 WL 1448077 [Sup Ct, New York County, 2017]). Risk retention groups, unlike traditional insurance companies, are owned and operated by their members which are their insureds. The federal Liability Risk Retention Act of 1986, 15 USC § 3901, et seq. ("LRRA") governs risk retention groups. In enacting the LRRA, Congress desired "to decrease insurance rates and increase the availability of coverage by promoting greater competition within the insurance industry" (*Preferred Physicians Mut. Risk Retention Group v Pataki*, 85 F3d 913, 914[2d Cir. 1996] [internal citations omitted]). "[T]he legislative history of the Act makes clear that Congress intended to exempt [risk retention groups] broadly from state law 'requirements that make it difficult for risk retention groups to form or to operate on a multi-state basis' " (*id.* at 915–16 [internal citations omitted]). The LRRA preempts "any State law, rule, regulation, or order to the extent that such law, rule, regulation or order would ... make unlawful, or regulate, directly or indirectly, the operation of a risk retention group" (15 USC § 3902[a][1]). The authority of the domiciliary, or chartering, state is empowered to "regulate the formation and operation" of risk retention groups (15 USC § 3902[a][1]).

By state law, risk retention groups are "authorized to engage in the business of insurance" in New York (Insurance Law § 5902[n][3][A]). However, the LRRA "provides for

broad preemption of a non-domiciliary state's licensing and regulatory laws " (*Fla. Dept. of Ins. v Natl. Amusement Purchasing Group, Inc.*, 905 F2d 361, 363–64 [11th Cir.1990]). An important distinction between risk management groups and insurance companies is that Insurance Law §5906 exempts risk management companies from the requirement of contributing to an insurance insolvency fund and eliminates the availability of such funds for the victims of tortfeasors. In accordance with this principle, the United States Court of Appeals for the Second Circuit has held that "[p]lainly, §§ 3902(a)(2) and (3) [of the LRRA] are not directed toward placing risk retention groups 'on equal footing' with traditional insurers. To the contrary, both of those provisions excuse risk retention groups from certain requirements that states may and typically do impose upon insurers licensed within that state" (*Wadsworth v Allied Professionals Ins. Co.*, 748F3d 100, 107 [2d Cir. 2014]).

Indeed, the Court of Appeals has further observed that certain sections of the Insurance Law do not apply to risk retention groups. For example, Insurance law §3420, which grants an injured party the right to sue the tortfeasor's insurer under limited circumstances in a direct action, has been held inapplicable to foreign risk retention groups (*id.*).

Thus, weighing the rights of alleged victims of medical malpractice to expeditiously resolve their claims against those of a guaranty fund, this court finds that the imposition of a stay is unwarranted on these facts. To be sure, it would be patently unfair and unjust to plaintiff to mandate that he wait to resume prosecution of his case simply because his medical treatment providers took a chance on a non-domiciliary risk retention group rather than opting for traditional insurance. It is axiomatic that a delay occasioned by defendants' actions should not be counted against plaintiff.

The court's finding is supported by the lack of a temporal limit to the litigation stay at issue. Indeed, while it could be argued that the risk retention group should be entitled to a temporary stay, there is no reasonable justification, articulated or otherwise, to extend Full Faith and Credit, comity or the UILA to an order which purports to indefinitely stay

actions involving Fairway in New York. The liquidation order at issue here purports to stay actions involving Fairway "until such time as the Commissioner rescinds or amends this Order." Such an order of indeterminate length would highly prejudice plaintiff, especially at his advanced age. How long is plaintiff to wait? One year? Five years? Ten years? A stay of indeterminate length raises the specter of such possibilities, and thus cannot be endorsed by this court. A finding to the contrary would permit an insurer's or a risk retention group's insolvency to permanently infringe upon the rights of those injured in New York to pursue legal action within the state.

Defendants' assertions to the contrary, Full Faith and Credit, comity or the UILA do not mandate that they may avoid the consequences of retaining a risk retention group in lieu of a licensed New York State medical malpractice insurer to the detriment of the alleged victims of medical malpractice. As mentioned above, significant prejudice would befall ailing and elderly individuals like plaintiff if lengthy stays, such as the one proposed here, were endorsed by this court or any other court for that matter.

As suggested in *Hala v. Orange Regional Medical Center*, by its finding here this court does not suggest that the District of Columbia lacks jurisdiction over claims involving the assets and liabilities of Fairway (*see Hala v. Orange Regional Medical Center*, 2018 WL 2013018, *supra*). Notably, Fairway is not a party to the instant action. Therefore, this court is not persuaded that the Full Faith and Credit Clause, or comity principles mandate enforcement of those parts of the District of Columbia's order that purport to impose a stay since the District of Columbia has no jurisdiction over the parties and the proceedings pending in New York (*see Ho v McCarthy*, 90 AD3d 710, 711 [2d Dept 2011]). Rather, "New York is not constitutionally required to give full faith and credit to a foreign judgment which is not final under that State's laws" (*Pearson v Pearson*, 69 NY2d 919, 210 [1987]).

Finally, imposing a stay in the instant matter would run athwart to the strong public policy within this state of protecting victims of medical malpractice and favoring the expeditious resolution matters on their merits (*see Mazur v Mazur*, 288 AD2d 945 [4th Dept

2001]).

Accordingly, it is hereby

ORDERED the parties respective applications seeking a stay of proceedings, or alternatively severance are denied in all respects; and it is further

ORDERED that plaintiff's separate application to expedite plaintiff's deposition is granted to the extent that plaintiff's deposition is to proceed on an immediate basis and no later than August 10, 2018; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants within ten (10) days of entry and shall file proof of service within five (5) days of service; and it is further

ORDERED that all parties to this action are directed to appear for a conference on August 14, 2018 at 111 Centre Street, Room 1227 at 9:30 AM.

This foregoing constitutes the decision and order of the court.

Dated: July 4, 2018
New York, New York

George J. Silver
HON. GEORGE J. SILVER

1. Check one: ..... ☐ Case Disposed ■ Non-Final Disposition

2. Check as Appropriate: ..... Motion is: ☐ Granted ■ Denied ☐ Granted in Part ☐ Other