

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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UTICA NATIONAL INSURANCE GROUP,
Plaintiff,

Index No.: 13672/07
Motion Date: 11/19/08
Motion Cal. No.:58

-against-

ARTHUR LUBAN, PROVIDIAN MEDICAL PC,
ASTORIA MEDICAL SERVICES PC, BAY MEDICAL
SERVICES PC, HARBOR MEDICAL & DIAGNOSTIC PC,
NORTHERN MEDICAL SERVICES PC, PRECISE
MEDICAL DIAGNOSTICS PC, VALIANT MEDICAL
SERVICES, PC, VITAL MEDICAL CARE, PC,
PRECISE MEDICAL DIAGNOSTICS PC,
Defendants.

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The following papers numbered 1 to 11 read on this motion by plaintiff for an order pursuant to CPLR 3212 granting plaintiff partial summary judgment in its favor and against defendants on the first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action for a money judgment in the amount of sixty one thousand two hundred seventy five dollars and seven cents with interest from the respective reimbursement dates; and cross-motion by defendants for an order pursuant to CPLR 3212 granting defendants **ASTORIA MEDICAL SERVICES PC, NORTHERN MEDICAL SERVICES PC., PRECISE MEDICAL DIAGNOSTICS PC,** and **N.Y. MEDICAL & DIAGNOSTIC PC** summary judgment in their favor and dismissing the complaint as against defendants **ASTORIA MEDICAL SERVICES PC, NORTHERN MEDICAL SERVICES PC., PRECISE MEDICAL DIAGNOSTICS PC,** and **N.Y. MEDICAL & DIAGNOSTIC PC**; and for an order pursuant to CPLR 3124 directing plaintiff to respond to defendants’ written interrogatories, notice for discovery and inspection, and to produce a witness for deposition.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-3
Notice of Cross-Motion-Affirmation-Exhibits	4-7
Affirmation in Opposition.....	8-9
Reply Affirmation.....	10-11

Upon the foregoing papers it is ordered that the motions are decided as follows:

This action seeks recoupment of payments made by Utica National Insurance Group

("Utica") to defendant Arthur Luban M.D. ("Luban") and the defendant professional corporations ostensibly owned by Luban. (the "Defendant Entities"). The payments made by Utica were made pursuant to New York's No-fault law for treatment and services allegedly provided by Luban and the Defendant Entities to automobile accident victims covered under the No-fault provisions of Utica automobile liability insurance policies. According to plaintiff, Arthur Luban M.D. and the defendant entities were not eligible to receive the No-fault payments they took from Plaintiff Utica National Insurance Group under section 5102(a)(1) of the Insurance Law, because the Defendants did not meet the New York State licensing requirements of Section 1503(a) of New York Business Corporation Law which requires that only persons licensed to practice medicine may own and control a medical professional corporation. Plaintiff claims that it paid bills and invoices from Providian Medical P.C. in the amount of \$29,998.12, from Harbor Medical Diagnostic P.C. in the amount of \$2,647, Valiant Medical Services in the amount of \$4,321.06, Vital Medical Care in the amount of \$23,308.75 and Bay Medical Services in the amount of \$1,000. These were entities which operated in Queens and Kings County as professional service corporations ostensibly owned and controlled by Arthur Luban and allegedly established to provide medical goods and services to, among others, New York patients injured in automobile accidents.

Plaintiff has now moved for partial summary judgment to recover the \$61,275.07 it paid directly to these entities for medical services, with interest from the respective reimbursement dates. Defendants have opposed this motion. It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

In support of its motion, plaintiff has submitted a series of Consent and Decree Orders defendant Luban, who was registered as the sole owner and shareholder of the Defendant entities, entered into with the New York Department of Health, State Board for Professional Misconduct. In sworn filings, defendant Luban admitted that he did not in fact control the defendant entities which were instead controlled by persons who were not licensed to practice medicine, relegating Luban to the role of owner in name only. The New York Department of Health, State Board for Professional Misconduct concluded, and Luban in his admissions acknowledged, that these facts were all in contravention of Article 15 of the New York Business Corporation Law, including Section 1503(a), which requires that only persons licensed to practice medicine may

own and control a medical professional corporation.

Plaintiff has also submitted a copy of the Uni Claims Payment History of Utica National Insurance Group and the Affidavit of Utica SIU Investigator Wendy Tiffin. This evidence shows that plaintiff has paid certain of the Luban entities \$61,275.07 since the April 4th, 2002 enactment of 11 NYCRR § 65-3.16(a)(12).

Defendants claim that plaintiff's submissions have not established that any of the Defendant entities was fraudulently incorporated and that consequently, plaintiff's motion should be denied. Defendants point out that neither plaintiff's counsel nor Wendy Tiffin, Plaintiff's Special Investigative Unit Investigator, has any personal knowledge of any relevant facts. Furthermore, defendants claim that the Consent Agreements and Orders do not support plaintiff's claims. According to defendants, the Consent Agreements, executed by Dr. Luban as the sole shareholder of the P.C.s, state that the Respondents do not contest the allegations and specifications in the statements of charges. However, the Respondents did not admit anything, in fact, defendants point out that at paragraph E in the Factual Allegations in the Statements of Charges sets forth that persons who were not licensed to practice medicine were instrumental in controlling the Respondents, including, but not limited to, "hiring and supervising professional staff, accessing bank accounts, disbursing funds, and otherwise handling banking and financial affairs." Defendants claim that these admissions do not rise to the level of control by unlicensed persons that would invalidate payments to Defendant entities.

Defendants also point out that in the matters of the seven entities whose Certificates of Incorporation were revoked on consent, the Consent Agreements And Orders specifically provide: "...that pursuant to Article 10 of the Business Corporation Law, the Respondent will be permitted to wind up all of its affairs, including, but not limited to, collection of outstanding accounts receivable, notwithstanding this revocation...". According to defendants, this indicates that the State Board for Professional Medical Conduct agreed that these seven (7) P.C.s could continue to collect outstanding receivables. Apparently, arguing that these receivables included money paid by plaintiff. Defendants also claim that plaintiff's submission of the Uni-Claims Payment History is deficient in that it does not even identify the patients-assignors, nor any other details, i.e., the treating doctor, services performed, nor that payments were made on dates which the defendant entities were in violation of the ownership rules.

Provisions of the no-fault law require insurers to reimburse patients or their medical provider assignees for "basic economic loss" (Insurance Law § 5102[a][1]). A provider of healthcare services is not eligible for reimbursement, however, "if the 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]). The Court of Appeals has interpreted 11 NYCRR 65-3.16(a)(12) to allow insurance carriers to withhold reimbursement for no-fault claims from fraudulently licensed medical corporations and to "look beyond the face of licensing documents to identify willful and material failure to abide by state and local law" State Farm Mut. Auto. Ins.

Co. v Mallela, 4 NY3d 313 (2005.) State law mandates that professional service corporations be owned and controlled only by licensed professionals (see Business Corporation Law §§ 1503[a]; 1507, 1508), and that licensed professionals render the services provided by such corporations (see Business Corporation Law § 1504[a]).

In State Farm Mut. Auto. Ins. Co. v Mallela, *supra*, the court found that the complaint did not clearly indicate, one way or the other, whether plaintiff had paid money to defendants after the amended regulation took effect. As such, the Court declined to consider whether State Farm could recover money already paid out under theories of fraud or unjust enrichment. This Court is presented with a complaint that clearly seeks to recover money paid to defendants who had failed to meet the applicable state licensing requirements, which prohibit non-physicians from owning or controlling medical service corporations. This Court finds that, under the reasoning of State Farm Mut. Auto. Ins. Co. v Mallela, *supra*, and its progeny, [*see First Help Acupuncture P.C. v State Farm Ins. Co.*, 12 Misc. 3d 130(A),(2006); *see also Allstate Ins. Co. v Belt Parkway Imaging, P.C.*, 33 AD3d 407 (2006); *see generally Metroscan Imaging P.C. v GEICO Ins. Co.*, 13 Misc 3d 35,(2006.)] and the applicable state regulations, it is appropriate to allow the insurance carrier to recover money already paid out to ineligible recipients.

Here, the evidence presented by the plaintiff established, *prima facie*, its entitlement to summary judgment on its first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth causes, as those actions relate to defendants Providian Medical P.C., Harbor Medical Diagnostic P.C., Valiant Medical Services, Vital Medical Care, and Bay Medical Services. Plaintiff has established that these defendants violated 11 NYCRR § 65-3.16(a)(12) by receiving money from plaintiff when they were ineligible for reimbursement from plaintiff for No-fault benefits. Plaintiff has failed to show any proof that the other defendants received such payments or controlled defendants Providian Medical P.C., Harbor Medical Diagnostic P.C., Valiant Medical Services, Vital Medical Care, and Bay Medical Services. Consequently only defendants Providian Medical P.C., Harbor Medical Diagnostic P.C., Valiant Medical Services, Vital Medical Care, and Bay Medical Services are obligated in damages to plaintiff for payments of \$61,275.07 issued to these defendants subsequent to April 4th, 2002.

Contrary to defendants' claim, Dr. Luban signed numerous Consent and Decree Orders, that established he was in violation of New York Education Law Section 6530(12) and of Article 15 of the New York Business Corporation Law, including Section 1503(a), which requires that only persons licensed to practice medicine may own and control a medical professional corporation. Whether Dr. Luban had actual intent to defraud at the time of incorporation is immaterial to the issue of whether the defendants were entitled to reimbursement where non-physicians were in control of and running the entities thus failing meet the state licensing requirements. All that must be established is that Dr. Luban was not in control of the Professional Corporation at the time the services were rendered. The consent decrees establish this lack of control. Furthermore, the references in the consent decrees to defendants' being able

to wind up and collect receivables are not an indication that the entities could collect for medical services. Clearly these entities could have been owed money for other than prohibited work and the decrees afforded the opportunity to collect for such work, while closing down pursuant to the Consent Decrees. Consequently, defendants Providian Medical P.C., Harbor Medical Diagnostic P.C., Valiant Medical Services, Vital Medical Care, and Bay Medical Services. were not entitled to reimbursement for the services rendered and are obligated to repay plaintiff for the amounts paid. Accordingly, the plaintiff's motion for partial summary judgment is granted to the extent that judgment on its first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth causes in favor of plaintiff and against defendants Providian Medical P.C., Harbor Medical Diagnostic P.C., Valiant Medical Services, Vital Medical Care, and Bay Medical Services is granted. State Farm Mut. Auto. Ins. Co. v Mallela, supra. The action shall proceed on the remaining causes of action.

Based on the above, the branch of the cross-motion by defendants for an order pursuant to CPLR 3212 granting defendants **ASTORIA MEDICAL SERVICES PC, NORTHERN MEDICAL SERVICES PC., PRECISE MEDICAL DIAGNOSTICS PC,** and **N.Y. MEDICAL & DIAGNOSTIC PC** summary judgment in their favor and dismissing the complaint as against defendants **ASTORIA MEDICAL SERVICES PC, NORTHERN MEDICAL SERVICES PC., PRECISE MEDICAL DIAGNOSTICS PC,** and **N.Y. MEDICAL & DIAGNOSTIC PC,** is granted to the extent that the first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth causes are dismissed as against these defendants. The branch of the defendants motion seeking discovery is granted. Discovery shall proceed regarding the remaining causes of action. Plaintiff shall respond to defendants' written interrogatories, notice for discovery and inspection, and to produce a witness for deposition. The court notes that it was not presented with any basis to deny the motion for summary judgment in order for this discovery to be completed. CPLR 3212 (f).

Dated: November 24, 2008

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ORIN R. KITZES, J.S.C.