

Alev Med. Supply, Inc. v GEICO Cas. Ins. Co.

2010 NY Slip Op 31122(U)

April 27, 2010

Sup Ct, NY County

Docket Number: 104270/09

Judge: Joan M. Kenney

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4/29/10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN M. KENNEY

PART 8

Justice

Aten Medical Supply, Inc. a/p/s
Marian Crayle,

- v -

GETCO Casualty Insurance Co.,

INDEX NO. 104770/09
MOTION DATE 4/6/10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to/for Service; transfer

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-5

Answering Affidavits — Exhibits _____

8-11

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

APR 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: April 27, 2010

Joan M. Kenney
HON. JOAN M. KENNEY J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----x
ALEV MEDICAL SUPPLY, INC. a/a/o MARIAN GAYLE,
RAMON FRIAS, DICK ROBINSON, GIL SANCHEZ,
GEORGE EVERETT, WILBAR HARRIS, JARUAN HIDALGO,
LINUS EZE, CHRISTOPHER AYALA, TYRONE BUEL,
SYDNEY GREEN, ODETTE WISDOM, JOYCE WOOD,
LATOYA NOTICE, HARDWICK JOHNSON,
FRANCISCO CAVETANO, DENISE WARNER, YVON RIMPEL,
ROTTAN SALMON, CHANTAL MANNING, JOSE BUSTELO,
JERVAN ROBERTS, DAN MADRID, VETA HERON,
MARCUS ALSTON, MARJORIE BROWN, OTHNEIL MARCH,
SANDRA WILLIAMS, LENNY MARKOV, VARGAS BOLIVA,
MELISSA WILLIAMS, and DILLON PITT,

DECISION & ORDER
INDEX: 104270/09
Motion Seq.: 002

Plaintiffs,

-against-

GEICO CASUALTY INSURANCE CO.,

Defendant.

FILED
APR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----x

JOAN M. KENNEY, J.:

For Plaintiff:
Amos Weinberg
49 Somerset Dr. S.
Great Neck, New York 11020
(516) 829-3900

For Defendant:
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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to sever and transfer this matter to Civil Court, New York County.

Papers	Numbered
Order to Show Cause, Affirmation and Exhibits	1-7
Affirmation in Opposition	8-11

FACTUAL & PROCEDURAL BACKGROUND

Defendant Geico Casualty Insurance Co. (Geico) seeks an Order, pursuant to CPLR 603 and CPLR 1003, severing plaintiff, Alev Medical Supply, Inc. (Alev)'s causes of action, and transferring said causes of action, pursuant to CPLR 325 (d), to Civil Court, New York County.

Alev, a medical supplier, instituted the present action as the

assignee of 32 separate assignors, seeking to recover the cost of health service benefits rendered by Alev to each of the assignors, pursuant to section 5101, et seq, of the New York State Insurance Law (no-fault law). The dollar amount of the claims for each assignor range from \$312.00 to \$1,532.00. By combining all of the individual claims into one action, Alev is now seeking a total aggregate amount of \$38,623.20.

This action involves separate accidents, separate insurance policies (some of which were purchased in states other than New York), separate fee schedule defenses raised by Geico, and over 10 different expert peer reviewers opining as to the necessity of the medical treatments provided.

The various and diverse medical supplies provided by Alev to the different assignors include a total of 18 massagers, 15 lumbosacral supports, 11 electronic muscle stimulation units, 11 thermophore pads, nine cervical collars, nine cervical pillows, eight bed boards, eight egg-crate mattresses, eight lumbar cushions, seven orthopedic pillows, five car seats, four hot/cold packs, two whirlpools, two infrared heat lamps, two thorocolumbosacral orthosis, two knee supports and one shoulder support.

In opposition to the instant motion, Alev contends that a similar motion by Geico to sever a claim involving over 100 assignors, none of whom is involved in the case at bar, was recently denied by another Supreme Court Justice and, therefore, Geico is

precluded from rearguing the same issue before a different judge in the same courthouse. Further, Alev asserts that Geico would not be unduly prejudiced if the cause of action were not severed, because the defense would be the same whether there was one or 32 trials.

DISCUSSION

CPLR 603 states:

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others."

CPLR 1003 states, in pertinent part:

"Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately."

CPLR 325 (d) permits a court, in its discretion, to remove an action that is before it to a "lower court where it appears that the amount of damages sustained may be less than demanded, and the lower court would have had jurisdiction but for the amount of damages demanded."

The recent judicial administrative trend has been to scrutinize all first-party no-fault actions that involve multiple assignors, and to sever such claims, unless there is a definitive showing that there is a common factual and/or legal issue common to all the causes of action. For example,

"[i]n Civil Court of the City of New York, which has seen most of the first-party no-fault actions that have

buried the trial courts of limited jurisdiction, a directive was issued by the Administrative Judge, Hon. Fern A. Fisher, directing the clerk 'to reject any no-fault summons and complaint filed in the court which contain either multiple plaintiffs or multiple assigned claims unless an affirmation is filed with the papers signed by the attorney for the plaintiff, ... outlining the reason for the joinder'; and directing Civil Court judges 'to review the reasons for joinder of multiple plaintiffs or assigned claims whenever a case appears before them.' (Directives and Procedures, Severance of No-fault Plaintiffs or Assigned Claims, August 3, 2006.)"

New York Central Mutual Insurance Company v McGee, 25 Misc 3d 1232(A), 2009 NY Slip Op 52385(U),*3 (Sup Ct, Kings County 2009).

Although "[t]he decision whether to grant severance 'rests soundly in the discretion of the trial court and, on appeal, will be affirmed absent a demonstration of abuse of discretion or prejudice to a substantial right' [citation omitted]" (Rapini v New Plan Excel Realty Trust, Inc., 8 AD3d 1013, 1014 [4th Dept 2004]), the court must consider several factors in reaching its ultimate determination as to whether a particular case warrants severance.

One of the factors that have been considered by courts faced with similar motions to sever no-fault cases that concern one provider as the assignee of multiple assignors is the singularity or multiplicity of insurance policies involved in the litigation.

In *Hempstead General Hospital v Liberty Mutual Insurance Co.* (134 AD2d 569 [2d Dept 1987]), a case relied upon by Alev in this action, the Appellate Court agreed with the trial court that severance was not mandated in a suit involving the single assignee of 29 assignors, specifically because all of the claims arose out

of a uniform contract of insurance and involved the interpretation of the same no-fault provisions of the Insurance Law. The rationale behind that holding was that the issue involved a common question of law; therefore, severance would be inappropriate.

However, recent cases have held that where the claims involve separate insurance policies, such as is the situation in the case at bar, the facts relating to each claim are likely to raise few, if any, common issues of law, and severance of the claims would be an appropriate exercise of judicial discretion. *Astoria Quality Medical Supply v State Farm Mutual Automobile Insurance Co.*, 20 Misc 3d 144(A), 2008 NY Slip Op 51855(U),*1 (App Term, 2d & 11th Jud Dists 2008) (case involved only three assignors, yet the court said that "[a] single trial involving different sets of facts regarding three underlying accidents and injuries would pose the danger of being unwieldy and confusing.")

Another factor to be weighed by the court in determining whether or not severance would be appropriate is the amount of factual differences that would have to be considered by the ultimate trier of fact.

In *Radiology Resource Network, P.C. v Fireman's Fund Insurance Co.* (12 AD3d 185 [1st Dept 2004]), a case involving the assignment of 68 separate individual no-fault claims, the court determined that it was unlikely that these claims, arising out of totally separate accidents, would involve identical legal or factual issues. Some

of the factual issues identified by the court that would have to be considered included, for each of the claims: (1) the validity of the assignments; (2) the necessity of the services provided in light of each assignor's medical condition and history; (3) the insurer's receipt of the bills; and (4) the sufficiency of the no-fault forms that have been submitted. The Court further opined that the viability of the insurer's defenses would depend on the particular facts relating to each separate claim, and that, "[u]nder the circumstances, to try all 68 claims together would be unwieldy and would create a substantial risk of confusing the trier of fact." *Id.* at 186.

The same result was found in a case involving 47 different no-fault claims. In *Poole v Allstate Insurance Co.* (20 AD3d 518, 519 [2d Dept 2005]), the Court said that "the reasons for the denial of benefits, as well as the defenses raised in [the] answer, are many and varied, and would necessarily entail mini-trials as to the individual claims."

Least important to the court's determination is the actual number of assignors involved in the lawsuit. Courts have severed combined no-fault claims with as few as two separate assignors, asserting that, even though there were only two distinct accidents involved, "[t]he facts relating to each claim are ... [u]nlikely to raise few, if any, common issues of fact." *Georgetown Mind-Body Med., P.C. v State Farm Mutual Automobile Insurance Co.*, 25 Misc 3d

142(A), 2009 NY Slip Op 52464(U), *1 (App Term, 2d, 11th & 13th Jud Dists 2009).

In the case at bar, severance is mandated because,

"[a]lthough this action was commenced by a single assignee against a single insurer and all [causes of action] allege the erroneous nonpayment of no-fault benefits ..., they arise from different automobile accidents on various dates in which the [32] unrelated assignors suffered diverse injuries and required different medical treatment [internal quotation marks omitted]."

Sunshine Imaging Association/WNY MRI v Government Employees Insurance Co., 66 AD3d 1419, 1420-1421 (4th Dept 2009).

Alev's argument that Geico should be collaterally estopped from seeking severance because another judge in this court, in the exercise of judicial discretion, denied a severance motion by Geico in a different case involving different assignors, is specious at best. Under this logic, a given litigant could argue a point of law only once, and a judicial determination on that issue would preclude that litigant from ever arguing that legal issue again in any other lawsuit.

Therefore, based on the multiplicity of assignors, the multiplicity of accidents, the multiplicity of insurance policies, and the multiplicity of defenses, the court, in the exercise of its discretion, grants Geico's motion to sever this action.

Lastly, since, once severed, none of the claims meets the jurisdictional requirements of this court, pursuant to the provisions of CPLR 325 (d), this action is removed to the Civil

Court.

Based on the foregoing, it is hereby

ORDERED, that defendant's motion to sever is granted, and plaintiff Alev Medical Supply, Inc.'s claim on behalf of Marian Gayle is hereby severed from the remaining claims and each claim shall proceed as separate actions in the Civil Court; and it is further

ORDERED, that this action is transferred to the Civil Court of the City of New York, County of New York, pursuant to CPLR 325 (d); and it is further

ORDERED, that defendant shall serve a copy of this Order with Notice of Entry upon the County Clerk within thirty (30) days of this order, who is directed to transfer the file in this action to the Civil Court of the City of New York, New York County, forthwith; and it is further

ORDERED, that plaintiff Alev Medical Supply, Inc. shall file an amended complaint in this action in the Civil Court solely on behalf of Marian Gayle, and file new actions in the Civil Court on behalf of its remaining assignors within sixty (60) days of this order.

Dated: *April 27, 2010*

ENTER: 

Joan M. Kenney, J.S.C.