NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

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

----------X

THE GENERAL INSURANCE, PERMANENT GENERAL ASSURANCE CORPORATION, PERMANENT ASSURANCE CORPORATION OF OHIO, THE GENERAL AUTOMOBILE INSURANCE COMPANY, INC.,

Index No. **22825/20E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

AYANNA PIQUION, ET AL.,

Defendant.

----------X

The following papers numbered 1 to 4, Read on this motion noticed on 1/6/22, and duly submitted as no. 10 on the Motion Calendar of 2/22/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendants ALL CITY FAMILY HEALTHCARE, ARON ROVNER, MD, PLLC, AVERROES PHYSICAL THERAPY, P.C., BURKE PHYSICAL THERAPY, P.C., CAVALLARO MEDICAL SUPPLY, EAST 19 MEDICAL SUPPLY CORP., JSJ ANESTHESIA PAIN MANAGEMENT, PLLC, JULES F. PARISIEN, LONGEVITY MEDICAL SUPPLY, INC., LR MEDICAL, PLLC, METRO PAIN SPECIALISTS, P.C., NOVA MEDICAL DIAGNOSTIC, P.C., CMA PSYCHOLOGY, DANIMARK PHYSICAL THERAPY, P.C., FAIRPOINT ACUPUNCTURE, P.C., and NYEEQASC, LLC's motion is Decided in accordance with the Decision and Order annexed hereto.

Dated: 6/10/2022

Hon. _____
FIDEL E. GOMEZ, AJSC

MOTION X DENIED

X NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

THE GENERAL INSURANCE, PERMANENT GENERAL ASSURANCE CORPORATION, PERMANENT ASSURANCE CORPORATION OF OHIO, THE GENERAL AUTOMOBILE INSURANCE COMPANY, INC.,

Plaintiff(s),

- against -

AYANNA PIQUION, ET AL.,

Defendant(s).

----------x

DECISION AND ORDER

Index No: 22825/20E

In this action for declaratory judgment, defendants ALL CITY FAMILY HEALTHCARE, ARON ROVNER, MD, PLLC, AVERROES PHYSICAL THERAPY, P.C., BURKE PHYSICAL THERAPY, P.C., CAVALLARO MEDICAL SUPPLY, EAST 19 MEDICAL SUPPLY CORP., JSJ ANESTHESIA PAIN MANAGEMENT, PLLC, JULES F. PARISIEN, LONGEVITY MEDICAL SUPPLY, INC., LR MEDICAL, PLLC, METRO PAIN SPECIALISTS, P.C., NOVA MEDICAL DIAGNOSTIC, P.C., CMA PSYCHOLOGY, DANIMARK PHYSICAL THERAPY, P.C., FAIRPOINT ACUPUNCTURE, P.C., and NYEEQASC, LLC (hereinafter "Provider Defendants") move seeking an order pursuant to CPLR § 603, severing each claim in the complaint and its corresponding cause of action, and thereafter, should the claims proceed to trial, trying each of them separately. Provider Defendants contend that because the claims in the complaint stem from 31 unrelated accidents, the issues presented are too voluminous and unmanageable to be tried in a single action. Provider Defendants also seek an

order pursuant to CPLR § 3211(a)(4), dismissing the complaint to the extent that it seeks a declaratory judgment with respect to 10 claims for which Provider Defendants have initiated prior and still pending declaratory judgment actions in Civil Court. Plaintiffs oppose the instant motion, asserting that the Court's (McShan, J.) decision, dated December 1, 2021, which denied Provider Defendants' prior application seeking severance, bars the instant motion and because the single motion rule bars Provider Defendants' motion seeking dismissal of the actions for which there exist previously commenced actions in Civil Court.

For the reasons that follow hereinafter, Provider Defendants' motion is denied.

The instant action is for declaratory judgment. The complaint alleges the following: Plaintiffs, insurance companies, issued insurance policies, which included no-fault coverage. In New York, the no-fault laws are designed to ensure that those involved and injured in a motor vehicle accident have an efficient mechanism to pay for and receive medically necessary healthcare and medical services. Each policy issued by plaintiffs, while providing coverage for accidents, precluded coverage for deliberate and staged collisions caused in furtherance of insurance fraud schemes. Additionally, the policies did not provide coverage to any person who knowingly concealed and/or misrepresented any material fact

related to insurance coverage at the time the policies were procured. Plaintiffs issued 28 insurance policies to 28 defendants in this action. Each policy provided liability coverage for bodily injury and property damage claims brought against those covered thereunder, no-fault benefits for those eligible thereunder, and UM/UIM coverage. On a host of different dates, as a result of different accidents occurring at different locations and involving different defendants, defendants were treated by Provider Defendants, who then made claims for payment to plaintiffs under New York's no-fault laws. Plaintiffs allege that all of the accidents giving rise to the claims by Provider Defendants were staged and did not involve a report or injury at the scene. Plaintiffs also allege that each of the insurance policies issued to defendants was procured through fraud and/or material misrepresentation. Based on the foregoing, plaintiffs interpose two causes of action for declaratory judgment. The first seeks A declaration that because the accidents giving rise to the claims by the Provider Defendants were staged and/or never occurred at all, defendants are not entitled to no-fault benefits and thus plaintiffs are not obligated to pay Provider Defendants for medical services provided by them. The second cause of action seeks identical relief on grounds that each of the policies issued by plaintiffs was procured through fraud.

PROVIDER DEFENDANTS' MOTION TO SEVER

Provider Defendants' motion to sever each claim and its corresponding cause of action is denied. Significantly, the Court (McShan, J.) previously denied the relief sought. As such, the relief sought is barred by the law of the case doctrine.

The law of the case doctrine generally bars the re-litigation of a prior pre-judgment judicial determination made within the same action (*People v Evans*, 94 NY2d 499, 502 [2000]; *Brownrigg v New York City Housing Authority*, 29 AD3d 721, 722 [2d Dept 2006]). Judges of coordinate jurisdiction are thus prohibited from entertaining or deciding previously decided matters (*id.* at 503-504; *Gee Tai Chong Realty Corp. v GA Insurance Company of New York*, 283 AD2d 295, 296 [1st Dept 2001]). Significantly,

> [o]nce a point is decided within a case, the doctrine of the law of the case makes it binding not only on the parties, but on all other judges of coordinate jurisdiction. While the adoption of the Individual Assignment System has greatly attenuated reliance upon the doctrine, where an application on an issue is directed to different justices, the finality to be ascribed to the prior ruling becomes a paramount consideration

(*Gee Tai Chong Realty Corp.* at 296 [internal quotation marks omitted]). In certain instances, however, the doctrine is not absolute and its applicability is circumscribed. Accordingly, the doctrine is only applicable when parties seek to re-litigate issues

that were previously resolved on the merits (*Gee Tai Chong Realty Corp.* at 296), and where the parties were previously afforded a full and fair opportunity to litigate the issues being raised (*Evans at 502; Gee Tai Chong Realty Corp.* at 296). Moreover, a previously decided issue can be re-litigated if there exist extraordinary circumstances or there is a change in law applicable to the issues previously decided (*Brownrigg* at 722; *Foley v Roche*, 86 AD2d 887, 887 [2d Dept 1982]).

Accordingly, once a prior a judge on a motion conclusively decides an issue, it becomes binding upon the proceedings thereafter. In *Gee Tai Chong Realty Corp*, the court denied defendants' motion for summary judgment and held that defendants were obligated to provide the plaintiff with insurance coverage (*id.* at 296). Thereafter, at trial, when defendants sought to re-litigate the issue of coverage, the Court concluded that re-litigation of the issue of coverage was barred by the law of the case doctrine (*id.* at 296).

Significantly, however, when motions for summary judgment result in denials of the same premised upon issues of fact precluding such relief, such decision does not preclude the re-litigation of summary judgment at trial or thereafter, since no conclusive finding has been made so as to trigger the law of the case doctrine (*Cushman & Wakefield, Inc. v 214 East 49th Street*

Corp., 218 AD2d 464, 468 [1st Dept 1996]["The dissent is correct when it notes that this case was tried upon the supposition that the pretrial decision denying both parties' respective motions for summary judgment (Altman, J.) had narrowed the issues at trial, and that the quantum of plaintiff's brokerage services, however slight, was not in controversy before the trial court. Indeed, there was never any dispute as to the two brief visits made by plaintiff's salesman to defendant. But we are unable to conclude that the outcome of the parties' motion practice was to relieve plaintiff of its obligation to establish a prima facie case, or its obligation, if it were ultimately to prevail, to prove its case by a preponderance of the credible evidence. This Court, of course, is not bound by the doctrine of 'law of the case' made on pretrial motions in reviewing a full record after trial."]; *Sackman-Gilliland Corporation v Senator Holding Group Corp.*, 43 AD2d 948, 949 [2d Dept 1974] ["A denial of a motion for summary judgment is not necessarily res judicata or the law of the case that there is an issue of fact in the case that will be established at the trial."]).

Here, essentially conceding that the Court has already determined that severance is unwarranted, Provider Defendants nevertheless assert that the instant motion is required to ensure

that there is no ambiguity on the issue of severance[1]. Specifically, in its Decision and Order, dated December 1, 2021, in reference to Provider Defendants' motion to sever, the Court stated that

> [i]nitially, the Court notes that neither the Rybak Defendants nor the Jakov Defendants move pursuant to CPLR 603 but they improperly proffer arguments to sever the claims under CPLR 3211(a)(7). While the Court finds the Rybak Defendants and Jakov Defendants' arguments persuasive, the prejudice that would be suffered by plaintiffs in severing the claims outweighs the aforementioned defendants' arguments. Furthermore, by Decision and Order also dated December 1, 2021, this Court granted plaintiffs' application for the entry of a default judgment against the defaulting defendants, which constitute the majority defendants in this action. In that Decision, this Court also severed the claims asserted against the defaulting defendants. It is well-settled that 'when a default judgment is taken against fewer than all of the defendants, the action is severed as against the remaining defendants' (*Holt v Holt*, 262 AD2d 530 [2d Dept 1999]). As such, trying the remaining claims asserted against the answering defendants would not prove as 'unwieldy' or 'create a substantial risk of confusing' this Court (*Radiology Res. Network, P.C.*, 12 AD3d 186). Accordingly, the moving defendants' application to

[1] Significantly, Provider Defendants assert that "the instant Motion is necessary so that, in the event of an appeal of any of the Court's decisions in this case, there is no ambiguity as to whether Provider Defendants have moved to sever the Claims pursuant to CPLR § 603" (Michael Kroopnick's Affirmation in Support at Footnote 6).

> sever the claims asserted in the complaint is denied.

While it is true that Provider Defendants failed to seek such relief in their Notice of Motion page - a mistake of their own making- they nevertheless raised it in their moving papers, such that the Court addressed it.

Accordingly, since the law of the case doctrine generally bars the re-litigation of a prior pre-judgment judicial determination made within the same action (*Evans* at 502; *Brownrigg* at 722) and judges of coordinate jurisdiction are prohibited from entertaining or deciding previously decided matters (*Evans* at 503-504; *Gee Tai Chong Realty Corp.* at 296), here, this Court cannot once again entertain severance, the issue already determined by another Justice of the Court.

PROVIDER DEFENDANTS' MOTION TO DISMISS

Provider Defendants' motion to dismiss 10 of the claims in the complaint, treated as one pursuant to CPLR § 3211(a)(4), is denied. Significantly, insofar as this is Provider Defendants' second motion seeking identical relief, it is barred by the single motion rule.

CPLR §3211(e) states that

> [a]t any time before service of the responsive pleading is required, a party

> may move on one or more of the grounds set forth in subdivision (a), *and no more than one such motion shall be permitted* (emphasis added).

Accordingly, it is well settled that no more than one motion to dismiss for any of the reasons set forth in CPLR § 3211(a) is permitted (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015]; *Ramos v City of New York*, 51 AD3d 753, 754 [2d Dept 2008]; *Klein v Gutman*, 12 AD3d 417, 420 [2d Dept 2004]; *Miller v Schreyer*, 257 AD2d 358, 361 [1st Dept 1999]; *Held v Kaufman*, 91 NY2d 425, 430 [1998]). Indeed, the rule "bars both repetitive motions to dismiss a pleading pursuant CPLR 3211(a), as well as subsequent motions to dismiss that pleading pursuant to CPLR 3211(a) that are based on alternative grounds" (*Bailey* at 739).

Here, because much like their prior application to sever, in their prior motion to dismiss, Provider Defendants also failed to seek dismissal pursuant to CPLR § 3211(a)(4) in their Notice of Motion page. Thus, it appears that the Court (McShan, J.) never addressed this portion of Provider Defendants' prior motion. However, this does not make the single motion any less applicable. To be sure, this is Provider Defendants' second motion pursuant to CPLR § 3211(a), whose consideration is nevertheless barred by the single motion rule. Indeed, at this point, Provider Defendants' only remedy is to seek renewal of the Court's prior decision on grounds that the Court overlooked a portion of their motion. It is

hereby

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : June 10, 2022
Bronx, New York

HON. FIDEL E. GOMEZ, AJSC