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

PRESENT: Hon. KARLA MOSKOWITZ **PART** 03
Justice

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ALLSTATE INSURANCE COMPANY, NATIONAL-BEN FRANKLIN INSURANCE COMPANY OF ILLINOIS, THE CONTINENTAL INSURANCE COMPANY, FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, THE BUCKEYE UNION INSURANCE COMPANY, THE GLENS FALLS INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, and THE FIDELITY & CASUALTY INSURANCE COMPANY OF NEW YORK,

Plaintiffs,

- against -

BELT PARKWAY IMAGING, P.C., DIAGNOSTIC IMAGING, P.C., METROSCAN IMAGING, P.C., PARKWAY MRI, P.C., PARKWAY MAGNETIC RESONANCE IMAGING, INC., METROSCAN RESONANCE IMAGING, INC., HERBERT RABINER, M.D., JAY KATZ, VLADIMIR SHTRAKHMAN, JOHN DOES 1-20, and ABC CORPS. 1-20,

Defendants.

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INDEX NO. 600509/2003

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying decision and order.

Dated: 12/22/04

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

- x

ALLSTATE INSURANCE COMPANY, NATIONAL-BEN FRANKLIN INSURANCE COMPANY OF ILLINOIS, THE CONTINENTAL INSURANCE COMPANY, FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, THE BUCKEYE UNION INSURANCE COMPANY, THE GLENS FALLS INSURANCE COMPANY, BOSTON OLD COLONY INSURANCE COMPANY, and THE FIDELITY & CASUALTY INSURANCE COMPANY OF NEW YORK,

Index No. 600509/2003

Plaintiffs,

- against -

DECISION & ORDER

BELT PARKWAY IMAGING, P.C., DIAGNOSTIC IMAGING, P.C., METROSCAN IMAGING, P.C., PARKWAY MRI, P.C., PARKWAY MAGNETIC RESONANCE IMAGING, INC., METROSCAN RESONANCE IMAGING, INC., HERBERT RABINER, M.D., JAY KATZ, VLADIMIR SHTRAKHMAN, JOHN DOES 1-20, and ABC CORPS. 1-20,

Defendants.

- x

KARLA MOSKOWITZ, J.:

Plaintiffs move for an order: (1) deeming their amended complaint served upon defendants Belt Parkway Imaging, P.C., Diagnostic Imaging P.C., Metroscan Imaging, P.C., and Parkway MRI, P.C., pursuant to CPLR 3025 (a), and directing the defendants to answer the amended complaint; (2) vacating any judgment entered in favor of defendants Herbert Rabiner, M.D., Jay Katz, Vladimir Shtrakhman, Metroscan Resonance Imaging, Inc., and Parkway Magnetic Resonance Imaging, Inc., and granting plaintiffs leave to serve the amended complaint upon these defendants, pursuant to CPLR 3025 (b), deeming the amended complaint served upon these defendants, and directing them to answer the amended complaint; and (3) clarifying the Court's March 15, 2004 Decision and Order (Prior Decision), to confirm that the court has not

dismissed any portion of plaintiffs' eighth cause of action[1] for declaratory judgment.

Background

The facts and issues underlying this action are set forth in the Prior Decision. Summarized, plaintiffs are insurance companies that participate in New York's no-fault automobile insurance program. Plaintiffs seek to recover from defendants payments that they made to defendants, pursuant to the no-fault program, for medical services that defendants rendered to people covered under automobile insurance policies that plaintiffs issued. Plaintiffs contend that they are entitled to recover the payments that they made, because defendants violated various statutes pertaining to the organization of medical corporations and because of fraudulent billing.

The "PC Defendants" include Belt Parkway Imaging, P.C., Parkway MRI, P.C., Diagnostic Imaging, P.C., and Metroscan Imaging P.C. The PC Defendants each purport to be a New York medical professional corporation providing diagnostic testing and other patient services, and their certificates of incorporation state that the owner is defendant Dr. Herbert Rabiner, a New York State-licensed physician, but the real owner and principal shareholder is a layperson -- defendant Jay Katz, with no health provider's license.

The "Management Company Defendants" include Parkway Magnetic Resonance Imaging, Inc. and Metroscan Resonance Imaging, Inc. Katz owns the Management Company Defendants, both of which contracted to provide management services to the PC Defendants.

The "Individual Defendants" include (1) Rabiner, (2) Katz, (3) Vladimir Shtrakhman, an

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1 The complaint and the proposed amended complaint refer to the causes of actions "Claims for Relief."

individual who allegedly conspired with Katz and others to pay remuneration (including kickbacks, bribes, and rebates) in cash and in kind to induce referrals to the PC Defendants, and (4) John Does 1-20, the names of which are not yet known to plaintiffs, who allegedly conspired to, and assisted in, the fraudulent, improper and unlawful conduct that the complaint alleges.

The "ABC Corp. Defendants" include additional business entities, the names of which are not yet known to plaintiffs, that conspired to, and assisted in, the fraudulent, improper and unlawful conduct that the complaint alleges.

Plaintiffs also allege that, in violation of Section 1507 of the Business Corporation Law, Rabiner has sold, or lent the use of his name and medical license, to Katz to form medical corporations in Rabiner's name, so that Katz could ostensibly own or control medical practices, profit from them, bill no-fault insurers for medical services, and, in so doing, facilitate fraudulent billing practices. Allegedly, once Rabiner fraudulently formed the PC Defendants with Katz, he did not have the type of involvement in those entities that would be expected of a real owner.

Plaintiffs also allege that the PC Defendants regularly submitted no-fault claims to the plaintiffs, falsely representing that they were valid medical professional corporations. Plaintiffs paid substantial amounts of money to the PC Defendants based upon their justifiable and good faith reliance that the PC Defendants comported with applicable statutes and administrative regulations governing the provision of health services. In addition, defendants' fraudulent conduct encompassed improper multiple billings and the providing of improper, unwarranted, or medically unreliable testing.

Plaintiffs claim further that defendants implemented a scheme to provide financial kickbacks to medical providers in exchange for referrals to the PC Defendants for diagnostic

testing. Plaintiffs assert that certain nonparty individuals pled guilty to enterprise corruption in connection with kickbacks the PC Defendants made.

In the Prior Decision, the Court granted Motion Sequence Number 002 in its entirety, dismissing the complaint against defendants Parkway Magnetic Resonance Imaging, Inc., Metroscan Resonance Imaging, Inc., Jay Katz, and Vladimir Shtrakhman, and granted Motion Sequence Number 003, to the extent of dismissing the first, second, and seventh causes of action and dismissing the complaint as against Rabiner.

Plaintiffs assert that the proposed amended complaint recognizes that the Prior Decision is "controlling law of the case" as to the portion of plaintiffs' first cause of action (common law fraud) relating to defendants' lack of standing, the second cause of action (General Business Law § 349), and with respect to the scope of plaintiffs' Public Health Law § 238 claims (third through sixth causes of action). Plaintiffs state that the proposed amended complaint only retains these claims to preserve plaintiffs' appellate rights. Thus, they assert, the only issue here pertains to the amended fraudulent billing allegations contained in the first cause of action and the request for clarification of the eighth cause of action.

The PC Defendants argue that, because the proposed amended complaint only seeks to amend a dismissed cause of action, plaintiffs are no longer entitled to amend as of right. The PC Defendants also argue, as do the "Non-PC Defendants," that leave to amend should be denied, because the proposed amended complaint does not rectify the pleading problems of the original complaint.

Discussion

Amendment of the First Cause of Action

As a preliminary matter, as to the PC Defendants, plaintiffs are entitled to amend their pleading once, without leave of court, because the time period in which these defendants have to respond to the original complaint has not yet expired (CPLR 3025 [a]; *Johnson v Spence*, 286 AD2d 481). It is undisputed that plaintiffs cannot amend the complaint as of right against the Non-PC Defendants, because the complaint was dismissed as to them, and, therefore, a responsive pleading is no longer required (*see* CPLR 3025 [a] ["A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it."]).

Even if defendants were correct in asserting that plaintiffs do not have the right to amend the complaint as to the previously dismissed cause of action, the Court grants them leave to do so regarding the billing fraud component of the first cause of action. The amended complaint contains sufficient particularity regarding the allegations of billing fraud, including the performance of unnecessary services, as part of an alleged scheme among the PC Defendants and other nonparty entities (*see e.g.*, ¶¶ 98-99, 150-155). The complaint describes the interlocking relationship of the defendants and nonparties, such as the "Bronx Clinic," Tatiana Rybuk, and the "Rybuck PCs," and alleges, in adequate detail, that defendants participated in the fraud (*Tompkins PLC v Bangor Punta Consol. Corp.*, 194 AD2d 493, *lv dismissed* 82 NY2d 888). Additionally, the allegations in the proposed amended complaint are broad enough to encompass the Non-PC Defendants (*see e.g.*, ¶¶ 79-85, 130-135, 146-155). Contrary to defendants' assertion, the record contains evidence indicating that the individual defendants were involved in

the medical services at issue (*see e.g.*, Exhibit L to Reply Affidavit of William J. Natbony, Esq.).

Unlike the conclusory allegations pertaining to billing fraud in the original complaint, the allegations are now sufficient to withstand this motion to dismiss addressed to the pleading (*Goldberg v Lee Express Cab Corp.*, 227 AD2d 241). The court should not interpret CPLR 3016 (b) so strictly to strike an otherwise valid cause of action where it may be impossible for the plaintiff to state in detail the circumstances constituting the fraud (*Oxford Health Plans (N.Y.) v Bettercare Health Care Pain Mgt. & Rehab PC*, 305 AD2d 223). This is particularly true here where the plaintiffs, insurance companies reimbursing covered persons, were not directly involved in the transactions constituting the alleged fraud.

Moreover, although much of the specificity in the amended complaint pertains to alleged unlawful kickbacks, that claim does not duplicate the third through sixth causes of action, because the complaint also alleges, in specificity, that defendants performed unnecessary services as part of the kickback scheme.

Further, plaintiffs have attached exhibits to the moving papers, as well as affidavits of two doctors that purport, for purposes of this motion addressed to the pleadings, to establish merit (*see e.g.*, Affidavits of Lawrence K. Spitz, M.D. and Mark Mishkin, M.D.). Plaintiffs' counsel also represents that he verified the complaint, pursuant to CPLR 3020 (d), because plaintiffs are located outside the county where his office is located. Counsel represents that he has specific personal knowledge of many of the allegations based upon his participation in the due diligence preparation of the complaint, and that many of the allegations are based, in part, upon publicly available documents that counsel obtained (Reply Memorandum, at 23). Plaintiffs also submitted the affidavit of L. Dennis Chambers, an "Analyst" with the "Special

Investigations Unit" of plaintiff Allstate Insurance Company, that, together with the exhibits attached to the affidavit, support the allegations of fraud for the purpose of demonstrating a meritorious claim.

Defendants also argue that the claims regarding the quality of scans or the accuracy of readings are untimely, because plaintiffs failed to object within a 30-day period Insurance Law § 5106 (a) and 11 NYCRR 65.15 (g) (3) require. Defendants acknowledge that, in the Prior Decision, the Court "suggested that allegations of fraud would not be precluded by the 30-day rule," but assert that the Court did not opine on the applicability of the 30-day rule to claims relating to the quality of scans or the accuracy of readings. This assertion is unpersuasive, however, because the proposed amended complaint cites the accuracy of the diagnostic testing as indicative of fraud.

Clarification of Eighth Cause of Action

The eighth cause of action, asserted against the PC Defendants, seeks a declaration that their activities are unlawful and that plaintiffs have no obligation to pay pending, previously denied and future no-fault claims of any of the PC defendants.

On the prior motion, defendants argued that plaintiffs are not entitled to declaratory relief, because the alleged conduct does not obviate plaintiffs' obligation under the no-fault law, and the scope of the declaration plaintiffs sought was overly broad. In the Prior Decision, the Court stated that defendants had not moved for dismissal of the third through sixth causes of action, alleging a violation of the Public Health Law, and, thus, defendants had not established why the declaration plaintiffs sought could not pertain to the claims in those third through sixth causes of action. Hence, dismissal of this cause of action would be premature.

Plaintiffs argue that the Court should clarify the scope of the eighth cause of action. No clarification is necessary. According to the Prior Decision, to the extent that the eighth cause of action for declaratory relief related to the surviving causes of action, *i.e.*, the third through sixth causes of action (none of which the Court had dismissed), the claim stated a cause of action. It appears that, in effect, plaintiffs are seeking expansion, rather than clarification, of the scope of this cause of action by deeming it applicable to the portions of the complaint that the Court had dismissed (*see* Affidavit of William J. Natbony, Esq., at ¶ 30).

Accordingly, it is

ORDERED that plaintiffs' motion is granted to the extent of (1) deeming their amended complaint served upon defendants Belt Parkway Imaging, P.C., Diagnostic Imaging P.C., Metroscan Imaging, P.C., and Parkway MRI, P.C., pursuant to CPLR 3025 (a), and directing these defendants to answer the amended complaint within 20 days after service of their order with notice of entry; (2) vacating any judgment entered in favor of defendants Herbert Rabiner, M.D., Jay Katz, Vladimir Shtrakhman, Metroscan Resonance Imaging, Inc., and Parkway Magnetic Resonance Imaging, Inc., granting plaintiffs leave to serve the amended complaint upon those defendants, pursuant to CPLR 3025 (b), deeming the amended complaint served upon those defendants, and directing them to answer the amended complaint within 20 days after service of the order with notice of entry.

Dated: December 22, 2004

ENTER:

J.S.C.