

Empire Healthcare Assur., Inc. v McVeigh

2007 NY Slip Op 32602(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0603533/2006

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Empire Healthchoice ASSURANCE, INC.

INDEX NO. 603533/06

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

McVeigh, DENISE FINN

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied for
attached

FILED

AUG 21 2007

COUNTY CLERK

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

Dated: 8/14/07
[Signature]

[Signature]
EMILY JANE GOODMAN /SG

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
EMPIRE HEATHCARE ASSURANCE, INC.
d/b/a EMPIRE BLUE CROSS BLUE SHIELD,

Plaintiff,

-against-

Index No. 603533/06

DENISE FINN McVEIGH, individually
and as Administratrix of the Estate of
JOSEPH E. McVEIGH,

FILED

Defendant.

AUG 21 2007

-----x
EMILY JANE GOODMAN, J.S.C.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff health insurer seeks to recover health benefits paid for medical expenses incurred by the decedent Joseph E. McVeigh prior to his death from his estate and his surviving spouse, individually.

Defendant Denise Finn McVeigh moves to dismiss this action pursuant to CPLR 3211(a)(5), CPLR 205(a) and SCPA § 1806¹ and 1810, on the ground of the expiration of the statute of limitations, and/or the doctrines of election of remedies and/or collateral estoppel. Dismissal of the claims asserted against defendant in her individual capacity is sought pursuant to CPLR 3211(a)(7). In the alternative to dismissal, defendant seeks to transfer venue of this action to the Supreme Court of Suffolk County and/or removal to the Surrogate's Court of this county, pursuant to CPLR 325(a), 325(e) and/or 510.

On May 19, 1997, Joseph E. McVeigh was involved in a motor vehicle accident in which he sustained catastrophic personal injuries that ultimately led to his death. The decedent was

¹While defendant cites SCPA § 1806 in her notice of motion, as discussed herein, she relies on section 1802 and 1803.

employed by the federal government, and was enrolled in the Services Benefit Plan, one of the federal government's nation-wide health benefits plans for federal employees and their dependents. Plaintiff Empire Healthchoice Assurance, Inc. d/b/a Empire Blue Cross Blue Shield (Empire) is the entity that administers the Service Benefit Plan in New York. Empire alleges that it paid \$157,309.06 for medical treatment relating to the decedent's injuries.

Tort actions were filed in 1998 on the decedent's behalf, and on behalf of defendant and her minor child, against third parties that allegedly caused the decedent's injuries. These actions were venued in Suffolk County Supreme Court where the accident occurred.

By letter dated November 17, 1999, Empire's counsel wrote to defendant's counsel and advised that Empire had a right of subrogation for medical benefits payable to and on behalf of the decedent as a result of the May 19th accident, and asserted a right to a lien on any recovery obtained by defendant in the tort actions. Defendant's counsel responded in a letter dated December 17, 1999, acknowledging Empire's right of subrogation, but claiming that such right of subrogation does not constitute a lien against a recovery in a personal injury case.

Joseph McVeigh died on November 9, 2001. Letters of Administration were issued to defendant on April 25, 2002 by the Surrogate's Court of New York County, where she resides.

The tort actions were settled on March 19, 2003. Defendant stipulated to settle the actions for \$2,675,000, with the respective shares for the estate, for herself and for her minor child to be apportioned by the Surrogate's Court. Empire appeared through counsel and consented to the settlement, on the condition that counsel for defendant hold \$100,000 in escrow until there was resolution of Empire's claim to a lien in the approximate amount of \$175,000. The transcript indicates that counsel for defendant represented to the court that Empire was

present in the courtroom that date by the law firm of Morrison, Cohen, Singer and Weinstein, LLP, consented to the settlement and to the escrow, and “agrees that they will bring any claim that they intend to bring within thirty days of this stipulation or be time barred from doing so.” Defendant’s lawyer further represented that Empire’s counsel had agreed that Empire “will not bring any claim against anyone else involved in this case to assert their lien, other than the estate of Joseph McVeigh.” Empire’s counsel was then asked on the record whether he agreed to what had been stated, and he stated that he had the authority to agree, and did so stipulate.

On April 18, 2003, Empire elected to assert its claim in the Southern District of New York against defendant, as administratrix of her husband’s estate. On September 18, 2003, the district court issued an opinion and order dismissing that action for lack of federal subject matter jurisdiction. On September 23, 2003, a civil judgment was entered and the case closed. Empire timely appealed the judgment to the Second Circuit Court of Appeals. On January 14, 2005, the Second Circuit affirmed the district court’s dismissal of Empire’s case for lack of subject matter jurisdiction. Empire then petitioned the United States Supreme Court for certiorari, which was granted, but, by opinion dated June 15, 2006, the Supreme Court affirmed the dismissal of Empire’s case. Empire Healthchoice Assurance, Inc., et al. v McVeigh, ___ US ___, 126 S Ct 2121 (2006).

In the meantime, on August 2, 2005, the Surrogate’s Court issued a decree approving the compromise and settlement of the underlying personal injury and wrongful death cases and allocated the settlement proceeds.

On October 6, 2006, Empire filed the summons and complaint in this action.

Defendant argues that this action is time-barred, both under CPLR 213’s six-year statute

of limitations, and because Empire failed to commence this action within 30 days of the settlement of the tort actions or within 30 days of termination of the federal action.

Even assuming that CPLR 213 applies to Empire's claim,² Empire's breach of contract claim did not accrue when the last medical payment was made on June 1, 2000, but in March of 2003 when the tort actions were settled and defendant refused to recognize Empire's lien. See Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 (1993) (claims accrue in a breach of contract action and the statute of limitations begins to run from the time of the breach). In any event, the applicable statute of limitations is the contractually-agreed upon 30 days from the settlement of the tort action. It is well-settled that parties may agree, by way of a stipulation, to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable statute of limitations. CPLR 201; John J. Kassner & Co., Inc. v City of New York, 46 NY2d 544, 550-51 (1979); Boss v American Exp. Financial Advisors, Inc., 15 AD3d 306, 308 (1st Dept 2005), affd 6 NY3d 242 (2006).

Empire argues that the first federal action was timely commenced within 30 days of the settlement, and that this state court action was timely filed within six months of the termination of the federal court action, relying on the tolling provision of CPLR 205(a). This section provides, in full:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, ..., may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that

²Defendant also argues both that the parties contractually agreed to a 30-day statute of limitations on March 19, 2003.

the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

CPLR 205(a) plainly applies where, as here, a timely-commenced federal action is dismissed for lack of federal subject matter jurisdiction. Dyer v Cahan, 150 AD2d 172, 173 (1st Dept 1989); see also Diffley v Allied-Signal, Inc., 921 F2d 421, 423 (2d Cir 1990); Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 18 F Supp 2d 297, 304 (SD NY 1998). There is no dispute that the federal court action was timely commenced on April 18, 2003. It is further undisputed that this action was commenced within six months of the “termination” of the federal court action, i.e, the U.S. Supreme Court’s decision determining Empire’s final appeal. See, e.g., Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C., 5 NY3d 514, 519-20 (2005); Lehman Bros., Inc. v Hughes Hubbard & Reed, L.L.P., 92 NY2d 1014, 1016 (1998); Bernardez v City of New York, 100 AD2d 798, 800 (1st Dept 1984). And the rule in New York is that CPLR 205(a) applies to a period of limitations fixed by contract. Flans v Federal Ins. Co., 43 NY2d 881, 882 (1978); Buchholz v U.S. Fire Ins. Co., 269 App Div 49, 50-51 (1st Dept), appeal dismissed 294 NY 807 (1945); Gustafson v A-B Svenska Amerika Linien, 258 App Div 734 (2d Dept 1939); Littrell v Allemania Fire Ins. Co. of Pittsburgh, Pa., 224 App Div 523, 524 (3d Dept 1928), revd on other grounds, 250 NY 628 (1929). Thus, even though Empire stipulated to be bound by a shorter statute of limitations, it is still entitled to the benefit of CPLR 205(a).

Empire fully complied with the stipulation of March 19, 2003, requiring it to file any action against the decedent’s estate within 30 days. That stipulation did not require Empire to file suit in any particular court or jurisdiction. Nor did the stipulation include any agreement on

Empire's part to waive the application of CPLR 205(a) or its statutory rights thereunder. To waive a legal right, a party's actions must be clear, unequivocal and deliberate. Silverman v Silverman, 304 AD2d 41, 46 (1st Dept 2003); Santamaria v 1125 Park Ave. Corp., 238 AD2d 259, 260-61 (1st Dept 1997).

Defendant also argues that if Empire is entitled to the tolling provision provided by CPLR 203(a), it should be limited to thirty days, because it was the intent of the parties to the March 19, 2003 stipulation that the issue of Empire's lien be determined expeditiously. It is Empire's position that CPLR 205(a) provided it within an absolute right to re-commence its suit within six months.

The Court of Appeals has held that "when the language of a statute is clear and unambiguous, the statute should be construed so as to give effect to the plain meaning of the words." In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 93 NY2d 729, 743-744 (1999); Pultz v Economakis, 40 AD3d 24, 28 (1st Dept 2007). "[T]he courts are not at liberty to hold that the Legislature had an intention other than its language imports, and new language cannot be imported into a statute to give it a meaning not otherwise found therein." McKinney's Cons Laws of NY, Book 1, Statutes § 94. CPLR 205(a) could have been written to require the second action be commenced, for example, "within six months after the termination of the prior action or the expiration of the applicable statute of limitations, applied anew, whichever is shorter," but it does not. Accordingly, while the plain intent of the parties to the stipulation was to have the issue of Empire's lien litigated expeditiously after settlement of the tort actions, this court is constrained, however unfair it seems to defendant, by the plain and unambiguous language of CPLR 205(a) to hold that this action was timely re-commenced against

defendant, as administratrix of the decedent's estate.

Defendant next argues that this action is untimely under Sections 1802 and 1803 of the Surrogate's Court Procedure Act (SCPA), because Empire did not present its claim in writing to the estate within seven months of the issuance of letters of administration. She further argues that Empire failed to commence an action within 60 days of the claim's rejection, as purportedly required by SCPA § 1810. Both claims are misplaced.

Sections 1802 and 1803 of the SCPA do not function as a statute of limitation, rather their purpose is simply to protect the fiduciary personally from the claims of possible unknown creditors. 4 Cox-Arenson-Medina, NY Civ Prac: SCPA, ¶ 1802.03, at p. 18-9 (2006). Section 1810 of the SCPA makes clear that a party need not present its claim to the estate as a pre-requisite to filing an action in law or equity. In addition, defendant's reliance on the SCPA makes no sense factually. Pointing to the December 17, 1999 letter from her litigation counsel, defendant argues that Empire's claim was rejected two years before Joseph McVeigh died. Empire could not have presented a claim at that time, since Joseph McVeigh was still alive. Empire's claim did not accrue until the tort actions were settled in March 2003, which was already well over seven months from issuance of the letters of administration to defendant.

Defendant's reliance on the doctrines of collateral estoppel and/or election of remedies is equally misplaced. There has been no adjudication of Empire's claim on the merits, an essential element of collateral estoppel. See Angcl v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368, 371 (1st Dept 2007); see also Oakes v Muka, 31 AD3d 834 (3d Dept 2006) (neither collateral estoppel or res judicata applies to a dismissal of prior federal action for lack of subject matter jurisdiction). Nor was the commencement of the federal court action an election of remedies,

which involves a choice made between “co-existing inconsistent remedies.” 331 East 14th St. LLC v 331 East Corp., 293 AD2d 361 (1st Dept), lv dismissed 98 NY2d 727 (2002).

Defendant moves to dismiss the claims asserted against her individually on the grounds that Empire stipulated in March of 2003 that it would only sue her husband’s estate and because no claim lies against her personally where the medical benefits were paid to the decedent or his medical providers for treatment rendered to him before he died. Empire contends that it did not stipulate to waive any causes of action that might arise in the future, and contends that a claim arose against the defendant in her individual capacity in 2005 when she personally distributed the estate’s assets with knowledge of Empire’s claim, and without notice to Empire. In addition, Empire contends that, pursuant to EPTL §§ 12-1.1 and 12-2.1, it may pursue its claim against defendant in her individual capacity as a beneficiary of the estate.

The court need not reach these issues, since the defendant, in her application to the Surrogate’s Court for an accounting and permission to distribute the estate’s assets, expressly agreed that she would personally pay any award or judgment recovered by Empire against the estate from the “share of the settlement proceeds received by her.” Affidavit of Denise Finn McVeigh sworn to on July 13, 2004, at ¶ 8. Having made this representation to the Surrogate’s Court, she is estopped from claiming that Empire may not sue her personally for the balance of any amount awarded over and above the \$100,000 placed in escrow. Judicial estoppel prevents a party from asserting a position that is inconsistent with one which the party has previously and successfully set forth in a prior legal proceeding. Gale P. Elston, P.C. v Dubois, 18 AD3d 301, 303 (1st Dept 2005).

Finally, defendant argues that this action should either be removed to the Surrogate’s

Court, New York County, pursuant to CPLR 325(e), on the ground that it affects the administration of a decedent's estate, or transferred to the Suffolk County Supreme Court.

Neither argument has merit.

The assets of the estate have already been accounted for and fully distributed. As such, Empire's breach of contract action will plainly not interfere with any ongoing administration of the decedent's estate. Defendant's counsel admits that the \$100,000 set aside upon settlement of the tort actions is still being held in escrow, and defendant agreed that she would be personally liable for the balance from her share of the settlement proceeds.

A change of venue to the Supreme Court of Suffolk County is also not warranted, whether it is pursuant to CPLR 325(a) or 510.³ New York, where both parties reside, is clearly an appropriate venue for this breach of contract action. See CPLR 503(a). Defendant argues that Hon. Edward D. Burke, the Supreme Court Justice who presided over the settlement of the tort actions, is more familiar with the terms and conditions of the settlement, the allocation of the proceeds of the various causes of action and the payments made. Defendant argues that it is "the rule of this case" that Suffolk County is the proper forum for the adjudication of Empire's reimbursement claims, citing to a statement by the United States Supreme Court that "the state court in which the personal-injury suit was lodged is competent to apply federal, to the extent it is relevant, and would seem best positioned to determine the lawyer's part in obtaining, and fair share in, the tort recovery." Empire Healthchoice Assurance, Inc., et al. v McVeigh, 126 S Ct at

³Again, while defendant cites to CPLR 510 in her notice of motion, she relies only on CPLR 325(a) in her supporting papers. However, that statute only applies to the removal of an action commenced in the wrong court, and does not apply to changes in venue amongst the various Supreme Courts.

2137. However, the Supreme Court was never asked to determine which state court should hear Empire's claim, and thus this statement is clearly dicta, made only in response to the argument that any reimbursement to Empire should take into account the attorneys' fees expended by defendant to obtain the tort recovery.⁴ The tort actions were dismissed over four years ago, and the amount of fees expended by defendant's counsel in the tort actions is a matter of record. If this issue is relevant to Empire's claim, this court is equally capable of adjudicating the issue.

For the foregoing reasons, it is hereby

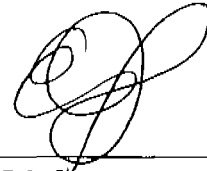
ORDERED that the defendant's motion is denied; and it is further

ORDERED that defendant shall serve and file an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

This Constitutes the Decision and Order.

Dated:  ~~September~~ 4, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

AUG 21 2007

⁴Furthermore, it is well settled law that where subject matter jurisdiction is lacking, a court has no power to adjudicate and should refrain from any further exercise of power. Matter of Vanessa E., 190 AD2d 134, 139 (1st Dept 1993); Dyer v Cahan, 150 AD2d at 173; see also American Fire & Cas. Co. v Finn, 341 US 6, 17-18 (1951).