

**Blue Cross of Cal. Inc. v American
Intl. Underwriters Corp.**

2007 NY Slip Op 33487(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0101922/2006

Judge: Deborah A. Kaplan

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: HON. DEBORAH A. KAPLAN
Justice

PART 22

**BLUE CROSS OF CALIFORNIA INC. a/s/o
LINDA PANCIARELLO**

INDEX NO. 101922/06

- v -

MOTION DATE _____

**AMERICAN INTERNATIONAL UNDERWRITERS
CORPORATION; THE ROBERT PLAN OF NEW
YORK.**

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to 5, were read on this motion and cross-motion for summary judgment on the issue of liability.

PAPERS NUMBERED

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

1,2

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

5

Cross-Motion: Yes No

FILED
5
OCT 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

I. Factual and Procedural Background

This subrogation action arises from a motor vehicle accident wherein Linda Panciarelo was injured when the vehicle she was operating was struck by another on February 11, 2003. Panciarelo received no-fault benefits from her automobile liability carrier, defendants American International Underwriters Corporation (American), for medical expenses incurred from the date of the accident until July 25, 2003. American discontinued Panciarelo's no-fault benefits on June 25, 2003. The denial was based upon a medical examination of Panciarella by Dr. Benzion Benatar, at American's request. Thereafter, Panciarelo's health insurance carrier, plaintiff Blue Cross of California Inc. (Blue Cross), paid for her medical expenses, which included reconstructive surgeries of both the right and left knee in 2004.

In February 2006, Blue Cross commenced this subrogation action against American and its claims administrator, The Robert Plan of New York (The Robert Plan) to recover the sum of \$50,828.40, the sum it paid for Panciarelllo's medical expenses. Blue Cross now moves for summary judgment on the issue of liability asserting that the defendants' discontinuance of no-fault benefits was improper. American opposes the motion and cross-moves, *inter alia*, to dismiss the complaint on the ground that Blue Cross, not being a provider of health care services, lacks standing to bring this action under 11 NYCRR 65-3.11 (New York No-Fault Regulation 68). Co-defendant The Robert Plan also opposes Blue Cross' motion, on the ground that it is no longer administering American's claims. In reply, Blue Cross argues that it is entitled to reimbursement under the principle of equitable subrogation. The cross-motion is addressed first since it is dispositive.

II. American's Cross-Motion for Summary Judgment

American cross-moves, pursuant to CPLR 3212, for summary judgment and, pursuant to CPLR 3211(a)(3) and (a)(7), to dismiss the complaint in its entirety on the ground that Blue Cross lacks standing to bring this action since it is not a provider of health care services as required by 11 NYCRR 65-3.11 and there is no privity of contract between the two entities or any other basis to maintain this action. Co-defendant The Robert Plan supports American's motion. In opposition, Blue Cross argues that it is not seeking reimbursement under 11 NYCRR 65-3.11, but, rather, under the common law doctrine of subrogation and thus has standing.

11 NYCRR 65-3.11 provides, in relevant part, that "an insurer shall pay benefits for any element of loss, other than death benefits, directly to the applicant or, ...upon assignment by the applicant... shall pay benefits directly to providers of health care services..." Blue Cross, as a health insurer, is clearly not a "*provider* of health care services." Indeed, the courts have consistently afforded the regulation a narrow construction. See e.g. Allstate Ins. Co. v Belt Parkway Imaging, Inc., 33 AD3d 407 (1st Dept. 2006); V.S. Medical Services, P.C. v New York Central Mutual Fire Ins. Co., 14 Misc 3d 134(A) (App Term 2nd and 11th Jud Dist. 2006); Craig Antell, D.O., P.C. v. New York Cent. Mut. Fire Ins. Co., 11 Misc 3d 137(A) (App Term 1st Dept. 2006); A.B. Medical Services PLLC v. Liberty Mut. Ins. Co., 9 Misc 3d 36 (App Term 2nd and 11th Jud Dist. 2005). Thus, 11 NYCRR 65-3.11(a) is unavailing to Blue Cross in this action.

Nor may Blue Cross maintain its claims against these defendants under the principle of equitable subrogation. "Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused the loss for which the insurer is bound to reimburse." Kaf-Kaf, Inc. V Rodless Decorations, Inc., 90 NY2d 654, 659 (1997). As such, where, as here, "an insured is driving a car and is hit and injured by another driver" and files a claim with her insurer, "the insurer then has the right, under the common law of subrogation, to 'stand in the shoes' of the insured and seek recompense from the third-party tortfeasor for the amount paid to the insured" so long as the insured has been made whole. ELRAC, Inc. v. Ward, 96 N.Y.2d 58, 75-76 (2001) *quoting* North Star Reins. Corp. v Continental ins. Co., 82 NY2d 281, 294 (1994); see Winkelmann v. Excelsior Ins. Co., 85 N.Y.2d 577 (1995); Federal Ins. Co. v. Spectrum Ins. Brokerage Services, Inc., 304 A.D.2d 316, 317 (1 Dept. 2003). "This right of subrogation is based upon principles of equity and natural justice." Allstate Ins. Co. v. Stein, 1 N.Y.3d 416, 422 (2004); *quoting*, Ocean Acc. & Guar. Corp. v. Hooker Electrochemical Co., 240 N.Y. 37, 47 (1925). Under these principles, the Court of Appeals has held that a health insurer may sue a tobacco company for injuries allegedly sustained by its insured from smoking tobacco products. In Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200 (2004), the Court found that while the insurer had no standing to sue under General Business Law § 349, a consumer protection statute, it was not precluded from recovering damages in an action in equitable subrogation. See also Principe v City of New York, 11 Misc 3d 879 (Sup Ct, Richmond County 2006).

Similarly, while plaintiff Blue Cross has no standing to bring this action against these defendants under 11 NYCRR 65-3.11, it may have a subrogation cause of action against the individual whose vehicle struck Panciarellò's vehicle, the "third-party tortfeasor" spoken of in the decisional authority. However, research reveals and Blue Cross cites to no statutory or decisional authority which would authorize it to maintain a subrogation action against these defendants to recover the sums it was contractually obligated to pay to its insured, Panciarellò. To allow it to do so would create an entirely new right of action unsupported by the long settled principles of equitable subrogation. Accordingly, defendant American's motion to dismiss the complaint is granted.

III. Blue Cross' Motion for Summary Judgment

In light of the disposition of the cross-motion, Blue-Cross' motion for summary judgment on the issue of liability is moot. Thus, the Court need not reach the merits of that motion, but notes that the medical findings set forth in Dr. Benatar's report, the sole basis for the denial, do not compel American's conclusion in its denial form that future orthopedic treatment was unnecessary. Nor was The Roberts' Plan opposition to Blue Cross' motion persuasive. The fact that it had stopped administering American's claims after December 31, 2005, is of no moment since Blue Cross' claim, were it viable, concerns the time period of July 25, 2003, through April 10, 2003.

IV. Conclusion

For these reasons and upon the foregoing papers, it is,

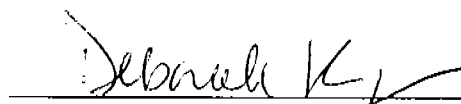
ORDERED that the plaintiffs' motion for summary judgment on the issue of liability is denied as moot; and it is further,

ORDERED that the cross-motion of defendant American International Underwriters Corp. to dismiss the complaint pursuant to CPLR 3212 and CPLR 3211(a)(3) and (a)(7) is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint in its entirety, with costs and disbursements to defendants, as taxed by the Clerk.

This constitutes the Decision and Order of the Court.

Dated: October 15, 2007



Deborah Kaplan

DEBORAH A. KAPLAN
J.S.C.

FILED
OCT 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE