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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 34

Travelers Indemnity Co.

-v-

Nida Radical

INDEX NO. 102007/07

MOTION DATE

MOTION SEQ. NO. 021

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order.

FILED
JUL 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/09

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

...THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------- X

In the Matter of the Application of

THE TRAVELERS INDEMNITY COMPANY and its Various Property Casualty Affiliates and Subsidiaries,

Petitioner,

-against-

MILAN MEDICAL, P.C.,

Respondent.

---------- X

Index No.: 102247/09

DECISION and OR[illegible]R

KORNREICH, SHIRLEY WERNER J.:

Petitioner, Travelers Indemnity Company (Travelers), brings this proceeding seeking: 1) a stay of two AAA arbitrations (Case Nos. 412008042415 and 412008040419) for the purpose of pre-arbitration discovery,[1] pursuant to CPLR §7503; 2) removal of three lower court proceedings (Case Nos. 138277/06, Civ. Ct. Kings County; 38524/02, Civ. Ct. Queens County; and 37930/03, Civ. Ct. Bronx County) to this court for consolidation, pursuant to CPLR §§ 325(b) and 602(b); 3) a stay of all lower court proceedings, both filed and as-yet-unfiled, involving the parties, pursuant to CPLR §2201; and 4) to compel Milan to comply with pre-arbitration discovery requests. Milan opposes.

I. Background

The gravamen of the dispute is Travelers refusal to disburse no-fault payments to Milan a medical provider. Travelers, a Connecticut corporation authorized to do business in New York, maintains an office at 485 Lexington Avenue, New York, NY. Travelers provides, among other things, automobile insurance subject to New York State's no-fault insurance scheme.

[1] Travelers also asks that a stay be granted for the purpose of "preliminary proceedings," but fails to delineate what those proceedings are or why a stay of arbitration would be appropriate.

The New York Department of State lists Milan as a "Domestic Professional Corporation." It purportedly is owned by German Laufer, M.D., with an office at 401 76th Street, Brooklyn, NY. Milan provides primary medical care services, such as patient treatment and testing, and accepts assignment of patient insurance benefits as payment.

Travelers contends that the true owner of Milan is a businessman named Jacob Kagan and that Dr. Laufer is merely the "on paper" owner. Were this the case, Milan's corporate structure would contravene Education Law §6507(4) and Business Corporation Law §§ 1507 and 1508, which bar lay-people from owning medical corporations.

Travelers submits an amended complaint filed by State Farm Mutual Automobile Insurance in the United States District Court for the Eastern District of New York (CV 04 2609). In that complaint, which alleges a RICO claim, Milan, Mr. Kagan, and Dr. Laufer are among the defendants. The complaint, *inter alia*, outlines the alleged fraudulent incorporation of Milan. Travelers also relies upon other evidence designed to raise an inference of fraud on the part of Milan, *viz.*: several search warrants executed at Mr. Kagan's businesses by the New York State Attorney General in November 2006; indictments of Mr. Kagan and Dr. Laufer for various crimes related to insurance fraud; affidavits by three doctors who engaged in similar fraudulent business schemes; and Travelers' own internal "files" and "investigations" (Travelers elected not to attach these files and investigative reports to its motion or to provide specific information as to what they contain).

Travelers, however, never alleged any of the above in a required, timely NF-10, a denial of claim form. Nevertheless, it refused to disburse payments to Milan. Seeking payment from Travelers, Milan filed the three civil court suits and two arbitrations which now form the subject of this motion (collectively, "the subject cases").

At least for the purposes of the present motion, neither party disputes the following: 1) Milan actually rendered the services claimed in each of the subject cases; and 2) the individual assignors whose insurance benefits Milan seeks to recover, were actually covered by a Travelers policy at all times relevant. The sole question presented is whether Travelers may deny payment upon proof of Milan's ineligibility to receive first-party insurance benefits pursuant to 11 NYCRR §65-3.16(a), despite Travelers failure to issue a timely NF-10.

II. Discussion

Under New York's no-fault automobile insurance scheme, carriers must pay a claim or deny such claim within 30 days. Insurance Law §5106(a); 11 NY CRRR §§65-3.4(c)(11), 65-3.8. An insurer who fails to either timely deny a claim or deny the claim with proper specificity is generally precluded from interposing a defense to that claim. *Hosp. for Jt. Disease v Travelers Prop. Cas. Ins. Co.*, 9 N.Y.3d 312, 318 (2007); *Nyack Hosp. v Metropolitan Property & Cas. Ins. Co.*, 16 A.D.3d 564 (2d Dept. 2005) (granting summary judgment due to incomplete NF-10).

Contrary to the suggestions of Milan, however, preclusion does not always automatically follow from failure to properly disclaim on an NF-10. An exemption exists for those defenses predicated upon claims which are not covered by the insurance policy. *Central General Hospital v CHUBB Group of Insurance Companies*, 90 N.Y.2d 195, 199 (1997)(where injuries did not arise from automobile accident, they were not covered by policy and failure to timely disclaim coverage did not bar defense); *Matter of Worcester Ins. Co. v Bettenhauser*, 95 N.Y.2d 185, 188-189 (2000) ("[When] the insurance policy does not contemplate coverage in the first instance . . . requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed."); *see also Matter of Allstate Ins. Co. v Massre*, 14 A.D.3d 610 (2d Dept.

2005)(where injured party intentionally caused automobile accident, it was not covered by policy and insurer could assert defense despite failure to properly deny claim). The Court of Appeals, however, has cautioned that the exception to the preclusion remedy is "a 'narrow' one for those 'situations where an insurance company raises a defense of lack of coverage.' " *Fair Price Medical Supply Corp. v Travelers Indem. Co.*, 10 N.Y.3d 556563 (2008) citing to *Hosp. for Jt. Disease, supra,* 9 N.Y.3d 318. At issue in this proceeding, thus, is not whether the affirmative defense particular to Travelers' strategy *has been* waived by its failure to timely assert it, but whether it *can* be waived.

A. Validity of Travelers' Asserted Defense

Failure to meet licensing requirements renders health care providers ineligible for reimbursement under New York State's no-fault insurance scheme. 11 NYCRR §65-3.16(a)(12); *State Farm Mut. Auto. Ins. Co. v Mallela*, 4 N.Y.3d 313, 322 (2005). Consequently, insurance carriers may withhold payment from such providers even if services, albeit of the unlicensed variety, have actually been rendered. *Id.* As explained by *Mallela* at 320:

> Insurance Law §5102 *et seq.* requires no-fault carriers to reimburse patients (or, as in this case, their medical provider assignees) for "basic economic loss." Interpreting the statute, the Superintendent of Insurance promulgated 11 NYCRR 65-3.16(a)(12)(effective April 4, 2002) and excluded from the meaning of "basic economic loss" payments made to unlicensed or fraudulently licensed providers, thus rendering them ineligible for reimbursement.

Hence, fraudulently licensed providers are not covered under no fault insurance.

The *Mallela* defense, *ergo*, is a coverage defense. As such, it is similar to the *CHUBB*, 90 N.Y.2d 195, and *Massre,* 14 A.D.3d 610, exceptions to the preclusion rule. Indeed, a number of courts have so held, finding that an insurer's failure to timely assert the *Mallela* defense did not waive it. *Multiquest, P.L.L.C. v Allstate Ins. Co.*, 17 Misc.3d 37 (App. Term, 2d Dept., 2007); *First Aid Occupational Therapy v State Farm Mut. Auto. Ins. Co.*, 21 Misc.3d 128A (App. Term, 2d Dept., 2008); *Multiquest, P.L.L.C. v Allstate Ins. Co.*, 20 Misc.3d 136A (App. Term, 2d Dept., 2008); *Multiquest, P.L.L.C. v Allstate Ins. Co.*,

16 Misc.3d 137A (App. Term, 2d Dept., 2007); *Crossbay Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 15 Misc.3d 110, 111 (App. Term, 2d Dept,. 2007) (defense of fraudulently licensed provider is nonwaivable defense); *First Help Acupuncture P.C. v State Farm Ins. Co.*, 12 Misc.3d 130A, 2 (App. Term, 2d Dept., 2006) ("The defense that a provider is fraudulently licensed and hence ineligible for reimbursement of no-fault benefits under 11 NYCRR 65-3.16 (a) (12), is a nonwaivable defense and is therefore not subject to the 30-day preclusion rule."); *Manhattan Med. Imaging, P.C. v State Farm Mut. Auto Ins. Co.*, 20 Misc.3d 1144 (Civ. Ct., Richmond County, 2008); *A.B. Med. Servs. PLLC v Travelers Indem. Co.*, 20 Misc.3d 509 (Dist. Ct., Nassau County, 2008); *Eastern Medical, P.C. v Allstate Ins. Co.*, 19 Misc.3d 775 (Dist. Ct., Nassau County, 2008).

Curiously, Milan focuses its opposition, drawn primarily from the Court of Appeals' holding in *Fair Price*, 10 N.Y.3d 556, arguing that Travelers' *Mallela* defense, *i.e.*, fraudulent incorporation, does not meet the tight restrictions of the exception to preclusion outlined in *CHUBB*. Apparently, it is Milan's understanding that subsequent treatments of *Mallela*, which have universally interpreted it as creating an exception to the general preclusion rule, all depended upon a loose interpretation of *CHUBB*. Essentially, Milan argues that: 1) a narrow interpretation of *CHUBB* mandates rejection of all exceptions other than "pure coverage" defenses; and 2) the *Mallela* court's categorization of the regulation requiring a provider to be properly incorporated as a condition precedent for payment, as mere dicta. On this basis, Milan contends that *Fair Price*'s requirement of renewed strictness in the application of *CHUBB* exposes *Mallela*'s fraudulent incorporation defense to preclusion.

Milan misperceives the interplay between the *Mallela, CHUBB* and *Fair Price* decisions. The *CHUBB* court held that an insurer who had not rejected a claim within the 30 day period, was not precluded from asserting a lack of coverage defense regarding an alleged injury which did not arise from an insured incident, but was precluded from asserting the defense of excessive medical treatment. *CHUBB*, 90 N.Y.2d 199. The court distinguished between a policy exclusion and threshold coverage matters. *Id.* at 200.

Mallela, like *CHUBB*, spoke to a threshold coverage matter. It addressed no-fault payments claimed by unlicensed or fraudulently licensed providers who were "ineligible for reimbursement." *Mallela*, 4 N.Y.3d 319 quoting *Matter of Medical Socy of N.Y. v Serio*, 100 N.Y.2d 854, 866 (2003), *Mallela* noted: "'Here, however, the challenged regulations create not a new category of exclusion, but rather merely a condition precedent with which all claimants must comply in order to receive benefits under the statute.'" *Id.* at 321, n.3.

Fair Price does not overrule the precedent of *CHUBB* and *Mallela*. In fact, to determine if preclusion applies, the *Fair Price* court follows these precedents and asks whether the defense is an exception from coverage or "a lack of coverage in the first instance"? *Fair Price*, 10 N.Y.3d 565. *Mallela and CHUBB* are both examples of lack of no-fault coverage in the first instance.

While it is true that *Mallela* involved fraudulent incorporation and fraud occurred in *Fair Price*, the type of fraud that occurred in *Fair Price*, *i.e.*, billing for medical devices not delivered, is distinct from that covered by the *Mallela* exception and this case. The fraud in *Fair Price* was similar to the overbilling in *CHUBB* – a defense likened to an exclusion, not a threshold matter and, therefore, not excepted from preclusion.[2]

For all of the above reasons, this court finds that Travelers could not waive its fraudulent incorporation defense when it failed to file it as part of a timely NF-10 denial of claim form.

B. Propriety of Discovery Compulsion

Milan additionally argues that discovery requests must be denied if the moving party cannot demonstrate "good cause" [*Mallela*, 4 N.Y.3d 313, 322 (2005)], a burden, Milan argues, has not been met by Travelers. In the context of the present case, good cause is met via some

[2] *Mallela* and the class of defenses it protects do not even enjoy a cursory reference in the *Fair Price* opinion despite being repeatedly referenced in that case's arguments of counsel. Given the tenets of *stare decisis*, this court requires more than the tenuous factual connection Milan asserts before it is prepared to infer an overruling. *Cenven, Inc. v Bethlehem Steel Corp.*, 41 N.Y.2d 842, 843 (1977) ("[T]he doctrine of *stare decisis* should not be departed from except under compelling circumstances."). The overwhelming weight of authority decided post-*Fair Price* supports these conclusions of law.

demonstration of behavior tantamount to fraud, although what constitutes fraud is limited to something more than mere mismanagement or mistaken investment decisions. *Id.*

A closer look at CPLR Article 31 and subsequent treatment of *Mallela*'s good cause language, however, reveals this aspect of *Mallela* as unbinding dicta. *Andrew Carothers, M.D., P.C. v Insurance Companies Represented by Bruno, Gerbino & Soriano, LLP and Freiberg & Peck, LLP*, 13 Misc.3d 970, 973 (Civ. Ct., N.Y. County, 2006). Instead, the prevailing view post-*Mallela* has determined the more appropriate standard to be that enshrined within Article 31 itself, *i.e.*, the "material and necessary standard."[3] CPLR §3101(a); *One Beacon Ins. Group, LLC v Midland Med. Care, P.C.*, 54 A.D.3d 738, 740 (2d Dept. 2008); *Family Care Acupuncture, P.C. v AutoOne Ins.* Co., ___Misc.3d___, 2009 NY Slip Op 51058U (App. Term, 1st Dept.); *Midborough Acupuncture P.C. v State Farm Ins. Co.*, 13 Misc.3d 58, 60 (App. Term, 2d Dept., 2006); *Cambridge Medical, P.C. v Nationwide Property and Cas. Ins. Co.*, 19 Misc.3d 1110(A) (Civ. Ct., N.Y. County, 2008); *Carothers*, at 973.

Moreover, in the context of fraudulent incorporation, New York State courts employ a rule of lenity when determining whether a given request meets the material and necessary standard. *Cambridge Medical*, 19 Misc.3d 110(A) ("[T]he bar against which to measure whether a defendant has shown that its discovery requests on the issue of fraudulent incorporation are 'material and necessary' is quite low."). Indeed, courts in these suits often consider relatively circumstantial evidence, under the moniker "badges of fraud," and may even infer fraud from the existence of these badges provided such fraud tends to accompany or produce them. *Nonas v. Romantini*, 271 A.D.2d 292, 292 (1st Dept. 2000); *Pen Pak Corp. v LaSalle Natl. Bank of*

[3] What constitutes the appropriate standard is largely academic in these proceedings. Coupling New York's pervasive attempt at stamping out instances fraud such as that alleged with Travelers' submitted documents, this court would hold that "good cause" exists and, therefore, would compel discovery under that standard as well. *Cf. Continental Medical Acupuncture Services, P.C. v Travelers Ins. Co.*, 13 Misc.3d 132(A), (App. Term, 1st Dept., 2006); (unreported); *Valley Physical Medicine & Rehabilitation v New York Cent. Mut. Ins. Co.*, 193 Misc.2d 675, 676 (App. Term, 2d Dept., 2002).

Chicago, 240 A.D.2d 384, 386 (2d Dept. 1997). Yet the standard is not toothless. Mere allegations will not suffice unless accompanied by something demonstrating that the discovery sought is reasonably calculated to produce relevant evidence. *Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 A.D.2d 420, 421 (2d Dept. 1989).

"Badges of fraud" are numerous enough in the present case such that this court need only enumerate a select handful: 1) the pending RICO case against Milan, Mr. Kagan, and Dr. Laufer; 2) the separate indictments upon, *inter alia*, charges of fraud served upon Mr. Kagan and Dr. Laufer; 3) the search warrants executed against Mr. Kagan, as well as the accompanying circumstances. Milan complains, and is certainly correct in doing so, that none of these so-called badges constitute direct proof of fraud. Milan is incorrect, however, in its assertion that they, therefore, are inadequate or inappropriate grounds for discovery compulsion. *See Matter of Shelly v Doe*, 249 A.D.2d 756, 758 (3d Dept. 1998).

Travelers' request is complicated, however, by the fact that discovery here involves arbitral proceedings. Discovery compulsion requests growing out of such proceedings are traditionally more difficult to secure absent extraordinary circumstances. *Matter of Moock v Emanuel*, 99 A.D.2d 1003, 1003-1004 (1st Dept. 1984); *Hooper v Motor Vehicle Acc. Indem. Corp.*, 42 Misc.2d 446, 446 (Sup. Ct., N.Y. County, 1963). Indeed, the test is one of "necessity rather than convenience." *State Farm Mut. Auto. Ins. Co. v Wernick*, 90 A.D.2d 519, 519 (2d Dept.1982). Typically, the discovery sought must be such that denying it will undercut the requesting party's ability to present a "proper case" to the arbitrator. *Hendler & Murray, P.C. v Lambert*, 127 A.D.2d 820, 820 (2d Dept. 1987).

To this end, Milan complains that discovery must be denied because the discovery Milan already has turned over is sufficient for Travelers' purposes. It appears, however, that the

documents furnished by Milan are mostly – perhaps entirely – restricted to matters unrelated to its corporate structure. Moreover, the compulsory nature of the instant arbitral proceedings in question is exceptional, implying a greater allowance of judicial intervention and authority. *See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 N.Y.2d 214, 223 (1996) (compulsory arbitral proceedings subject to closer judicial scrutiny); *see also Smith v Firemen's Ins. Co.*, 55 N.Y.2d 224, 228 (1982).

As to the specific necessity of the method of discovery sought, Travelers is not required to prove the inadequacy of other, previously pursued methods. *New Era Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 2009 NY Slip Op 51140U, 3 (App. Term, 2d Dept. 2009) (unreported); *see also Edwards-Pitt v Doe*, 294 A.D.2d 395, 396 (2d Dept. 2002). Given the pertinence of the requested discovery to Travelers' proffered defense, the court directs Milan to comply with Travelers' discovery requests. *See One Beacon Ins. Group*, 54 A.D.3d at 738; *New Era Acupuncture*, *id.* at 2.

C. Propriety of Staying and Consolidation

Travelers' motion to stay the subject cases is otherwise unopposed, although this court notes that staying these proceedings would be proper in the present case even if opposed more directly by Milan. CPLR §§ 7503, 3102© (court authority to stay arbitral proceedings for discovery purposes); *Matter of Motor Veh. Acc. Indem. Corp.*, 19 A.D.2d 349, 352 (1st Dept. 1963) (expressing "no doubt" as to ability to stay arbitrations for valid discovery purposes). Milan's remaining resistance is instead constrained to several arguments against consolidation, each principally designed to persuade this court of the burden expected from what it styles as the forced juxtaposition of several quite disparate and exclusive cases.

A motion to consolidate may be granted if the subject suits share a common set of factual or legal questions. CPLR §602(a). Beyond this limitation consolidation is principally a matter of judicial discretion. *Mars Assoc. v. New York City Educ. Constr. Fund*, 126 A.D.2d 178, 185 (1st Dept. 1987); *Inspiration Enters. v. Inland Credit Corp.*, 54 A.D.2d 839, 839 (1st Dept. 1976); *Matter of Hill v. Smalls*, 49 A.D.2d 724, 724 (1st Dept. 1975) (describing such discretion as "wide"). In exercising this discretion, however, courts are well-advised to consider whether consolidation will contribute to or cause delays in litigation. CPLR §602(a) ("[T]he court, upon motion . . . may order the actions consolidated, and may make such other orders concerning proceedings therein *as may tend to avoid unnecessary costs or delay*.") (emphasis added); *Inspiration Enters.*, 54 A.D.2d at 840. Courts also may deny consolidation if the party opposing demonstrates that such consolidation would prejudice its case, although the burden of proving such prejudice lies with the resisting party. *Mars Assoc.*, 126 A.D.2d at 193; *Malgur v Saratogian, Inc.*, 47 A.D.2d 982, 983 (3d Dept. 1975).

Milan has satisfactorily demonstrated to this court that consolidation, at least to the extent sought by Travelers, is imprudent. While it is true that the outcome in each of the subject cases *may* turn on the same legal issue, *i.e.*, Travelers' fraudulent incorporation defense as per *Mallela*, the factual, and perhaps even legal, mismatch beyond this is too great to justify consolidation. Neither party disputes that the seven subject cases all involve different assignors, different accidents, different treatments, different dates, etc. which may give rise to different and perhaps conflicting defenses, issues and requirements beyond those covered by this opinion. More important, the instant proceeding merely asks for a stay of two arbitration in order that pre-arbitration discovery may take place.[4] It, thus, would not serve the ends of judicial economy or

[4] Movant also asks for the stay for the purpose of preliminary proceedings. Nowhere does movant explain what preliminary proceedings it refers to.

the interests of the parties to consolidate the civil court trial cases to this proceeding. Accordingly, it is

ORDERED that Travelers' petition to stay AAA arbitrations (Case Nos. 412008042415 and 412008040419) for purposes of discovery only is granted; and it is further

ORDERED that Travelers' petition to stay all filed and as-yet-unfiled Civil cases between the parties is denied; and it is further

ORDERED that Milan is directed to comply with Travelers' attached discovery requests; and it is further

ORDERED that Travelers' petition to consolidate and remove Civil Court Case Nos. 138277/06, Civ. Ct. Kings County; 38524/02, Civ. Ct. Queens County; and 37930/03, Civ. Ct. Bronx County, is denied.

ENTER:

J.S.C.

Date: July 9, 2009
New York, N.Y.

FILED
JUL 10 2009
COUNTY CLERK'S OFFICE
NEW YORK