SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, DEERBROOK INSURANCE COMPANY,

Plaintiffs,

-against-

PLAINVIEW PROFESSIONAL MEDICAL, P.C., BRUCE BROMBERG, D.C., RAFAEL GARCIA, M.D., PPC HEALTHCARE MANAGEMENT, INC. and HANDON MANAGEMENT LTD.,

Defendants.

INDEX No. 11427/06

MOTION DATE: Aug. 20, 2009
Motion Sequence # 007

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... XX
Affidavit in Support..... X
Reply Affirmation X
Memorandum of Law..... X
Plaintiff's Rule 19-A Statement..... X

This motion, by plaintiffs Allstate Insurance Company, Allstate Indemnity Company and Deerbrook Insurance Company, for an order pursuant to CPLR 3212 for summary judgment against defendants is determined as hereinafter provided.

ALLSTATE INSURANCE CO., et al **Index no. 11427/06**

STATUTORY PREDICATE

Plaintiffs are insurance companies that participate in New York's no-fault automobile insurance program. Pursuant to Insurance Law § 5103, every automotive insurance policy must provide for payment of no-fault or first party benefits to occupants of a covered vehicle who sustain loss through the use or operation of the vehicle. First party benefits are defined in § 5102(b) as payment to reimburse the injured person for basic economic loss i.e., necessary medical expenses and lost earnings up to $50,000, less certain deductions. Business Corporation Law §§ 1503(a), 1507 and 1508 mandate that professional service corporations such as defendant Plainview Professional Medical, P.C. (Plainview) be owned and controlled only by individuals authorized by law (licensed) to practice the profession which the corporation is authorized to practice and that licensed professionals render the services provided by such corporations. Business Corporations Law § 1504(a). With respect to claims for personal injury protection benefits, 11 NYCRR 65-3.16[a][12], promulgated by the Superintendent of Insurance, states that:

> "[a] provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable new York State or local licensing requirement necessary to perform such service in New York."

This regulation was initially promulgated to take effect on September 1, 2001, but implementation was stayed by court order until April 4, 2002. Relying on this regulation, the Court of Appeals in ***State Farm Mut. Auto Ins. Co. v Mallela***, 4 NY3d 313, 319, 2005 has held that "insurance carriers may withhold payment for medical services provided by fraudulently incorporated enterprises to which patients have assigned their claims" and, based on the particular facts in ***Mallela***, found that "no cause of action for fraud or unjust enrichment will lie for any payments made by the carriers before . . . April 4, 2002." *Id,* ***supra*** at 322.

REQUESTED RELIEF

In this action, plaintiff insurers seek a declaration that plaintiffs are under no obligation to pay pending, previously denied or future no-fault claims submitted to them by defendants since Plainview's certificate of incorporation was annulled by order of the New York State Department of Health, State Board for Professional Medical Conduct. In addition,

plaintiffs seek to recoup payments made to defendants pursuant to New York State's no-fault law from April 4, 2002 through and including July 18, 2006, predicated on causes of action sounding in fraud and unjust enrichment/restitution.

ANALYSIS

Where, as here, a health care provider is a professional service corporation, § 1507 of the Business Corporation Law requires that any individual who holds shares in such corporation be licensed to practice the profession. Additionally, §1508 provides that an individual must be licensed to serve as a director or officer of such a corporation. Simply put, non-physicians are prohibited from owning or controlling medical service corporations.

In support of their motion for summary judgment, plaintiff insurers contend that, as a consequence of their failure to comply with the state licensing requirements of § 1503(a) of the Business Corporation Law, defendants were not eligible to receive in excess of $600,000 in no-fault payments paid to them by said insurers. Specifically, plaintiffs assert that Plainview was formed in violation of Business Corporation Law § 1503 in that Rafael Garcia was not, in fact, Plainview's true owner and Plainview's certificate of incorporation was annulled by the New York State Department of Health, State Board for Professional Medical Conduct on or about October 6, 2008 after an evidentiary hearing at which neither Rafael Garcia nor Plainview appeared to contest the charges. The Hearing Committee found that unqualified individuals were instrumental in operating, controlling and/or handling Plainview's financial and operational affairs, to wit: according to the Findings of Fact contained in the Determination and Order of the Hearing Committee, Plainview "evaded the legal restrictions on incorporation, ownership and/or control of [Professional Corporations] by concealing * * * that legally unqualified individuals incorporated, owned, operated and controlled medical service corporations". While Rafael Garcia, M.D. was listed on Plainview's certificate of incorporation, filed with the Secretary of State on March 8, 2000, as Plainview's sole shareholder, director and officer, he did not operate or control Plainview from its inception through the present. Although he apparently did not practice medicine at Plainview since in or about the summer of 2000, he was compensated for the use of his name.

Moreover, once he surrendered his medical license, effective February 6, 2008, pursuant to Public Health Law §230.12, defendant Rafael Garcia was no longer authorized to practice medicine, a further violation of §§1503(a) and (b) and 1504(a) of the Business Corporation Law.

The Hearing Committee notes in its decision that while surrender of his license is the appropriate penalty for a physician who abdicates his responsibility by allowing unqualified individuals to use his name to run a medical professional corporation, the appropriate penalty for a corporation which fails to comply with state laws regarding the practice of medicine, is annulment of its certificate of incorporation.

With respect to the annulment of Plainview's certificate of incorporation, authorized pursuant to §1503 (f) of the Business Corporation Law and §230(a)(5) of the Public Health Law, and those of three other such medical service corporations purportedly owned by Rafael Garcia but otherwise unrelated to this matter, the order states that

> "the Hearing Committee believes that annulment goes beyond revocation in that the corporations will be treated as if it [sic] never validly existed from day one and * * * will be unable to collect on any accounts receivable."

In opposition to plaintiffs' motion, defendant chiropractor, Bruce Bromberg, who purports to be Plainview's manager, asserts, ***inter alia***, that 1) Rafael Garcia was the owner of the defendant corporation and the practicing medical doctor at the practice; 2) only fully credentialed, licensed medical professionals were employed by the practice and 3) the Department of Health decision on which plaintiff insurers rely cannot be used against him or defendant Handon Management Ltd., of which he was an officer and sole shareholder, as neither party had an opportunity to participate in the proceeding before the State Board of Professional Medical Conduct Hearing Committee.

Under the Court of Appeals holding in ***State Farm v Mallella***, ***supra*** at 319, where, as here, a professional service corporation such as Plainview was established under the facially valid cover of a nominal physician owner i.e., defendant Rafael Garcia, but was, in fact, actually operated by a non-physician in violation of Business Corporation Law § § 1507 and 1508 and Education Law § 6507(4)(c), insurance carriers may properly withhold payment to such an enterprise for medical services provided to patients covered by no-fault insurance.

Given the Hearing Committee's finding that Plainview's authority to render professional services was obtained through fraudulent means–and given that only corporations that are in full compliance with applicable statutory and regulatory authority are entitled to reimbursement (Education Law § 6507[4][c]; Business Corporation Law

§1503(d), defendant Plainview was/is ineligible to receive reimbursement for no-fault claims at issue herein. While nominally owned by Rafael Garcia, Plainview was, according to the Hearing Committee, actually operated by a non-physician in violation of New York's applicable licensing statutes.

With respect to the collateral estoppel defense raised by Bruce Bromberg on behalf of himself and his corporation, Handon Management Ltd., the court notes that the doctrine of collateral estoppel precludes a party from relitigating an issue which has been previously, actually and necessarily decided against him, or those in privity with him, in a proceeding in which there was a full and fair opportunity to litigate the point. (***Buechel v Bain***, 97 NY2d 295, 303, 2001, *cert denied* 535 U.S. 1096 [U.S.N.Y. 2002]; ***Chiara v Town of New Castle***, 61 AD3d 915, 916, 2nd Dept., 2009). The burden rests on the proponent of collateral estoppel to demonstrate the identicality and decisiveness of this issue. (***Laing v Cantor***, 1 AD3d 406, 407, 2nd Dept., 2003, *lv to appeal dismissed in part, denied in part* 4 NY3d 731, 2004). The opponent, on the other hand, has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the administrative hearing. (***Kaufman v Lily & Co.***, 65 NY2d 449, 455, 1985; ***City College of New York v College Point Sports Ass'n Inc.***, 61 AD3d 33, 42, 2nd Dept., 2009). The doctrine is applicable not only to court decisions but to prior determinations made in administrative forums that are quasi judicial in nature and governed by procedures substantially similar to those used in a court of law. (***Town of Wallkill v Lachmann***, 27 AD3d 724, 725, 2nd Dept., 2006). The Board of Professional Medical Conduct's disciplinary hearings are among the most procedurally rigorous administrative proceedings in New York State. These proceedings are quasi judicial in the general sense required for application of the doctrine of collateral estoppel. (***Jeffreys v Griffin***, 1 NY3d 34, 41-42, 2003).

The doctrine is a flexible one–the fundamental inquiry being whether relitigation should be permitted in light of fairness to the parties, conservation of the resources of the court and litigants and the societal interests in consistent and accurate results. (***Staatsburg Water Co. v Staatsburg Fire Dist.***, 72 NY2d 147, 153, 1998). With respect to the notion of a full and fair opportunity to litigate, the issues to be considered include, ***inter alia***: 1) the nature of the forum; 2) the importance of the claim in the prior proceeding; 3) the incentive and initiative to litigate and the actual extent of litigation and 4) the competence and expertise of counsel. (***Ryan v New York Telephone Co.***, 62 NY2d 494, 501, 1984).

Here, the dispositive issue before the Hearing Committee was whether unqualified individuals owned and were instrumental in operating, controlling and/or handling the

financial affairs of Plainview.

Herein, collateral estoppel may not be used by plaintiffs to preclude Bruce Bromberg from litigating the question of whether he was the true owner/controller of Plainview; neither Bruce Bromberg nor Handon Management Ltd. was a party to the administrative proceeding. Neither, therefore, had an opportunity to present evidence at the hearing or to cross examine witnesses on the crucial ownership/control issue. A contrary holding would contravene the concept of fairness underlying the doctrine. While the Hearing Committee found that the unqualified individual(s) owned, operated/controlled/handled the financial affairs of defendant Plainview, it made no finding *vis a vis* defendant Bruce Bromberg's ownership and/or control of said corporate defendant. Fairness dictates that this issue be resolved by the finder of fact in this litigation.

CONCLUSION

Accordingly, plaintiffs' motion for summary judgment against defendants Plainview and Rafael Garcia as to payments made to Plainview from April, 2002 to the present is **granted**, and it is hereby declared that plaintiffs have no obligation to pay any pending previously denied or future claims submitted to said insurers by Plainview for service provided during that time period.

Pursuant to such finding, plaintiffs are **granted** summary judgment against defendants Plainview and Rafael Garcia on their second cause of action for unjust enrichment/restitution in an amount to be determined at trial at which, ***inter alia***, Bruce Bromberg's ownership interest in, and control of, Plainview, and that of his management company, Handon Management Ltd., shall be determined and their liability in damages as and for the claims asserted by plaintiffs herein assessed.

Dated SEP 24 2009

J.S.C.

ENTERED
SEP 30 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE