

**Amer-A-Med Health Prods., Inc. v GEICO Ins. Co.**

2010 NY Slip Op 31032(U)

April 15, 2010

Supreme Court, Nassau County

Docket Number: 009808/04

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**  
**SUPREME COURT - STATE OF NEW YORK**

**Present:**  
**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 3  
NASSAU COUNTY

AMER-A-MED HEALTH PRODUCTS, INC.,  
a/a/o Heather Goldberg, Annette Guerro and  
Sarah Johnson, on behalf of itself and all others  
similarly situated,

Plaintiff(s),

ORIGINAL RETURN DATE:02/05/10  
SUBMISSION DATE: 03/19/10  
INDEX No.: 009808/04

-against-

GEICO INSURANCE COMPANY,

Defendant(s).

MOTION SEQUENCE #7

The following papers read on this motion:

Notice of Motion.....	1
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Plaintiffs' Reply Memorandum of Law.....	4
Defendant's Memorandum of Law.....	5

Plaintiff, Amer-A-Med Health Products, Inc., (Amer-A- Med) moves pursuant to CPLR 3211(a) (6), (7) and (8) and CPLR 3211(b) for an order dismissing the First and Second Counterclaims and the First, Third, Fourth, Tenth, Eleventh, Twelfth and Twenty-First Affirmative Defenses asserted by defendant, GEICO Insurance Company (GEICO).

The within putative class action was filed on July 19, 2004, by Globe Surgical Supply (Globe), a supplier of durable medical equipment ( DME). Globe commenced the action on behalf of itself and all other members who had received from GEICO certain reimbursement payments for claims submitted in connection to DME. Globe alleged that while the claims submitted were subject to a particular payment schedule embodied in former Part E of the Twenty Third Amendment to Regulation No. 83 (11 NYCRR 68), GEICO illegally reduced the amount reimbursed in direct

contravention of the insurance regulations.\* Following a degree of discovery, Globe sought class certification, which application was denied. Thereafter, Globe moved for reargument, and while this Court granted leave to reargue, it adhered to its prior determination which denied class certification. Plaintiff subsequently appealed, and on December 30, 2008, the Appellate Division, Second Department, issued a reversal and held that plaintiff's motion for class certification was "denied without prejudice to renewal" (*Globe Surgical Supply v GEICO Insurance Company*, 59 AD3d 129, 147 [2d Dept 2008]). In so holding, the Appellate Division determined that all of the prerequisites for class certification were present with the exception of the adequacy of the proposed class representative, to wit: Globe Surgical Supply (*Id.* at 145).\*\* The Appellate Division additionally held that with respect to defendant, GEICO, it "would not be able to present a defense based upon fraudulent billing or the inability of the class members to establish 'documented costs'" and that "GEICO's failure to claim the fraud defenses within the required 30-day period thus precludes it from raising it in the class action" (*Id.* at pp. 141-142).

On July 31, 2009, Amer-A-Med moved to intervene in the within action so that the motion for class certification could be renewed. On September 17, 2009, the application was granted, and Amer-A-Med was substituted as the plaintiff in the within action. In or about October 2009, Amer-A-Med filed an Amended Class Action Complaint in response to which GEICO filed an Answer and an Amended Answer on November 10 and November 30, 2009, respectively. GEICO's Amended Answer contained various Affirmative Defenses and Counterclaims, several of which are the subject of plaintiff's instant application which seeks dismissal thereof.

CPLR 3211(b) provides that a party may move for judgment dismissing one or more defenses on the basis that a defense is not stated or has no merit. When entertaining such an application, "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*Abney v Lunsford*, 254 AD2d 318 [2d Dept 1998]). Where there is any doubt as to the availability of the defense, it should not be dismissed (*Warwick v Cruz*, 270 AD2d 255 [2d Dept 2000]; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2d Dept 2008]).

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\* Former Part E regulated and prescribed the amount of reimbursement to providers of DME and stated the following: "For medical equipment and supplies (e.g. TENS units, soft cervical collars) provided by a physician or medical equipment supplier, the maximum permissible charge is 150 percent of the documented costs of the equipment to the provider."

\*\* Globe's principal, Mr. Jean M. Francois, was arrested on or about June 1, 2005, and charged with Insurance Fraud in the Third Degree and Conspiracy in the Fifth Degree (*see* Weller Affirmation, Ex. G, ¶4). Mr. Francois thereafter entered into a plea agreement, pleading guilty to disorderly conduct (*Id.*).

GEICO's First Affirmative Defense states that the "Amended Complaint fails to state any claim upon which relief can be granted" (*see* GEICO's Am. Ans. at ¶43). In arguing for dismissal thereof, counsel for plaintiff contends that in the Second Judicial Department, a defense of this type may not be interposed in an answer and rather may only be asserted by way of a motion (*see* Belesi Affirmation in Support at ¶23; *see also* Plaintiff's Reply Memorandum of Law at p. 5). In support of this proposition, counsel references the case of *Jacobowitz v Leak*, 19 AD3d 453 [2d Dept. 2005]. However, the holding in *Jacobowitz* was abrogated by *Butler v Catinella*, which held that the defense of a failure to state a cause of action may properly be interposed in an answer (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). According, plaintiff's application seeking dismissal of the First Affirmative Defense is hereby denied.

GEICO's Third Affirmative Defense states that "Plaintiff and other members of the purported class may be barred, in whole or in part, from recovery to the extent that they engaged in staged or phony automobile 'accidents'" (*see* GEICO's Am. Ans. at ¶45). In moving for dismissal, the central contention posited by counsel for plaintiff is that defendant GEICO has failed to produce any facts or a well founded belief upon which to predicate its blanket assertion that each and every accident which led to GEICO reducing a putative class members' claim for DME was the result of a staged accident (*see* Pl's Reply Mem. of Law at pp. 5-7).

GEICO opposes the application arguing that it indeed possesses a good faith belief upon which to base this defense and asserts that during the pendency of the within application it has "uncovered evidence of fraud by the new class representative Amer-A-Med" (*see* Def's Mem. of Law at pp. 4, 16). GEICO further contends that a valid basis for the defense exists inasmuch as the entity originally chosen as class representative was charged with insurance fraud (*Id.* at p. 17).

An insurer may assert a defense predicated upon lack of coverage notwithstanding that it failed to reject a claim within the 30 days following receipt thereof, as is generally required by both statute and regulation (*Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]). Such a defense must be "premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (*Id.* at 199). The insurer carrier bears the burden of coming forth with admissible evidence, which either demonstrates that there is in fact no coverage or evidence which supports the insurer's belief that there is no coverage (*see Mount Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11 [2d Dept 1999]).

In the instant matter, while quite mindful of the pervasive fraud plaguing the no fault system, this Court remains bound by controlling case law. Here, while GEICO claims that it has uncovered evidence of fraud perpetrated by Amer-A-Med, it does not provide even the most rudimentary facts surrounding this assertion (*Id.*). Moreover, that the entity originally chosen to represent the class was charged with insurance fraud does not, in and of itself, constitute competent evidence that Amer-A-Med has engaged in staging accidents (*Id.*)

Based upon the foregoing, plaintiff's application seeking dismissal of the Third Affirmative Defense is hereby granted.

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Defendant's Fourth Affirmative Defense states that: "Plaintiff and other members of the purported class may be barred, in whole or in part, from recovery to the extent the assignments to them from Claimants are invalid" (see GEICO's Am. Ans. at ¶46).

The defense alleging an invalid assignment of benefits is not analogous to a defense predicated upon lack of coverage and thus where an insurer fails to either seek additional verification of the claim or to deny a claim within thirty days of receipt, it is precluded from raising a defense based thereon (*Hospital for Joint Diseases v Travelers Property Casualty Ins. Co.*, 9 NY2d 312 [2007]; *Westchester Medial Ctr. v Safeco Ins. Co. of America*, 40 AD3d 984 [2d Dept 2007]; *Nyack Hosp. v Encompass Ins. Co.*, 23 AD3d 535 [2d Dept 2005]; *Hospital for Joint Diseases v Allstate Ins. Co.*, 21 AD3d 348 [2d Dept 2005]). In the instant matter, the putative class action involves claims which were reduced by GEICO not denied by GEICO. More specifically, upon receipt of the claims, GEICO never issued a denial but rather paid the claims in a reduced amount calculated in accordance with what GEICO unilaterally determined to be the prevailing market price in the industry. Therefore, as GEICO neither denied the claims within the 30 days following receipt thereof or demanded additional verification, any defense with respect to the validity of the assignment of benefits form has been waived (*Id.*).

Based upon the foregoing, plaintiff's application which seeks dismissal of GEICO's Fourth Affirmative Defense is hereby granted.

GEICO's Tenth Affirmative Defense states that "Plaintiff and other members of the purported class may be barred, in whole or in part, from recovery based upon the doctrine of unclean hands (see Geico's Am. Ans. at ¶52). "The interposition of the defense of unclean hands against relief in the form of money damages is clearly improper" (55 NY Jur 2d, Equity §112 quoting *Natcontainer Corp. v Continental Can Co.*, 362 F Supp1094 [SD NY1973]; see also *Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189 [1<sup>st</sup> Dept 2005]). In the matter *sub judice*, the class action sounds in breach of contract and seeks monetary damages as a result thereof. Accordingly, the equitable defense of unclean hands is inappropriate and is accordingly dismissed.

The Eleventh Affirmative Defense set forth by GEICO, states that: "Plaintiff and other members of the purported class may be barred, in whole or in part, from recovery to the extent that the costs do not arise from a bona fide, arms-length transaction, as required by the New York State Insurance Department" (see GEICO's Am. Ans. at ¶53). Here, the substance of the defense challenges the documented costs and raises issues as to the billing attendant to the submission of the claims for the DME. However, as noted above, the Appellate Division quite clearly articulated that GEICO was unable to raise a defense predicated upon those grounds (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 141-142 [2d Dept 2008]). Accordingly, plaintiff's application is granted, and the Eleventh Affirmative Defense is dismissed.

GEICO's Twelfth Affirmative Defense alleges that: "Plaintiff and other members of the purported class may be barred, in whole or in part, from recovery to the extent that they have engaged in

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fraud against defendants, including but not limited to the staging of accidents, the submission of invoices for DME not actually purchased, and the submission of invoices for misidentified DME” (see Geico’s Am. Ans. at ¶54).

Initially, as to those allegations in the defense claiming fraudulent billing and the inability of class members to document costs, said defenses, as noted above, were held by the Appellate Division to be unavailable (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d at 141,142). Moreover, and again, as noted above, that portion of this defense alleging that plaintiffs have engaged in staged accidents is hereby stricken due to GEICO’s failure to produce competent evidence upon which said defense is based (*Central Gen. Hos. v Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]; *Mount Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11 [2d Dept 1999]).

Based upon the foregoing, plaintiff’s application is granted, and the Twelfth Affirmative Defense is hereby dismissed.

GEICO’s Twenty First Affirmative Defense states that: “Plaintiff and other members of the purported class may be barred, in whole or in part, from recovery to the extent that they have failed to meet, or comply with, any applicable provisions of the policies beyond those set forth above” (see GEICO’s Am. Ans. at ¶63). Said defense appears to allege a lack of coverage defense and as repeatedly noted herein, such a defense must be predicated upon a “founded belief that the alleged injury does not arise out of an insured incident”, which GEICO has failed to provide herein (*Central Gen. Hos. v Chubb Group of Ins. Cos.*, 90 NY2d 195 [1997]).

Accordingly, plaintiff’s application is hereby granted, and the Twenty First Affirmative Defense is hereby dismissed.

Defendant’s First Counterclaim alleges fraud on behalf of members of the purported class, who intentionally and knowingly engaged in fraudulent conduct by making false statements and material misrepresentations to GEICO with respect to the actual costs incurred in purchasing DME, and that said misrepresentations were made to induce GEICO to pay the bills for the DME (see GEICO’s Am. Ans. at ¶¶83-88). GEICO’s Second Counterclaim sounds in unjust enrichment and alleges that as a result of their fraudulent activities, the members of the purported class benefitted thereby from receiving payments from GEICO to which they were not entitled (see GEICO’s Am. Ans. at ¶¶89-94).

A counterclaim cannot be contingent and must state a viable cause of action (84 NY Jur 2d, Pleading §164; *Efdey Elec. Contractors, Inc. v Melita*, 167 AD2d 501 [2d Dept 1990]; see also *Felhaber Corp. & Horn Constr, Co. v State of New York*, 69 AD2d 362 [3d Dept 1979]). Here, GEICO concedes that “the counterclaims are contingent upon Plaintiff certifying a class” (see Def’s Mem. of Law at p. 13). Thus, the counterclaims must be dismissed on that basis (CPLR 3211(a)(6); *Efdey Elec. Contractors, Inc. v Melita*, 167 AD2d 501 [2d Dept 1990]).

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Moreover, CPLR 3019(d) provides, in relevant part, that "[a] cause of action contained in a counterclaim . . . shall be treated . . . as if it were contained in a complaint." Additionally, CPLR 3016(b) requires that "where a cause of action is based upon . . . fraud . . . , the circumstances constituting the wrong shall be stated in detail." However, the counterclaims interposed herein by GEICO do not contain any particularized allegations as to which members of the putative class engaged in fraudulent activities and are therefore insufficient to sustain an action sounding in fraud (*Id.*; CPLR 3211(a)(7)).

Based upon the foregoing, plaintiff's application which seeks dismissal of GEICO's First and Second Counterclaims is hereby granted. All applications not addressed herein are denied.

This decision constitutes the order of the court.

Dated: 4-15-10

HON THOMAS P. PHELAN  
*[Signature]*  
J.S.C.

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**ENTERED**  
APR 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE