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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Rempen

- v -

Superior

INDEX NO. 104922/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied as set forth in the attached memorandum decision.

FILED

FEB 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/16/11

JUDGE DORIS LING-COHAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-against-

SUPERIOR MEDICAL REHAB, P.C., JUNCTION EXPRESS RADIOLOGY, P.C., LAXMIDHAR DIWAN, M.D., FRANKLIN DIAZ and MANUEL LORA,

Defendants.

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Index No. 104492/10

Motion Seq. No. 001

DORIS LING-COHAN, J.:

On August 19, 2009, defendants Franklin Diaz ("Diaz") and Manuel Lora ("Lora") were allegedly involved in a collision while riding together in an automobile insured by plaintiff Kemper Independence Insurance Company ("Kemper"). Plaintiff alleges that it was a minor collision and Diaz and Lora made no complaints of pain, nor sought medical assistance, at the time of the accident. Subsequently, defendants-movants Superior Medical Rehab, P.C. and Junction Express Radiology, P.C. began submitting claims to Kemper for courses of treatment received by Diaz and Lora, including physical therapy, nerve testing, trigger point injections, and magnetic resonance imaging testing, as their alleged assignees.

In this action, Kemper seeks a declaration that it owes no duty to pay No-Fault benefits to any of the named defendants on the ground that defendants Diaz and Lora failed to appear for duly scheduled examinations under oath, as required under the insurance policy and the insurance laws of the state of New York. Further, Kemper argues that it owes no duty to pay No-Fault benefits because the alleged treatment was not related to the underlying August 19, 2009 collision that serves as the basis of defendants' claims.

Defendants Junction Express Radiology, P.C. and Superior Medical Rehab, P.C. now move to dismiss the complaint against them, pursuant to CPLR 3211. First, movants argue that the complaint should be dismissed because plaintiff failed to state a cause of action, and instead only made conclusory allegations without attaching the insurance policy. Second, movants contend that the declaratory judgment being sought by plaintiff is inappropriate relief.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

With regard to movants' first argument, that plaintiff failed to state a cause of action, movants contend that: (a) the complaint is comprised of conclusory, unsupported allegations; (b) the breach of contract claim does not identify which provision was breached and plaintiff failed to attach a copy of the contract, i.e. the insurance policy; and (c) plaintiff failed to make the requisite showing for its injunctive relief claim.

The allegations set forth in the complaint are sufficient to warrant denial of movants' motion to dismiss. The complaint gives notice of what is intended to be proved and the material elements of each cause of action. *See Foley v D'Agostino*, 21 AD2d 60, 62 (1st Dep't 1964). Although movants contend that plaintiff did not identify which specific provision of the contract was breached, the complaint alleges that "Kemper, pursuant to its rights under the policy, duly and properly sought verification of these claims by requesting the examinations under oath ('EUO') of the Franklin Diaz and Manuel Lora to confirm the legitimacy of this loss and the alleged treatment." Compl ¶ 14. Further, the complaint alleges that "[d]espite due demand, both

Franklin Diaz and Manuel Lora failed to appear for the properly requested EUOs, which was a material breach of the provisions of the policy." *Id.* ¶ 15. These allegations, along with the other allegations in the complaint, adequately give notice of plaintiff's breach of contract claim and what it intends to prove.

While movants argue that plaintiff was required to attach a copy of the policy and other supporting documentation, such evidence is not necessary at this stage. On a motion to dismiss, the court accepts the alleged facts as true and views them in the light most favorable to the non-moving party, here, the plaintiff, as "[i]n determining . . . a motion [to dismiss], it is not the function of the court to evaluate the merits of the case." *Khan v Newsweek, Inc.*, 160 AD2d 425, 426 (1st Dep't 1990). Proof at this stage is not needed; only sufficient allegations must be made, which are accepted as true on a motion to dismiss.

As to movants' contention that plaintiff failed to make the requisite showing to be awarded injunctive relief, the court notes that plaintiff did not move for a preliminary injunction staying any pending collection actions of defendants at this moment, but seeks a stay of such actions in the complaint, as its ultimate relief in this case. Thus, movants' assertion that plaintiff has not met the three prongs required to be awarded a preliminary injunction is irrelevant, at this juncture. Moreover, plaintiff has acknowledged that currently there are no such actions pending, thus, this issue is currently moot, as plaintiff is not seeking a stay at this time, but only reserving its right to make such an application if, and when, the time is appropriate. *See* Harlan R. Schreiber Affirmation in Opp ¶ 9; Pl Opp Brief at 7.

With regard to movants' second argument, that declaratory relief is inappropriate, movants contend that: (a) there is no justiciable controversy and, thus, this action is purely

advisory; and (b) declaratory judgments may not be granted unless there is no possible factual or legal basis on which the insurer may eventually be held liable, which movants argue exists here. However, movants' arguments that declaratory relief is inappropriate are not persuasive. The cases cited by movants are distinguishable from the case before this court and, therefore, not applicable.

Movants cite to *Employers' Fire Insurance Company v Klemons*, 229 AD2d 513 (2d Dep't 1996), in support of its contention that this court does not have jurisdiction to render decisions in this matter since any decision would be purely advisory. *See* Bruce Rosenberg Affirmation ¶ 16. Contrary to movants' position, *Employers' Fire Insurance Company* does not stand for the general proposition that declaratory judgment actions cannot be commenced by insurers for declarations on any future claims defendants might assert. Instead, *Employers' Fire Insurance Company* held that an insurer cannot seek a declaration as to whether a claim is time-barred since a statute of limitations defense is an affirmative defense that must be asserted in a responsive pleading to be valid and because the insurer had not yet allowed or denied the underlying claim. 229 AD2d at 514. However, in the instant case, an affirmative defense which could be waived if not timely asserted is not at issue, and it is undisputed that Kemper has denied all claims presented by movants.

Moreover, as a present controversy exists, since movants have submitted claims to Kemper, which have been denied, this is a judiciable controversy and not purely advisory. "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *James v Alderton Dock Yards, Ltd.*, 256 NY 298, 305 (1931). In this case, Kemper denied any

subsequent claims received from defendants following Diaz's and Lora's failure to appear for an examination before oath, and also sent the providers denial letters placing them on notice that any previously submitted No-Fault claims were being retroactively denied based upon the claimants' violation of a condition precedent to coverage. Kemper thereafter initiated the instant declaratory judgment action to adjudicate its disclaimers in a single proceeding. Thus, this litigation serves "to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary." *Klostermann v Cuomo*, 61 NY2d 525, 538 (1984). The Court of Appeals has stated that: "[T]he courts should not perform useless or futile acts and this should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties." *New York Public Interest Research Group, Inc. v Carey*, 42 NY2d 527, 530 (1977). Presumably, this litigation will resolve whether Kemper should pay the claims submitted by movants or the other defendant-claimants, and have an "immediate practical effect" without defendants having to commence an action. *Id.*

Movants also contend that plaintiff does not have a right to seek a declaratory judgment because declaratory judgments may not be granted unless there is no possible factual or legal basis on which the insurer may eventually be held liable. Movants cite to three cases in support of its contention; however, all three are distinguishable as they were decisions made on motions for summary judgment and not motions to dismiss. *See Colon v Aetna Life and Casualty Ins. Co.*, 66 NY2d 6 (1985); *Spoor-Lasher Co. v Aetna Casualty and Surety Co.*, 39 NY2d 875 (1976); *Bianco v Travelers Ins. Co.*, 99 AD2d 629 (3d Dep't 1984). None of these cases stands for the proposition that a declaratory judgment cannot be sought; instead, they determined that declaratory judgments could not be granted in those particular cases, after reviewing the evidence

on summary judgment motions. It appears that movants have confused the procedural posture of this case as they contend: "The claims that Plaintiff has alleged all include questions of fact and should be determined by a jury." Def Brief at 6. Whether the relief is ultimately granted is to be decided on summary judgment or by trial, and not at this stage.

Based on the foregoing reasons, movants' motion to dismiss the complaint is denied.

Accordingly, it is

ORDERED that defendants Superior Medical Rehab, P.C. and Junction Express Radiologdy, P.C.'s motion to dismiss the complaint is denied; and it is further

ORDERED that said defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon defendants.

Dated: 2/16/11

DORIS LING-COHAN, J.S.C.

J:\Dismiss\Kemper Independence Ins Co, dismiss declaratory action - denied.wpd